

DISINTERESTED TRUTH: LEGITIMATION OF THE DOCTRINE OF TENURE POST-MABO

SAMANTHA HEPBURN*

[This article argues that it is time for the complete abolition of feudal tenure in Australian land law and its replacement with an allodial model better able to promote proprietary independence, equality and cultural neutrality. The article considers the questionable constitutional legitimacy of adopting strict feudal tenets in a territory already inhabited by indigenous occupants. It goes on to examine the various legitimisation devices that the courts have utilised to sustain the feudal construct and the effect that Mabo has had upon feudal orthodoxy. In particular, the article outlines why post-Mabo tenure is incapable of embracing a pluralist land system; it is suggested that the Eurocentric character of feudal tenure and the structural impediments associated with the acceptance of a non-Crown title prevent it from ever being able to effectively integrate native title into the structure of property law. In light of this, the article argues that post-Mabo tenure lacks both legal and social legitimacy and the 'disinterested' perpetuation of this system must be brought to an end. The article argues that the time has well and truly come to replace feudal tenure with an allodial model, based broadly on the system that has developed in the United States but with particularised adaptations. The removal of the Crown and its associated cultural assumptions from the land framework would, it is argued, allow land interests to develop according to their individual cultural origins. This would create a more responsive and balanced system better equipped to embrace the developments of contemporary common law jurisprudence.]

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We saw and remembered in our own favour and we persuaded ourselves along the way. Pitiless objectivity, especially about ourselves, was always a doomed social strategy. We're descended from the indignant, passionate tellers of half truths who in order to convince others, simultaneously convinced themselves. Over generations success had winnowed us out, and with success came our defect, carved deep in the genes like ruts in a cart track — when it didn't suit us we couldn't agree on what was in front of us. ... Disinterested truth.¹

* BA, LLB (Monash), LLM (Melb); Senior Lecturer, Faculty of Business and Law, Deakin University.

¹ Ian McEwan, *Enduring Love* (1997) 180–1.

I INTRODUCTION

The aim of this article is to critically examine the enduring legitimacy of the feudal doctrine of tenure within the Australian land law framework.² From its initial adoption by a colonial legal system to its contemporary status as an institutionalised foundation of Australian land law, the validity of the tenure regime has been supported by contentious and unevaluated legal and political presumptions. There was no clear constitutional basis supporting the application of an inherited feudal tenure regime to colonial Australia. Its presence was more a product of political expediency and the directives underlying Imperial expansion than legitimate legal assumption. Feudal tenure may well have been the ‘birthright’ of all Englishmen and a familiar property discourse for the settlers, but its application to colonial Australia lacked any specific legal or social rationalisation. Feudal tenure was not adopted within Australia because the settlers craved the security and structure of English common law, nor because of its relevance to the social and geographical conditions of the colony. The primary motivation for the adoption of tenure within Australia was control. A system whereby the Crown assumed absolute ownership over all land and determined the manner and form of all land grants overcame the difficulties associated with the acquisition of an inhabited territory. If the system *assumed* that the Crown held absolute ownership and that all ownership emanated from the Crown, the problem of pre-existing ownership was effectively eradicated.

The conception of the Australian tenure system was quiet, with a conspicuous absence of discussion and evaluation. Feudal tenure, with all of its ancient incidents as well as some new ‘enhancements’, was adopted by colonial courts without question and, disturbingly, without contextual evaluation. This system has endured to the present day, remarkably unscathed by the gradual emergence of unique forms of statutory land interests and, eventually, indigenous native title — even though the development of such interests is completely foreign to the feudal perspective.

The decision of the High Court in *Mabo* to reject the fictionalised presumption of Australia as an uninhabited territory marked a critical turning point in the Australian identity. For the first time since settlement, the Court revealed a preparedness to confront the reality of indigenous existence and question the legitimacy of Australian land law. The Court paused, momentarily, to assess the historical axis of assumed fiction and half-truths, with the aim of accepting the reality of indigenous proprietary title. Unfortunately, instead of utilising this opportunity to rectify an inherently flawed and illegitimate system, the Court chose to sustain it and reinvent the fiction.

New devices were employed to achieve this objective. Almost immediately, the Crown was characterised as holding a ‘radical’ rather than an ‘absolute’ title,

² See Samantha Hepburn, ‘Feudal Tenure and Native Title: Revising an Enduring Fiction’ (2005) 27 *Sydney Law Review* 49 for a discussion of the different manifestations of tenure that have existed within Australia and their relevance after *Mabo v Queensland [No 2]* (1992) 175 CLR 1 (‘*Mabo*’). For a general discussion of the range of estates, see W J V Windeyer, *Lectures on Legal History* (2nd ed, 1957) 44–7; A W B Simpson, *A History of the Land Law* (2nd ed, 1986) 6–7.

and past injustices were swept away under the auspices of an illegitimate terra nullius principle. The inherent flaws associated with the application of feudal tenure to a new pluralist land framework were ignored. This disinterest cannot continue. The doctrine of tenure is more than simply a historical fiction; it represents an outmoded Eurocentric framework that is unable to embrace or respond to the proprietary character of any interest that does not emanate from the Crown.

The aim of this article is to examine the enduring legitimacy and relevance of the feudal doctrine of tenure to a contemporary, pluralist land system. Ultimately, it is argued that the abolition of tenure and its replacement with an allodial land model is imperative for the effective progression of Australian land law. Whilst such reform could be introduced at a statutory level, judicial reassessment of the tenure framework would provide an instrumental foundation for a shift in common law perspective. Until the judiciary is prepared to critically evaluate both the doctrine of tenure and the fictitious assertions upon which it is founded, the chasm between common law and native title 'ownership' will expand. In other words, until it suits the court to agree upon what was and what is in front of them, the presumptions of a disinterested truth will endure.

II AUSTRALIAN FEUDAL TENURE

The doctrine of tenure is historically derived from Norman England and its feudal infrastructure. English feudal tenure described the character of the relationship that existed between the King, as the sovereign owner of all conquered land, and the tenant as the holder and occupier of that land.³ In Norman England, the doctrine of tenure was a social dynamic founded upon the concept of exchange: the King retained absolute title and control over all conquered land, but was able to issue a grant of specific parcels of land in return for a particular service or the receipt of goods.⁴ An enormous variety of different forms of tenure exchange existed during Norman England, ranging from the pledge of loyalty as a knight to a variety of different social and agricultural services. The burden of feudal tenure gradually declined in England with shifting social and political circumstances. The enactment of the *Tenures Abolition Act 1660*, 12 Car 2, c 24 abolished most forms of traditional feudal tenure. The fourth section of that Act specifically declared that any future tenure created by the Crown had to be a tenure in 'free and common socage' — that is, free of any pledge of exchange.⁵

When Australia eventually inherited English feudal tenure, the only form of tenure it acquired was, therefore, free and common socage.⁶ The courts were, however, quick to endorse their interpretation of the *effect* of an inherited feudal

³ See S F C Milsom, *The Legal Framework of English Feudalism: The Maitland Lectures Given in 1972* (1976) 39; H A L Fisher (ed), *The Constitutional History of England: A Course of Lectures Delivered by F W Maitland* (1908) 143–4.

⁴ Michael Bennett, 'The English Experience of Feudalism' in Edmund Leach, S N Mukherjee and John Ward (eds), *Feudalism: Comparative Studies* (1985) 124, 130.

⁵ Military tenures of knight service and grand serjeanty were retained. Furthermore, apart from escheat and forfeiture, all incidents of value were abolished. See A D Hargreaves and B A Helmore, *An Introduction to the Principles of Land Law (New South Wales)* (1963) 36.

⁶ T P Fry, 'Land Tenures in Australian Law' (1946) 3 *Res Judicatae* 158, 159.

tenure system. In the words of Isaacs J in *Williams v Attorney-General (NSW)*, '[i]t has always been a fixed principle of English law that the Crown is the proprietor of all land for which no subject can show a title. When Colonies were acquired this feudal principle extended to the lands oversea [sic].'⁷

The patent absence of a feudal history and any established exchange infrastructure made this inheritance awkward and ungainly. It was not even clear that this peculiarly English and feudal doctrine *could* be employed legitimately and effectively outside its historical context.⁸ To exacerbate matters, it was extremely difficult to regulate effectively the vast Australian landscape within the parameters of an ancient and inflexible feudal doctrine designed to accommodate a smaller, established system.⁹

Inevitably, colonial administrators were forced to introduce specific statutory grants capable of accommodating detailed provisions for the regulation and management of large areas of harsh uncultivated land.¹⁰ Indeed, one of the primary characteristics of the Australian tenure system was the proliferation of diverse forms of statutory tenures.¹¹

In this respect, it is arguable that *feudal* tenure only ever had an illusory presence within Australia — colonial jurists incessantly endorsed the feudal rhetoric whilst colonial legislators simultaneously issued specific, workable land grants.¹² This highlights the essential paradox of Australian feudal tenure: independent statutory grants with a distinctly allodial character were issued within a feudal framework that was unequipped to accept them. The disparity

⁷ (1913) 16 CLR 404, 439. These views were approved in *New South Wales v Commonwealth* (1975) 135 CLR 337, 438–9 (Stephen J). See also Kent McNeil, 'A Question of Title: Has the Common Law Been Misapplied to Dispossess the Aboriginals?' (1990) 16 *Monash University Law Review* 91, 99–100.

⁸ This was alluded to by Brennan J in *Mabo* (1992) 175 CLR 1, 47 when his Honour noted that 'universality of tenure is a rule depending on English history and ... is not reasonably applicable to the Australian colonies.'

⁹ See Lee Godden, 'Wik: Feudalism, Capitalism and the State. A Revision of Land Law in Australia?' (1997) 5 *Australian Property Law Journal* 168, 178 who notes that '[f]eudal property concepts, while providing a convenient fiction for the establishment of the Crown's title to land, were limited as "regulatory template" for state allocation of ... land use in the colonial era and beyond'.

¹⁰ Ibid 179. For a discussion on the emergence of statutory land grants within an evolving capitalist framework, see also C B Macpherson, 'Capitalism and the Changing Concept of Property' in Eugene Kamenka and R S Neale (eds), *Feudalism, Capitalism and Beyond* (1975) 104.

¹¹ See B A Helmore (ed), *The Law of Real Property in New South Wales* (4th ed, 1930) 474 where the discussion of statutory grants refers to the 'bewildering multiplicity of tenures'. This quote is referred to in T P Fry, *Freehold and Leasehold Tenancies of Queensland Land* (1946) 29 where the author further suggests that 'the complexity and multiplicity of the law of Crown tenures beggars comparison'. See also Gummow J in *Wik v Queensland* (1996) 187 CLR 1, 174–5 ('*Wik*') where his Honour discusses the emergence of legislative activities creating tenures which were 'unknown to the common law'.

¹² See Fry, 'Land Tenures in Australian Law', above n 6, 159: 'the constitutional supremacy of Australian Parliaments and the Crown over all Australian lands, as much as the feudal doctrines of the Common Law, is the origin of most of the incidents attached to Australian land tenures.' See also Nehal Bhuta, 'Mabo, Wik and the Art of Paradigm Management' (1998) 22 *Melbourne University Law Review* 24, 26: 'while the practical legal consequences of feudal doctrine were negligible in Australia, "[t]he received idea of feudalism, essentially from Blackstone and by this time highly abstracted, unequivocally informed the articulation of Australian land law"', citing Michael Stuckey, 'Feudalism and Australian Land Law: "A Shadowy, Ghostlike Survival"?' (1994) 13 *University of Tasmania Law Review* 102, 107.

between fact and fiction and the dislocation of Australian land law from its inherited feudal discourse became apparent.

III LEGITIMACY UNDER BRITISH IMPERIAL CONSTITUTIONAL LAW

In order to examine the legitimacy of Australian feudal tenure and any impediments to its abolition, the rules relating to the acquisition of territory require examination. The international constitutional principles justifying the application of English common law to a new territory were well documented by the English common law. The Privy Council's 1722 memorandum from an anonymous case provides an excellent outline of Imperial constitutional law concerning settlement, conquest and cession:

if there be a new and uninhabited country found out by *English* subjects, as the law is the birthright of every subject, so, wherever they go, they carry their laws with them, and therefore such new found country is to be governed by the laws of *England* ... Where the King of *England* conquers a country ... he may impose upon [the conquered people] what laws he pleases. But, ... [u]ntil such laws given by the conquering prince, the laws and customs of the conquered country shall hold place ...¹³

To summarise, there are three different rules: the settlement rule, the conquest rule and the cession rule. Under the settlement rule, the discovery and occupation of an uninhabited territory entitles the settlers to assume control of that territory and impose existing English common law and legislation relevant to the particular local circumstances.¹⁴

By contrast, the conquest rule provides that after land has been conquered, existing local law will continue to regulate the inhabitants where such law is intelligible to the British — unless the laws are contrary to British concepts of justice and morality or are altered by the Crown.¹⁵

Where land is acquired by cession, the rule is the same as where the land has been conquered, with the exception that the local laws are to be subject to the terms of the treaty of cession. The fundamental difference between the settlement rule and the conquest/cession rules is known as the 'continuity principle', under which local, intelligible laws would 'continue' in conquered or ceded territories.

The rationale underlying the settlement rule is one of necessity: where land is uninhabited and there is no pre-existing law available to the settlers, it is only natural that the legal system of their birth country be imposed. It is a system with

¹³ *Anonymous* (1722) 2 P Wms 75, 75–6; 24 ER 646, 646 (emphasis in original). For a general discussion of the scope and application of this memorandum, see Mark Walters, 'British Imperial Constitutional Law and Aboriginal Rights: A Comment on *Delgamuukw v British Columbia*' (1992) 17 *Queens Law Journal* 350, 359–63.

¹⁴ *Cooper v Stuart* (1889) 14 App Cas 286, 291 (Lord Watson):
the law of England must (subject to well-established exceptions) become from the outset the law of the Colony, and be administered by its tribunals. In so far as it is reasonably applicable to the circumstances of the Colony, the law of England must prevail, until it is abrogated or modified, either by ordinance or statute.

See also *Mabo* (1992) 175 CLR 1, 35–8 (Brennan J).

¹⁵ *Calvin's Case* (1608) 7 Co Rep 1a, 17b; 77 ER 377, 398.

which the settlers are familiar and, as the land is uninhabited, there is no possibility that a pre-existing regime will conflict with it.¹⁶

The legitimacy of applying English law to a settled territory was confirmed by Holt CJ in *Blankard v Galdy*, who noted that English laws apply in the ‘case of an uninhabited country newly found out by English subjects’.¹⁷ This decision was reinforced in *Dutton v Howell*, where the House of Lords indicated that if the subjects of the Crown went and possessed ‘uninhabited desert Country’ with the consent of the Crown, then the ‘Common Law must be supposed their Rule, as ’twas their Birthright’.¹⁸ However, it was only in 1722, with the issuing of the Peere Williams’ Reports of the memorandum by the Privy Council, that the common law eventually came to recognise settlement as a constitutional ground for the acquisition of territory.¹⁹

Unlike settlement, the rationale underlying the conquest/cession rule is based upon recognition of the existence of the defeated or ceding inhabitants. Where Imperial England assumed sovereignty over an inhabited land, intelligible local laws would continue where they accorded with the British sense of morality and fairness and had not been expressly altered by the Crown.²⁰ In the words of Holt CJ in *Blankard v Galdy*, ‘in the case of an infidel country, their laws by conquest do not entirely cease, but only such as are against the law of God’.²¹ Similarly, in *Amodu Tijani v Secretary, Southern Nigeria*, Viscount Haldane held that ‘[a] mere change in sovereignty is not to be presumed as meant to disturb rights of private owners’.²² The doctrine of continuity presumed that pre-existing rights would endure and be ‘enforceable without recognition’.²³

The occupation of Australian territory has been consistently rationalised under the settlement principle. The possibility of basing the acquisition of Australian territory on the conquest/cession principles was never seriously considered by the courts.²⁴ Colonists were reluctant to rely upon the conquest/cession princi-

¹⁶ *Anonymous* (1722) 2 P Wms 75; 24 ER 646; *Dutton v Howell* (1693) Show KB 24; 1 ER 17.

¹⁷ (1693) 2 Salk 411, 412; 91 ER 356, 357.

¹⁸ (1693) Show KB 24, 32; 1 ER 17, 22.

¹⁹ *Anonymous* (1722) 2 P Wms 75; 24 ER 646. See also M F Lindley, *The Acquisition and Government of Backward Territory in International Law: Being a Treatise on the Law and Practice Relating to Colonial Expansion* (1926) 20–3 who argues that settlement can only validate the assumption of territory where the land is truly terra nullius.

²⁰ See generally Sir Kenneth Roberts-Wray, *Commonwealth and Colonial Law* (1966) 214.

²¹ (1693) 2 Salk 411, 412; 91 ER 356, 357.

²² [1921] 2 AC 399, 407 (*Amodu Tijani*).

²³ Kent McNeil, *Common Law Aboriginal Title* (1989) 177. The author compares the effect of the doctrine of continuation with the doctrine of recognition, which suggests that rights can only endure where they are specifically recognised by the new sovereign.

²⁴ This was an argument raised by counsel for the plaintiffs in *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141, 243–4 (Blackburn J) (*‘Milirrpum’*). The value of a ‘reclassification’ was discussed by McNeil, ‘A Question of Title’, above n 7, 92–3 who notes that ‘reclassifying Australia as conquered probably would not enhance the cause of land rights claimed on the basis of customary Aboriginal law. If such rights existed, they should have continued regardless of whether Australia was conquered or settled’: at 93. For a general discussion of the rationales underlying the application of the settlement principle, see Nii Lante Wallace-Bruce, ‘Two Hundred Years On: A Reexamination of the Acquisition of Australia’ (1989) 19 *Georgia Journal of International and Comparative Law* 87, 100–5; Sir Victor Windeyer, ‘“A Birthright and Inheritance”: The Establishment of the Rule of Law in Australia’ (1962) 1 *Tasmanian University Law Review* 635, 636–9.

ples not only because the physical reality of a battle or treaty did not actually exist, but also because of their distaste for the continuity of law principle: colonial courts and Imperial authorities were disinclined to allow customary Aboriginal law to have any continued application to British settlers.²⁵ This reluctance was founded upon a range of factors primarily associated with fear, ignorance, and racial or cultural intolerance. Counsel in *R v Murrell* argued that:

This country was not originally desert, or peopled from the mother country ... Neither can it be called a conquered country, as Great Britain was never at war with the natives, nor a ceded country either; it, in fact, comes within neither of these, but was a country having a population which had manners and customs of their own, and we have come to reside among them; therefore in point of strictness and analogy to our law, we are bound to obey their laws, not they to obey ours.²⁶

Whilst the Australian Law Reform Commission considered the possibility of reclassifying Australia as a ‘conquered’ land, this proposal was never formally adopted.²⁷

It is also clearly established that the settlement rule need only carry as much English law as is *relevant to the circumstances of the society in which it is applied*.²⁸ The idea that the settlement principle requires the absolute assumption of an unmodified English common law cannot apply to an inhabited territory.²⁹ The flexibility of the settlement principle was noted by Kent McNeil, who suggests that the principle was intended to be adaptable and to sanction different forms of occupation within different communities.³⁰

If colonial law-makers had attempted such an adaptation, it would have allowed for the application of English common law to all areas except those where it was not relevant — namely, Aboriginal communities evincing a de facto autonomy. Furthermore, it may also have resulted in the rejection of English feudal tenure on the grounds of irrelevance.³¹

²⁵ For a general discussion of the colonial attitudes in this regard, see David Neal, *The Rule of Law in a Penal Colony: Law and Power in Early New South Wales* (1991) ch 1. Neal notes that colonial law-makers ‘had trouble deciding whether the Aborigines should be treated as subjects of the Crown or foreign enemies who could be hunted down in reprisal raids and shot’: at 17.

²⁶ (1836) 1 Legge 72, 72.

²⁷ See Australian Law Reform Commission, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) vol 1, ch 5.

²⁸ See McNeil, *Common Law Aboriginal Title*, above n 23, 180–1.

²⁹ See generally *Blankard v Galdy* (1693) 2 Salk 411; 91 ER 356; *Cooper v Stuart* (1889) 14 App Cas 286, 291–2 (Lord Watson). This is also outlined in the writings of William Blackstone, *Commentaries on the Laws of England* (1st ed, 1765) vol 1, 105 who notes that in countries ‘that have already laws of their own, the king may indeed alter and change those laws; but, till he does actually change them, the antient [sic] laws of the country remain, unless such as are against the law of God, as in the case of an infidel country’. See also Walters, above n 13, 366–72.

³⁰ See McNeil, *Common Law Aboriginal Title*, above n 23, 115–16 where McNeil notes that ‘the diverse nature of the vast colonial empire which Britain acquired’ meant that ‘adjustments had to be made to accommodate local conditions ... in settled territories containing indigenous populations the importation of English law by the settler community did not necessarily abrogate pre-existing customary law.’

³¹ *Ibid* 116.

A further significant issue associated with the application of the settlement principle to Australia lies in its manner of interpretation. Historically, the settlement principle is amenable to two divergent interpretations: ‘simple’ settlement and ‘complex’ settlement.³² The basic premise of the simple interpretation is that both English settlers and indigenous inhabitants are subjected to one law. Where a colony was uninhabited or lacked a polity intelligible to British society, the laws of England, as relevant to their conditions, applied. Where the colony was inhabited, and the legal system and polity were intelligible, the local laws in existence at the time of acquisition would continue unless it was contrary to the British conception of justice and fairness or the Crown had expressly altered it.³³

The complex interpretation has its origins in the opinion of Master Stephen in *Freeman v Fairlie*,³⁴ a case involving succession and property laws in Calcutta. In an interesting conclusion, after reviewing a range of Royal Charters and parliamentary statutes applicable to Calcutta, Master Stephen announced: ‘I find, in none of them, any express introduction of English law, but on the contrary, they seem all to have proceeded on the assumption that English law was already in force’.³⁵

Master Stephen concluded that the application of British law in Calcutta could be justified by utilising the settlement rule and treating the land as *effectively* uninhabited. Once settlement was justified, the continuity principle could then be applied to validate the perpetuation of any pre-existing indigenous legal system. This ‘complex’ interpretation was effectively a combined application of the settlement and the continuity principles.³⁶ The spirit of the complex interpretation was endorsed by the Privy Council in *Amodu Tijani* where Viscount Haldane stated that, in accordance with British policy and law,

[t]he general words of the cession are construed as having related primarily to sovereign rights only. ... Where the cession passed any proprietary rights they

³² The simple and complex annexation rules are outlined by Walters, above n 13, 366–85.

³³ The simple settlement and conquest/cession interpretation is derived from the comments of Lord Mansfield in *Campbell v Hall* (1774) Lofft 655, 741; 98 ER 848, 895:

the law and legislation of every dominion equally affects all persons and property within the limits thereof, and is the true rule for the decision of all questions which arise there: whoever purchases, sues or lives there, puts himself under the laws of the place, and in the situation of its inhabitants.

³⁴ (1823) 1 Moo Ind App 305; 18 ER 117.

³⁵ *Ibid* 321; 126.

³⁶ The complex interpretation of Imperial constitutional law also finds judicial support in early American decisions: *Johnson v McIntosh*, 21 US (8 Wheat) 543, 574 (1823) (*‘Johnson’*) where Marshall CJ stated that the original inhabitants were

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

See also *Worcester v Georgia*, 31 US (6 Peters) 515 (1832); and the New Zealand decisions *R v Symonds* (1847) NZPCC 387; *Hineiti Rirerire Arani v Public Trustee of New Zealand* (1919) NZPCC 1.

were rights which the ceding king possessed beneficially and free from the usufructuary qualification of his title in favour of his subjects.³⁷

With the benefit of hindsight, the pluralist conception of the complex interpretation of Imperial constitutional laws would have better accommodated indigenous recognition and title than the stricter, monistic approach of the simple interpretation. Certainly, the complex interpretation would have given greater legitimacy to the application of English common law to colonial Australia because of its acceptance of indigenous identity: a complex interpretation would justify the settlement of Australia and the endorsement of *both* English and indigenous law. It would have upheld the assumption that English law is the ‘birthright’ of colonial settlers and recognised the continuity of a pre-existing indigenous social infrastructure.³⁸ By contrast, the simple interpretation could only validate the application of English common law to colonial Australia and this application was rationalised on the discriminatory assumption that the land was to be treated as uninhabited and therefore capable of automatic settlement.³⁹

The failure of the colonial courts to accept and rationalise indigenous identity undermined the legitimacy of our legal inheritance. Rather than being ‘fraught with the accumulated wisdom of the ages’,⁴⁰ Australia was bound by the strictures of an immoral past.⁴¹ The endorsement of a simple settlement principle meant that the colonial courts presumed, without explanation, that Australia was an uninhabited territory, amenable to the automatic application of English law. In the words of Stephen CJ in *Attorney-General v Brown*, ‘the waste lands of this Colony are, and ever have been, from the time of its first settlement in 1788, in the Crown’.⁴²

This assumption continued until the historic decision in *Mabo*, where the High Court accepted the reality of indigenous existence and title. In some ways, the ‘historical reassessment’ undertaken by the Court was similar to the complex interpretation of the settlement rule, in that the *Mabo* revision presumed the legitimacy of an enduring indigenous identity. However, unlike the complex interpretation, the High Court’s interpretation in *Mabo* endorsed the continuity of indigenous native title *within* the confines of an English law framework.⁴³

³⁷ [1921] 2 AC 399, 407.

³⁸ Significantly, however, whilst indigenous occupants might have their own independent perspective on ownership, unless and until a mechanism for validating customary title evolves, the proprietary status of indigenous land rights is dependent upon the proprietary characterisation given to such interests by English law: see McNeil, *Common Law Aboriginal Title*, above n 23, 196–7.

³⁹ The terra nullius device was examined by Lindley, above n 19, 20–3. See also *Re Southern Rhodesia* [1919] AC 211, 233 where the Privy Council applied a racist evolutionary theory to distinguish between ‘civilised’ and ‘uncivilised’ inhabitants.

⁴⁰ Blackstone, above n 29, vol 4, 435.

⁴¹ See Gerald Postema, ‘On the Moral Presence of Our Past’ (1991) 36 *McGill Law Journal* 1153, 1156–7 who notes that ‘[l]aw is essentially historical, not just in the sense that the life stories of legal systems can be chronicled, but more importantly in the sense that it is characteristic of law to anchor justification to the past. Time is the soil of the lawyer’s thinking.’

⁴² (1847) 1 Legge 312, 316.

⁴³ See especially Bhuta, above n 12, 36 (citations omitted) who notes that [t]he adjustment of established legal doctrines to accommodate indigenous property rights undertaken in *Mabo* is best regarded, in my view, as a kind of ‘minimalist legal pluralism’. In-

Nevertheless, it was very clear to all members of the High Court that, in order to develop and recognise indigenous land title, a re-examination of the discriminatory and archaic foundations of Australian land law was imperative.⁴⁴

The first rationalisation involved the rejection of what the Court described in *Mabo* as the doctrine of ‘enlarged terra nullius’. It was this principle, the Court argued, which presumed that land should be regarded as uninhabited where it was occupied by indigenous inhabitants who were intrinsically barbarous and therefore legally irrelevant.⁴⁵ This principle, more a reflection of social attitude than of any articulated legal doctrine, was not uncommon amongst Imperial expansionists as there were very few uninhabited territories available to European colonists: most desirable lands already had indigenous occupants. The strong desire to claim unfettered Imperial sovereignty and settle such lands undoubtedly encouraged the use of inventive legal concepts. Hence, British law applied to Australian colonies because the colonists *regarded* the land as uninhabited and proceeded with complete disregard to indigenous existence.⁴⁶

Such blatant social and institutional racism is particularly striking in Western societies: in a culture where equality of rights is the official norm, gross inequality of treatment must somehow be justified. Whilst Western liberalism claims that ‘all men are created equal’, systemic inequality can only be justified upon the grounds that the victims of discrimination are *not* fully human:

What makes Western racism so autonomous and conspicuous in world history has been that it developed in a context that presumed human equality of some kind ... and there are groups of people within the society who are so despised or disparaged that the upholders of the norms feel compelled to make them exceptions to the promise or realization of equality, they can be denied the pros-

digenous property rights are acceptable only to the extent that they conform (or can be made to conform) to the ‘skeleton’.

See also Stewart Motha, ‘*Mabo*: Encountering the Epistemic Limit of the Recognition of Difference’ (1998) 7 *Griffith Law Review* 79, 80 where the author notes that *Mabo* was ‘not a cessation of colonialism or a postcolonial moment. It is a continuation of colonial rule whereby the original inhabitants are forced to accept the invader’s law and *its* translation of their relationship to the land’ (emphasis in original).

⁴⁴ In the words of Brennan J in *Mabo* (1992) 175 CLR 1, 45:

It was only by fastening on the notion that a settled colony was terra nullius that it was possible to predicate of the Crown the acquisition of ownership of land in a colony already occupied by indigenous inhabitants. ... If that hypothesis be rejected, the notion that sovereignty carried ownership in its wake must be rejected too.

⁴⁵ See the discussion on terra nullius by Sir Harry Gibbs, ‘Foreword’ in M Stephenson and Suri Ratnapala (eds), *Mabo: A Judicial Revolution* (1993) xiii, xiv.

⁴⁶ See especially Gerry Simpson, ‘*Mabo*, International Law, *Terra Nullius* and the Stories of Settlement: An Unresolved Jurisprudence’ (1993) 19 *Melbourne University Law Review* 195, 200: ‘The accepted and prevailing version of Australian history in 1889 could not deny the existence of the Aboriginal peoples entirely, but could easily accommodate a construction of them as unsettled, primitive and without law.’ See also Michael Asch and Patrick Macklem, ‘Aboriginal Rights and Canadian Sovereignty: An Essay on *R v Sparrow*’ (1991) 29 *Alberta Law Review* 498, 511 who suggest that territorial sovereignty under the settlement principle was justified, not because the land was vacant, but rather, because the settlers assumed themselves to hold a better claim than the original inhabitants on the basis of a presumed superiority ‘of Christianity over heathen religions, of agriculture over hunting and gathering, of western cultural institutions such as private property over non-western notions, and, of course, of one skin colour over another’.

pect of equal status only if they allegedly possess some extraordinary deficiency that makes them less than fully human.⁴⁷

The rejection of enlarged terra nullius by the High Court in *Mabo* represented a significant reassessment of settlement assumptions. Nevertheless, the weakness of the decision lay in the failure of the High Court to go further and examine the enduring legitimacy of a system founded upon an unexamined application of the settlement principle to an inhabited territory. From a contemporary perspective, this application was illegitimate and was therefore unable to support the direct application of a feudal doctrine of tenure.⁴⁸ The conviction of a presumed mandate has, particularly post-*Mabo*, become an insufficient foundation for tenure now that Aboriginal identity has both a physical *and* a legal reality.⁴⁹

A A 'Practically Uninhabited' Land: Terra Nullius and Enlarged Terra Nullius as a Self-Serving Myth

The connection between tenure and terra nullius and the effect that its rejection has had upon the enduring legitimacy of tenure is significant and requires further explanation. According to William Blackstone, uninhabited lands referred to lands which were 'desart [sic] and uncultivated'.⁵⁰ These lands had no previous legal system or land tenure. The exact meaning of 'desart [sic] and uncultivated' remains unclear — although it is very likely that the reference to desart *and* uncultivated lands means that for territorial sovereignty to be assumed, the land must be proven to be both unoccupied *and* uninhabited; that is, terra nullius in an absolute sense.⁵¹

In a literal sense, terra nullius means that the land is physically vacant and uninhabited; in a legal sense, terra nullius implies a vacant status — land which is either physically or legally *regarded* as vacant.⁵² The legal concept of terra nullius is derived from the early Roman principle known as *occupatio*, which conferred automatic title upon the discoverer of property which was *res nullius* — that is, property which belonged to nobody.⁵³

⁴⁷ George Fredrickson, *Racism: A Short History* (2002) 11–12.

⁴⁸ See David Ritter, 'The "Rejection of Terra Nullius" in *Mabo*: A Critical Analysis' (1996) 18 *Sydney Law Review* 5, 6: 'Traditional Aboriginal society was no longer seen as having been mendicant and without laws, and Aboriginal people were no longer seen as backward or inferior. The result was ... a crisis of legitimacy for the rule of law in Australia.'

⁴⁹ This is clearly outlined by Gerry Simpson, above n 46, 200 where he notes that the Aboriginal inhabitants were regarded as 'physically present but legally irrelevant'.

⁵⁰ Blackstone, above n 29, vol 1, 104.

⁵¹ Henry Reynolds, *The Law of the Land* (2nd ed, 1987) 33–4.

⁵² The diversity of the meaning of terra nullius was acknowledged in 1975 by the International Court of Justice in *Western Sahara (Advisory Opinion)* [1975] ICJ Rep 12. However, the Court concluded that terra nullius was not applicable to a land inhabited by socially and politically organised occupants. The Court was asked to determine whether Western Sahara was, at the time of its colonisation by Spain, a territory that belonged to no-one. It responded that Western Sahara was not, because the information given to the Court indicated that it 'was inhabited by peoples which, if nomadic, were socially and politically organized in tribes and under chiefs competent to represent them': at 39.

⁵³ See E de Vattel, *The Law of Nations or the Principles of Natural Law, Applied to the Conduct and to the Affairs of Nations and Sovereigns* (Charles Fenwick trans, first published 1758, 1916 ed) 84 [trans of: *Le Droit des Gens, ou Principes de la Loi Naturelle, Appliqués à la Conduite*

The first Australian case to make an indirect reference to the basic physical concept of terra nullius was *Cooper v Stuart*, where the Privy Council held that settlement of an inhabited land was possible where any inhabitants on the land were ‘unsettled’ or ‘primitive’, making the land ‘practically’ uninhabited. Lord Watson made the classic statement:

There is a great difference between the case of a colony acquired by conquest or cession, in which there is an established system of law, and that of a Colony which consisted of a tract of territory practically unoccupied, without settled inhabitants or settled law, at the time when it was peacefully annexed to the British dominions. The Colony of New South Wales belongs to the latter class. ... In so far as it is reasonably applicable to the circumstances of the Colony, the law of England must prevail, until it is abrogated or modified, either by ordinance or statute.⁵⁴

The judicial narrative of a legalised Australian settlement has been highly dependent upon the removal of Aboriginal existence and this discourse has proven highly durable. As Gerry Simpson remarked,

Aboriginal history has been consistently omitted from the judicial narrative of settlement. This has proved relatively unproblematic for the legal system which supplied its own discrete historical narrative from *Cooper v Stuart* onwards — ie the *terra nullius* story. The durability and resilience of this discourse is at once impressive and surreal. ... What must the original inhabitants of this land make of such mysticism?⁵⁵

Most judicial pronouncements prior to *Mabo* blatantly disregarded indigenous existence. Such disregard did nothing to indurate the validity of feudal tenure. Indeed, by failing to address the issue of indigenous title, colonial jurists exacerbated the legal uncertainty and mystique surrounding such possessory rights and their exact status within a tenure system. In the words of Henry Reynolds, ‘[r]ather than untie the legal tangle created by settlement of an already inhabited land they went on ignoring the problem, in supreme indifference to reality.’⁵⁶ This sentiment echoed the words of Blackstone:

Pleased as we are with the possession, we seem afraid to look back to the means by which it was acquired, as if fearful of some defect in our title; or at best we rest satisfied with the decision of the laws in our favour, without examining the reason or authority upon which those laws have been built.⁵⁷

It was not until the Northern Territory Supreme Court decision in *Milirrpum* that the question of Aboriginal legal title was judicially considered and, for the first time, legally examined. In that case, despite recognising and endorsing the social existence and fundamental rights of the indigenous community, Blackburn J upheld the validity of the settlement principle, arguing that it gave the Crown full sovereign title over all lands to the exclusion of any indigenous

aux Affaires des Nations et des Souverains]: ‘When, therefore, a Nation finds a country uninhabited and without an owner, it may lawfully take possession of it’.

⁵⁴ (1889) 14 App Cas 286, 291.

⁵⁵ Gerry Simpson, above n 46, 210 (citations omitted).

⁵⁶ Reynolds, above n 51, 35.

⁵⁷ Blackstone, above n 29, vol 2, 2.

rights. His Honour specifically noted that ‘the attribution of a colony to a particular class is a matter of law, which becomes settled and is not to be questioned upon a reconsideration of the historical facts.’⁵⁸

Milirrpum has been critically condemned and the need for a comprehensive judicial overhaul of the doctrinal foundations of English settlement has become increasingly apparent.⁵⁹ Ninety years after *Cooper v Stuart*, the High Court in *Coe v Commonwealth* concluded that the settlement rule applies where the land is terra nullius because the territory ‘by European standards, had no civilized inhabitants or settled law.’⁶⁰

Murphy J, in dissent, challenged the validity of the ‘settlement’ of Australia, noting that:

there is a wealth of historical material to support the claim that the aboriginal people had occupied Australia for many thousands of years; that although they were nomadic, the various tribal groups were attached to defined areas of land over which they passed and stayed from time to time in an established pattern; that they had a complex social and political organization; that their laws were settled and of great antiquity ...⁶¹

Interestingly, the judgments in *Coe v Commonwealth* failed to justify the terra nullius principle, with Gibbs J preferring to reiterate the orthodox presumption that Australia was settled because it ‘has always been regarded’ as such.⁶²

These decisions highlight the inherent artificiality of a system which piled fiction upon fiction:⁶³ feudal tenure was created from a mandate without legal or social foundation, a mandate arising from a ‘series of elisions and slippages that came to characterize Australian judicial pronouncements on acquisition and to provide the tools for a series of artificial and purely formal reconciliations of law, politics and history.’⁶⁴

Colonial law-makers did not bother justifying the settlement of Australia under terra nullius because, from their perspective, indigenous inhabitants were so barbaric and inhuman that they did not deserve legal recognition. By describing Australia as ‘practically uninhabited’, the courts developed a self-serving myth, reinforced by the construction and rejection of the terra nullius concept in *Mabo*.

⁵⁸ (1971) 17 FLR 141, 202–3.

⁵⁹ See Richard Bartlett, *Native Title in Australia* (2000) 14 where the judgment of Blackburn J is described as ‘singularly flawed’. See also Gerry Simpson, above n 46, 201 who notes that whilst Blackburn J in *Milirrpum* found that no doctrine of communal native title existed at English or Australian common law, ‘[i]n *Mabo*, the Judges, using the same series of authorities as Blackburn J, came to the opposite conclusion.’

⁶⁰ (1979) 24 ALR 118, 129 (Gibbs J), 138 (Aickin J agreeing).

⁶¹ *Ibid* 138.

⁶² *Ibid* 129. See also Ritter, above n 48, 19 where he notes that the use of terra nullius was ignored by Gibbs and Aickin JJ in *Coe v Commonwealth* and Jacobs J ‘construed it as a matter related to the “law of nations”, that was not for consideration by a municipal court.’

⁶³ See the comments of Kirby J in *Fejo v Northern Territory* (1998) 195 CLR 96, 152 (*‘Fejo’*).

⁶⁴ Gerry Simpson, above n 46, 200. In this regard, the comments of John Borrows, ‘Sovereignty’s Alchemy: An Analysis of *Delgamuukw v British Columbia*’ (1999) 37 *Osgoode Hall Law Journal* 537, 568 are appropriate: ‘Words, as bare assertions, are pulled out of the air to justify a basic tenet of colonialism: the settlement of foreign populations to support the expansion of non-Indigenous societies.’

This had an indirect impact upon the validity of the tenure system. Feudal tenure was an efficient system within an uninhabited territory because it presumed the absence of any other form of proprietary identity.⁶⁵ However, the proprietary landscape of a ‘practically uninhabited’ land was completely different — the existence of indigenous inhabitants meant that it was not possible to suggest that *all* land ownership emanated from the Crown. Instead of adapting and significantly revising feudal tenure to accommodate this difference, colonial law-makers assumed that the issue could be overcome by simply ignoring the reality of indigenous existence. This approach took the doctrine beyond its binary perspectives, imbuing it with an explicit ethnocentricity.⁶⁶

In seeking the conquest of the earth, the Western colonizing nations of Europe and the derivative settler-colonized states produced by their colonial expansion have been sustained by a central idea: the West’s religion, civilization, and knowledge are superior to the religions, civilizations, and knowledge of non-Western peoples. This superiority, in turn, is the redemptive source of the West’s presumed mandate to impose its vision of truth on non-Western peoples.⁶⁷

It was not until *Mabo* that the High Court was prepared to accept that feudal tenure existed because of a blatant and socially unacceptable discrimination against indigenous inhabitants.⁶⁸ However, instead of acknowledging the social reality of such discrimination, the High Court channelled it into a legal device — enlarged *terra nullius* — which became ‘a genteel way to sweep the great injustice under the carpet, to salve the consciences of pioneers and their descendants by denying that there had ever been a conflict or that the Aborigines had possessed land.’⁶⁹

It also perpetuated a framework for internal colonialism. As noted by David Ritter:

‘Discourse of *terra nullius*’ describes both the ‘legal framework for the legal legitimacy of the invasion’, and ‘the development and functioning of the internal colonialism which has characterised the Australian political economy ever since.’⁷⁰

⁶⁵ For a discussion of the nature of English feudal tenure, see Bennett, above n 4, 130.

⁶⁶ This term is used by McNeil, ‘A Question of Title’, above n 7, 92.

⁶⁷ Robert Williams Jr, *The American Indian in Western Legal Thought: The Discourses of Conquest* (1990) 6.

⁶⁸ Brennan J in *Mabo* (1992) 175 CLR 1, 39 cited *Re Southern Rhodesia* [1919] AC 211, 233 as authority for the application of the enlarged *terra nullius* principle, referring to the comments of the Privy Council that the indigenous inhabitants were regarded as ‘so low in the scale of social organization’ that they and their occupancy of colonial land were ignored in considering the title to land in a settled colony. The difficulty with the decision in *Re Southern Rhodesia* is that it actually dealt with the conquest principle and not the settlement principle. This inaccurate reference to *Re Southern Rhodesia* was identified by Bartlett, *Native Title in Australia*, above n 59, 24–5; Ritter, above n 48, 23.

⁶⁹ Bruce Kercher, *An Unruly Child: A History of Law in Australia* (1995) 20.

⁷⁰ Ritter, above n 48, 12–13 (citations omitted). See also Bartlett, *Native Title in Australia*, above n 59, 25 where he notes: ‘It is suggested that the rhetoric with respect to the rejection of *terra nullius* and the erroneous reasoning of Brennan J with respect to *Re Southern Rhodesia* opened the High Court to public attack on the ground of “making law” and inventing the concept of native title.’

The legal terra nullius discourse obscured the physical reality of colonial attitudes. Colonial law-makers ignored indigenous inhabitants because of a discriminatory assumption, inherent within the colonial psyche, that indigenous inhabitants were irrelevant and should therefore be treated as if they did not exist. This attitude was a consequence of ingrained social perception: 'it involves a denial of the existence of a valid Aboriginal perspective, and is thus characteristic of the self-serving ethnocentricity upon which colonialism is based.'⁷¹

When the High Court rejected enlarged terra nullius as a discriminatory doctrine in *Mabo*, it gave the superficial appearance of change when, in fact, the system remained completely intact. Feudal tenure endured unaltered. The doctrine of enlarged terra nullius was an appropriate device to give the reinstitutionalisation of tenure and the common law the appearance of change.

The distancing of past discrimination and injustice allowed the High Court to rewrite both legal precedent and history: discriminatory attitudes against indigenous inhabitants were modified through the creation of a legalised fiction shifting individual responsibility to doctrinal ambiguity.⁷²

These judicial invocations of history demonstrate the capacity of a culturally insular system to recreate itself. The evocative words of Aviam Soifer resonate powerfully in this respect:

To abuse or ignore history is to forget a crucial link. Finding out what happened and why should be crucially relevant when judges consider Native American legal claims. Legal amnesia is always unjust. But injustice is compounded — and becomes almost unbearably poignant and powerful — when failures of memory, meaning, and history are invoked to brush away the claims of Native Americans.⁷³

Ultimately, terra nullius was a convenient heuristic for the High Court in *Mabo*, rather than an accepted constituent of Australian settlement history.⁷⁴ The rejection by the Court was little more than posturing; it did not alter the indelible fact that there is no legal rationale for the acquisition of Australian territory and the adoption of English feudal tenure principles to the exclusion of the rights and interests of indigenous occupants.⁷⁵

B *The Legal Implications of the Rejection of Enlarged Terra Nullius*

By legitimising settlement under the mandate of enlarged terra nullius, it was easier for the High Court to retain feudal tenure. Indeed, the High Court specifi-

⁷¹ McNeil, 'A Question of Title', above n 7, 91–2.

⁷² See Motha, above n 43, 93 who notes that '[t]he doctrine of tenure, the stability of the Australian community and the ability of the court to decide in choosing principle were part of the network of concepts which vitiated the move toward justice and responsibility.'

⁷³ Aviam Soifer, 'Objects in Mirror Are Closer than They Appear' (1994) 28 *Georgia Law Review* 533, 553.

⁷⁴ See especially the comments of Gerry Simpson, above n 46, 197–8: 'the High Court appears to have developed a theory of acquisition at international law that is politically expedient but ultimately indefensible.'

⁷⁵ See de Vattel, above n 53, 84. See also Ian Brownlie, *Principles of Public International Law* (6th ed, 2003) 133–5, where the author notes that terra nullius is only valid where the land is 'not possessed by a community having a social and political organization.'

cally rationalised the continued presence of tenure on the basis of consistency, stability and a desire to perpetuate the English system of private ownership.⁷⁶ The eventual rejection of terra nullius did not alter the perception that tenure was a legitimately inherited doctrine.

A significant issue for the ongoing legality of the doctrine of tenure in Australia is whether the rejection of enlarged terra nullius has removed the basic prerequisites for a tenorial system. There are two possible responses to this. The first argues that the rejection of enlarged terra nullius effectively invalidates the settlement of Australia. Consequently, the inheritance of English common law and the application of feudal tenure lack constitutional validation. In light of this, fictionalised doctrines such as feudal tenure, which are incapable of responding to the contemporary needs of a bicultural land system, should be abolished. The second response argues that the rejection of enlarged terra nullius may have invalidated the settlement of Australia. However, the application of English common law is justifiable under what is best described as the ‘acceptable continuance’ rationale. According to this principle, any inherited law which has become, through the effluxion of time, what the High Court has described as ‘skeletal’ cannot be disturbed. In accordance with this argument, it is literally too late to abolish feudal tenure.⁷⁷

The acceptable continuance rationale was expressly endorsed by the Court in *Mabo*. Brennan J argued that land tenures granted in Australia under the ‘accepted land law cannot be disturbed’ in the following passage:

It is not surprising that the fiction that land granted by the Crown had been beneficially owned by the Crown was translated to the colonies and that Crown grants should be seen as the foundation of the doctrine of tenure which is an essential principle of our land law. It is far too late in the day to contemplate an allodial or other system of land ownership. Land in Australia which has been granted by the Crown is held on a tenure of some kind, and the titles acquired under the *accepted* land law cannot be disturbed.⁷⁸

Although the Court revealed a willingness to depart from English precedent, particularly where it seriously offended contemporary values, Brennan J felt that any such departure could not be justified where it would ‘fracture the skeleton of principle’.⁷⁹

Deane and Gaudron JJ came to similar conclusions, stating that:

If the slate were clean, there would be something to be said for the view that the English system of land law was not, in 1788, appropriate for application to the circumstances of a British penal colony. It has, however, long been accepted

⁷⁶ See especially *Mabo* (1992) 175 CLR 1, 47 (Brennan J). Brendan Edgeworth argues that the retention of the doctrine of tenure was founded upon ‘the political and ideological functions played by this doctrinal mythology’: see Brendan Edgeworth, ‘Tenure, Allodialism and Indigenous Rights at Common Law: English, United States and Australian Land Law Compared after *Mabo v Queensland*’ (1994) 23 *Anglo-American Law Review* 397, 427.

⁷⁷ This rationale was outlined by Brennan J in *Mabo* (1992) 175 CLR 1, 47. See also Bhuta, above n 12, 36 who notes that ‘[m]odern legal doctrine, with its tendency towards reification, had “forgotten” the social realities that gave rise to feudal land law while retaining *in abstracto* its concepts and terms as the theoretical justification for the force of law’ (citations omitted).

⁷⁸ *Mabo* (1992) 175 CLR 1, 47 (emphasis added).

⁷⁹ *Ibid* 29.

as incontrovertible that the provisions of the common law which became applicable upon the establishment by settlement of the Colony of New South Wales included that general system of land law.⁸⁰

The acceptable continuance rationale was reiterated by Brennan J in *Wik*, where his Honour concluded that '[i]t is too late now to develop a new theory of land law that would throw the whole structure of land titles based on Crown grants into confusion.'⁸¹

There is, however, an inherent circularity associated with the acceptable continuance rationale. How can it be too late to overturn British land law principles when *Mabo* was the first case to actually investigate their 'presumptive' validity? Furthermore, the acceptable continuance rationale assumes that the adoption of the tenure regime was legitimate in the first place — this is, of course, dependent upon the assumption that the settlement of Australian territory was valid. However, this elaborate construction collapses with the removal of terra nullius discourse.

Finally, and perhaps most significantly, the acceptable continuance rationale is based on the fundamental premise that legitimacy is increased with the effluxion of time. This is a weak and unsubstantiated argument. British law does not become 'more legitimate' with the passing of time. In fact, quite the contrary has been the case with the doctrine of tenure — a fiction which has become increasingly irrelevant and marginalised with the evolution of an array of unique statutory tenures and, post-*Mabo*, the emergence of a distinct, bicultural land identity.⁸²

Ultimately, the removal of enlarged terra nullius, a fable existing as a consequence of the constructive ingenuity of the High Court, highlights the illegitimacy of settlement and the inherited common law. Working from this position, there is no legal impediment to the abolition of the doctrine of tenure. Feudal tenure should not endure just because it is all that Australia has ever known. This assumption is particularly flawed when we consider that racism and discrimination are the elementary reasons why we have only ever known British law.⁸³ Ultimately, the Australian legal system is dynamic, in need of continual legitimation; the idea that it is 'far too late in the day' for change or that the basic laws

⁸⁰ Ibid 81 (citations omitted). See also the judgment of Brennan J, who quotes Sir Frederick Pollock and Frederic William Maitland, *History of English Law before the Time of Edward I* (2nd ed, 1959) vol 1, 236, arguing that 'the notion of universal tenure "perhaps was possible only in a conquered country"': at 46; Edward Jenks, *A History of the Australasian Colonies: From Their Foundation to the Year 1911* (3rd ed, 1912) 59.

⁸¹ (1996) 187 CLR 1, 93.

⁸² As noted by Jenks, above n 80, 59 in discussing the relevance of the feudal doctrine of tenure, '[i]t may seem almost incredible that a question of such magnitude should be settled by the revival of a purely technical and antiquarian fiction.' See also Godden, above n 9, 166 for a discussion of whether the conceptual framework of the common law 'continues to have relevance to the very different social, economic, cultural and physical environment that distinguished, and continues to distinguish, Australia from feudal England.'

⁸³ For a discussion on the racist assumptions underpinning the common law, see Valerie Kerruish, *Jurisprudence as Ideology* (1991) 15 who describes the dispossession of indigenous inhabitants from the land and the application of English law as an 'act of ideological genocide.' See also Dianne Otto, 'A Question of Law or Politics? Indigenous Claims to Sovereignty in Australia' (1995) 21 *Syracuse Journal of International Law and Commerce* 65, 77: 'The colonial creation story, mirrored by the legal system, was one grounded in racism and elitism.'

cannot be ‘disturbed’ is simply incorrect. There is no reason why Australian law must remain ‘the prisoner of its history’, particularly where that history lacks any meaningful relevance to the society in which we now live.⁸⁴

C Radical Title and Tenure

In addition to the absence of a legal mandate justifying the continuation of feudal tenure within Australia, it may also be argued that it is simply not possible to perpetuate such a regime following the recognition of what the High Court described in *Mabo* as ‘radical title’. In order to legally recognise native title and validate indigenous possession of the land, the Court concluded that Crown ownership was not universal and absolute in all areas. Rather, it held that the Crown only held absolute ownership over those lands that were not already inhabited by indigenous occupants and subject to valid native title claims.⁸⁵ Crown title which was capable of being *burdened* by native title rights was described as ‘radical’. Brennan J held that:

Recognition of the radical title of the Crown is quite consistent with recognition of native title to land, for the radical title, without more, is merely a logical postulate required to support the doctrine of tenure ... It is only the fallacy of equating sovereignty and beneficial ownership of land that gives rise to the notion that native title is extinguished by the acquisition of sovereignty.⁸⁶

Radical title is presented in *Mabo* as title which is capable of legally supporting native title rights. Radical title anticipates that native title, where properly established, will reduce the ownership rights of the Crown. If native title can be extinguished by the fallacy of ‘equating sovereignty and beneficial ownership of land’, then clearly native title can only exist if the Crown does not hold absolute, beneficial ownership over all land. Radical title acknowledges the fact that the Crown necessarily holds a deteriorated title in areas where native title exists.⁸⁷

The concept of the Crown holding radical title was not new. Brennan J’s judgment in *Mabo* refers to the *Case of Tanistry*,⁸⁸ one of the first cases to consider the relationship between customary law and the common law in a colonial context. In the *Case of Tanistry*, the Irish Brehon custom of tanistry was not recognised because it was based in violence and its scope was uncertain.⁸⁹

⁸⁴ *Mabo* (1992) 175 CLR 1, 29 (Brennan J).

⁸⁵ *Ibid* 48 (Brennan J): ‘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.’

⁸⁶ *Ibid* 50–1.

⁸⁷ For a discussion on the scope and nature of radical title, see Nicolette Rogers, ‘The Emerging Concept of “Radical Title” in Australia: Implications for Environmental Management’ (1995) 12 *Environmental and Planning Law Journal* 183, 186 who notes that

radical title is a bare right of property in land, a *nuda proprietas*. The investiture of radical title in the Crown creates no beneficial entitlement to the land to which it relates. It is merely the mechanism through which the Crown may invest persons (including itself) with beneficial ownership of land.

⁸⁸ (1608) Dav 28; 80 ER 516. For the English translation, see Sir John Davies, *A Report of Cases and Matters in Law, Resolved and Adjudged in the King’s Courts in Ireland* (1762) 78 (‘Davies translation’).

⁸⁹ Davies translation, above n 88, 94–6.

Nevertheless, it was held that native inhabitants and their heirs could hold title without any grant or confirmation by the conqueror.⁹⁰ It was clear that the only customary title which the common law would support was that perceived to be consistent with basic common law tenets.⁹¹ In *Mabo*, Brennan J concluded that it was time to develop an exception to the strict consistency requirements outlined in the *Case of Tanistry*, so that customary native title could be enforced even where it was inconsistent with common law assumptions.⁹² The enforcement of such customary title was possible with the acceptance of a radical Crown title. Radical title was, in the words of the Privy Council in *Amodu Tijani*, a title which was ‘throughout qualified by the usufructuary rights of communities’.⁹³ However, the Privy Council made it very clear that ‘much caution’ had to be taken in rendering indigenous ‘title conceptually in terms which are appropriate only to systems which have grown up under English law.’⁹⁴

Viscount Haldane described the title of the indigenous occupants in a ceded territory as presumptive: it is a title based upon the assumption that the Crown has accepted the indigenous occupants as subjects and the indigenous occupants, in turn, have agreed to be bound by the new rule of law.⁹⁵ In this way, the title of indigenous occupants was communal and usufructuary in character but could ‘not assume definite forms analogous to estates, or may, where it has assumed these, have derived them from ... the mere analogy of English jurisprudence.’⁹⁶

It is important, however, to distinguish the form of title adopted within *Amodu Tijani* from the circumstances confronted by the Court in *Mabo*. The acceptance of a ‘presumptive’ title within a ‘ceded’ territory differs dramatically from a customary title endorsed within an allegedly ‘settled’ territory. Australian native title is not actually or presumptively a derivation of the Crown. The estrangement of indigenous inhabitants upon the annexation of Australian colonies makes it difficult to suggest an implied ‘reciprocal agreement’ between the Crown and indigenous occupants. Further, upon the settlement of Australia, it was initially assumed that the Crown automatically became the absolute owner of all land.⁹⁷ Australian native title is not, therefore, a presumptive title issued by the Crown but rather an encumbrance which burdens the ownership status of the Crown. Australian radical title is the postulate for native title, but the proprietary identity of native title is not dependent upon it. For example, native title was recognised

⁹⁰ Ibid 122. See especially Shaunnagh Dorsett, ‘“Since Time Immemorial”: A Story of Common Law Jurisdiction, Native Title and the *Case of Tanistry*’ (2002) 26 *Melbourne University Law Review* 32. Brennan J refers to the *Case of Tanistry* and *Witrong and Blany* (1674) 3 Keb 401; 84 ER 789 in *Mabo* (1992) 175 CLR 1, 49.

⁹¹ *Case of Tanistry* (1608) Dav 28; 80 ER 516; Davies translation 94–9.

⁹² *Mabo* (1992) 175 CLR 1, 49: ‘there is no reason why the common law should not recognize novel interests in land which, not depending on Crown grant, are different from common law tenures.’

⁹³ [1921] 2 AC 399, 404 (Viscount Haldane).

⁹⁴ Ibid 402–3.

⁹⁵ Ibid 407.

⁹⁶ Ibid 403.

⁹⁷ See especially McNeil, *Common Law Aboriginal Title*, above n 23, 175–7 who considers the ‘recognition doctrine’ in respect of settled territory which ‘seems to involve a presumption that all property would vest in the Crown upon acquisition of a territory. ... the recognition doctrine postulates a state of affairs which, if taken seriously, would be potentially chaotic’: at 177.

in land below the low-water mark in *Commonwealth v Yarmirr*, even though the Crown held no radical title in it.⁹⁸ Australian native title is not a creature of the common law; it is both culturally and conceptually extraneous to the feudal framework.

Hence, the radical title accepted by the Australian High Court is quite different to that endorsed by the Privy Council in *Amodu Tijani*. Australian radical title endows the Crown with absolute ownership subject to a native title encumbrance, which may be extinguished in circumstances where the Crown has issued an inconsistent land grant. By contrast, the Privy Council version of radical title presumed that the Crown actually issued land title to indigenous occupants so that the Crown retained absolute ownership in the same way that it retained ownership over other forms of estate. Hence, when Viscount Haldane in *Amodu Tijani* described the radical title as ‘a pure legal estate, to which beneficial rights may or may not be attached’,⁹⁹ his Lordship merely described the title of the Crown where a valid land tenure has been issued.

Australian radical title can, where native title is effectively established, have the effect of significantly reducing the ownership status of the Crown. Whilst this ‘deterioration’ is vital for the recognition of native title, it is fundamentally inconsistent with traditional feudal tenure principles. Brennan J argues in *Mabo* that ‘the fallacy of equating sovereignty and beneficial ownership’ resulted in the extinguishment of native title following the acquisition of sovereignty.¹⁰⁰ However, his Honour overlooks the fact that this ‘fallacy’ was the cornerstone of the inherited feudal regime. Australian radical title may well be ‘no more than a postulate to support the exercise of sovereign power within the familiar feudal framework of the common law’, but it is directly inconsistent with the tenets of a land system based upon absolute sovereignty.¹⁰¹

English feudal tenure was predicated on the assumption that the Crown was the paramount lord over all conquered land. This title therefore gave the Crown the power to issue land tenures.¹⁰² As outlined by Blackstone, absolute Crown ownership was an essential postulate

(though in reality a mere fiction) of our English tenures, ‘that the king is the universal lord and original proprietor of all the lands in his kingdom; and that no man doth or can possess any part of it, but what has mediately or immediately been derived as a gift from him ...’¹⁰³

⁹⁸ (2001) 208 CLR 1, 50–2 (Gleeson CJ, Gaudron, Gummow and Hayne JJ). This point was raised by Melissa Perry and Stephen Lloyd, *Australian Native Title Law* (2003) 12.

⁹⁹ [1921] 2 AC 399, 403.

¹⁰⁰ *Mabo* (1992) 175 CLR 1, 51.

¹⁰¹ *Ibid* 54 (Brennan J).

¹⁰² See Pollock and Maitland, above n 80, vol 1, 773, who note that ‘the King had dominium directum, the subject dominium utile’. The authors were cited in the judgment of Brennan J in *Mabo* (1992) 175 CLR 1, 46. Universal ownership was a convenient and fundamental fiction.

¹⁰³ Blackstone, above n 29, vol 2, 51. See also Hepburn, above n 2, 75–81 where the post-*Mabo* doctrine of tenure is described as ‘radical tenure’.

Despite the argument that paramount ownership was a peculiarly ‘English phenomenon’,¹⁰⁴ Australian courts expressly promoted this characteristic of feudal tenure so that it became an entrenched aspect of the entire tenure system. In the classic words of Forbes CJ:

By the laws of England, the King, in virtue of his crown, is the possessor of all the unappropriated lands of the Kingdom ... The right to the soil, and of all lands in the Colony, became vested immediately upon its settlement, in His Majesty, in the right of his crown, and as representative of the British Nation.¹⁰⁵

The transformation of such a deep-rooted feudal perspective is arguably impossible without significant systemic revision. Indeed, it is also arguable that a *feudal* tenure system simply cannot function in the absence of absolute Crown ownership since it reduces the character of the ownership which would otherwise have vested in the Crown and therefore qualifies the power of the Crown to issue tenure.

McNeil has argued that any interpretation suggesting that the doctrine of tenure requires absolute ownership is

based on a misunderstanding of the effect of the doctrine of tenures. The doctrine is concerned primarily with feudal relations. It would not give the Crown an original title to lands in demesne, even in a settlement that was uninhabited when acquired.¹⁰⁶

Whilst this may be true, there is no doubt that Australian courts have explicitly promoted absolute Crown ownership — probably more for political expediency than doctrinal purity. If we are to accept that a feudal tenure system endures simply because it has existed for so long, surely the acceptable continuance rationale would also apply to its primary characteristic: paramount ownership.

Hence, there is nothing ‘logical’ about radical title operating as a postulate for the doctrine of tenure.¹⁰⁷ The radical title introduced by the *Mabo* High Court is an adaptation of the inherited feudal form which is incompatible with the tenurial

¹⁰⁴ See William Holdsworth, *A History of English Law* (4th ed, 1936) vol 2, 199 where he notes that universal ownership in tenure is ‘a purely English phenomenon’. This was cited by Brennan J in *Mabo* (1992) 175 CLR 1, 46 fn 22. However, it has been argued that absolute beneficial ownership is ‘a concept ... arguably quite alien to the medieval cast of mind’: Kevin Gray, *Elements of Land Law* (2nd ed, 1993) 52, referring to the discussion of A W B Simpson, above n 2, ch 3. See also Edgeworth, above n 76, 429 where universal ownership is described as an ‘invented tradition’.

¹⁰⁵ *R v Steel* (1834) 1 Legge 65, 68–9.

¹⁰⁶ See McNeil, *Common Law Aboriginal Title*, above n 23, 241–2 who argues that the Crown acquired an occupancy title over vacant land based upon prior possession. In areas occupied by indigenous inhabitants, no such title could be proven. However, McNeil argues that the feudal doctrine of tenure would apply in such circumstances to ‘give the Crown a paramount lordship over those lands. To explain the existence of this lordship one might apply the fiction that the lands were originally possessed and owned by the Crown; but if so, one would also have to accord fictitious grants to the indigenous landholders’: at 242.

¹⁰⁷ A similar argument is raised by Rogers, above n 87, 184 who notes that ‘[i]t seems illogical that, on the one hand, the High Court could affirm the feudal doctrine of tenure as part of the land law of Australia, and yet reject the fundamental tenet of that doctrine, that sovereignty and ownership of all lands in the realm is fused in the Crown.’

infrastructure. How can feudal tenure endure as a skeletal principle when its ‘bones’ have been displaced?

Australian radical title anticipates the existence of a fundamentally distinctive and sui generis land interest *within* an unrevised tenure infrastructure. Native title arises where proof of a continuing cultural connection with the land can be established; it does not emanate from the Crown.¹⁰⁸ The bicultural property system that Australian radical title envisages is beyond the scope of a feudal regime nurtured upon monocultural ownership assumptions. Norman England may have accepted the validity of allodial Saxon title which endured beyond the Norman conquest, but such title could only exist as an externalised entity.¹⁰⁹

The assumption in *Mabo* that the shift to radical title could be accommodated within the existing feudal narrative has proven to be short-sighted. The fundamental difficulty is that a system founded upon an amalgam of feudal and indigenous concepts cannot resolve the basic collision point: traditional tenured estates are derived from a Crown grant, whereas indigenous customary title is not.¹¹⁰ Retaining the feudal fiction ultimately prevents the common law from developing a more culturally neutral framework. Customary native title will always be divergent from the ‘feudal imagery of English constitutional theory’.¹¹¹ As explained by Beaumont and von Doussa JJ in *Western Australia v Ward*:

Native title rights and interests thus give rise to jural rights which are ‘artificially defined’ under the common law because they arise from the acknowledgement and observance of traditional laws and customs under a different legal system. The common law accords a status to, and permits enforcement of, those rights according to common law principles. The artificiality is a consequence of the intersection of the common law system of law with traditional laws and customs of the indigenous people.¹¹²

Ultimately, the concept of the Crown holding a radical ownership which is amenable to a native title encumbrance is beyond the scope of a feudal system.

¹⁰⁸ See *Mabo* (1992) 175 CLR 1, 60 where Brennan J notes that ‘[t]he common law can, by reference to the traditional laws and customs of an indigenous people, identify and protect the native rights and interests to which they give rise.’ See also Lisa Strelein, ‘Conceptualising Native Title’ (2001) 23 *Sydney Law Review* 95, 122:

Native title is unique because it is communal, because it is inalienable (except by surrender to the Crown), because it is susceptible to inconsistent grant, and because the rights, incidents and privileges exercisable under it are regulated by the laws and customs of the community who hold title.

¹⁰⁹ For a discussion of allodial landholding in feudal England, see especially Peter Goodrich, ‘Eating Law: Commons, Common Land, Common Law’ (1991) 12 *Journal of Legal History* 246. See also A R Buck, ‘Property, Aristocracy and the Reform of the Land Law in Early Nineteenth Century England’ (1995) 16 *Journal of Legal History* 63.

¹¹⁰ See generally Richard Bartlett, ‘Humpies Not Houses or the Denial of Native Title: A Comparative Assessment of Australia’s Museum Mentality’ (2003) 10 *Australian Property Law Journal* 83 where the problem of assessing traditional customary rights within a ‘private’ property framework is considered. Bartlett suggests that the approach of the High Court in *Western Australia v Ward* (2002) 213 CLR 1 (*Ward*) ‘is fundamentally flawed. It fails to recognise that native title is primarily concerned with the traditional society’s collective rights, not those of individuals’: at 90. See also *De Rose v South Australia* [2002] FCA 1342 (Unreported, O’Loughlin J, 1 November, 2002).

¹¹¹ Edgeworth, above n 76, 413.

¹¹² (2000) 99 FCR 316, 349.

The attempt to ‘blend’ fundamentally incompatible concepts has created an artificial environment. As noted by French J in *Lansen v Olney*, ‘[i]n the end the concept of radical title has little if any relevance to the grant of interests in land in post-federation Australia. Indeed it has little relevance to the grant of interests in any of the self-governing colonies prior to federation.’¹¹³

Radical title is a means to an end. It exists purely because it is the only way that native title could ‘fit’ into a tenure infrastructure.¹¹⁴ Its existence foreshadows the eventual destruction of feudal tenure in Australia primarily because it is the constitutional and political foundation for the enforcement of native title rights and a non-homogenous proprietary culture.¹¹⁵ If the Crown can no longer be correctly described as the paramount lord, then the whole purpose underlying the assumption of the feudal fiction in Australia no longer exists.¹¹⁶ The ‘received idea’ of Australian feudal tenure has become an illusion.¹¹⁷

D *Beyond Fiction: Australian Land Law Post-Mabo*

1 *Towards an Expansive Common Law*

Recognition of the existence of indigenous occupants and their native title claims has changed the whole dynamic of property relations within Australia, necessitating a systemic shift.¹¹⁸ By rejecting decades of social and judicial disregard for indigenous existence in *Mabo*, the High Court cleared the way for

¹¹³ (1999) 100 FCR 7, 24 (*Lansen*). See also *Mabo* (1992) 175 CLR 1, 81 in which Deane and Gaudron JJ note that ‘the practical effect of the vesting of radical title in the Crown was merely to enable the English system of private ownership of estates held of the Crown to be observed in the Colony.’

¹¹⁴ Note the comments of Kirby J in *Wik* (1996) 187 CLR 1, 234: ‘Radical title is not a real title for property purposes. It is more in the nature of a political notion and in that sense a legal fiction’.

¹¹⁵ The difficulties faced by this pluralist culture are discussed by Irene Watson, ‘Law and Indigenous Peoples: The Impact of Colonialism on Indigenous Cultures’ (1996) 14(1) *Law in Context* 107, 110 who notes that ‘using Anglo-Australian law to decide what the rights of Indigenous people are, is the same as using Aboriginal law to decide what are the rights of non-indigenous Australians. From both camps there is a denial of the other’s sovereignty.’ See also Bhuta, above n 12, 40 where the author notes that ‘a just *framework* for the adjudication of indigenous and Anglo-European property is one which predicates the sovereignty and “coordinate legitimacy of the [diverse] Aboriginal traditions and institutions”’ (emphasis in original) (citations omitted).

¹¹⁶ See Hepburn, above n 2, 58–67 where the cultural and sovereignty motivations of feudal tenure are explored. For a discussion on the nature and purpose of ‘legal fictions’, see generally Peter Fitzpatrick, *The Mythology of Modern Law* (1992); Garth Nettheim, ‘*Wik*: On Invasions, Legal Fictions, Myths and Rational Responses’ (1997) 20 *University of New South Wales Law Journal* 495, 500 who notes that ‘[m]yths and legal fictions are slow to disappear.’

¹¹⁷ The ‘received idea’ of feudalism was alluded to by Hargreaves and Helmore, above n 5, 18, who note that ‘at the birth of the colony the ghost of feudalism hovered over the scene.’ Note that it has been argued by Andrew Wells that feudalism never existed in colonial Australia and that it is preferable to refer to the idea of capitalism, because the Australian colonies became ‘increasingly autonomous and adaptive’: Andrew Wells, *Constructing Capitalism: An Economic History of Eastern Australia, 1788–1901* (1989) 87–8. This was rejected by A R Buck, ‘Property Law and the Origins of Australian Egalitarianism’ (1995) 1 *Australian Journal of Legal History* 145, 151 who argues that ‘[w]hat is needed is a description which reflects the peculiarities of the relationship between property, law and society in nineteenth century Australia.’ Buck suggests the term ‘egalitarianism’.

¹¹⁸ See John Devereux and Shaunnagh Dorsett, ‘Towards a Reconsideration of the Doctrines of Estates and Tenure’ (1996) 4 *Australian Property Law Journal* 30, 40.

the acceptance of a more culturally representative land system.¹¹⁹ Unfortunately, in failing to abolish the feudal doctrine of tenure, this potential was never realised.

Adherence to doctrinal fiction is usually the consequence of a specific motivation. As Gummow J commented in *Wik*, '[i]n the law, fictions usually are acknowledged or created for some special purpose, and that purpose should be taken to mark their extent'.¹²⁰ The primary motivation of the colonial courts in adhering to the feudal fiction was to promote their interpretation of its fundamental characteristic: absolute Crown ownership.¹²¹ If the Crown was the paramount lord over all land, the concerns associated with settling an inhabited land could be ignored. However, the endorsement of a radical title amenable to native title encumbrance has changed everything. If the Crown is no longer accepted as holding absolute ownership, the purpose of the tenure fiction will have run its course.

Removing the purpose of the tenure fiction eliminates the need for its perpetuation. The unique cultural perspective associated with native title rights cannot be properly developed if regulation and enforcement are dependent upon a static common law infrastructure. Indigenous distinctiveness cannot be expressed through a land system whose process and methodology reflect a fundamentally different value system.¹²² Whilst native title rights are now significantly regulated by state and Commonwealth legislation, their existence is still a consequence of a common law revision. Native title was created in *Mabo* and codified in subsequent legislation. The detailed nature of the statutory provisions has imbued the recognition and enforcement of native title rights with a distinctly legislative character. However, the very existence of native title is dependent upon a modification of the common law presumptions of Crown sovereignty.

This does not, however, mean that native title is a common law title. Native title retains a highly ambiguous status — it is neither common law title, nor, as noted by Noel Pearson, is it Aboriginal law title. Pearson argues that '[n]ative title is therefore the space between the two systems, where there is recognition. Native title is, for want of a better formulation the recognition space between the common law and the Aboriginal law'.¹²³

Consequently, native title owes its status as a highly vulnerable encumbrance over Crown title to the tenure system. If the Crown retained no fictional owner-

¹¹⁹ See generally Nonie Sharp, 'No Ordinary Case: Reflections upon *Mabo (No 2)*' (1993) 15 *Sydney Law Review* 143, 158 where the author notes that the *Mabo* decision increased the 'self-confidence and awareness' of the Meriam people and in the process helped the 'judges to see certain truths about them which were previously not visible': at 158.

¹²⁰ (1996) 187 CLR 1, 187.

¹²¹ See especially Hepburn, above n 2, 67–73 where the political motivations underlying the endorsement of feudal tenure within colonial Australia are explored.

¹²² See Motha, above n 43, 84–5 who notes that '[t]he "difference" at issue in *Mabo* is the difference in Aboriginal and non-Aboriginal relationship to land. ... The European subject was and is unable to recognise the indigenous relationship to the land other than through their own conceptions of it.'

¹²³ Noel Pearson, 'The Concept of Native Title at Common Law' in Galarrwuy Yunupingu (ed), *Our Land Is Our Life: Land Rights — Past, Present and Future* (1997) 150, 154.

ship over land, it is arguable that native title could exist as a customary proprietary interest in an equalised but culturally distinctive manner to non-indigenous proprietary interests. This may also overcome the constraints associated with defining native title in terms of a preconceived bundle of personal rights, rather than a holistic proprietary interest.¹²⁴

In *Ward*, the High Court was concerned that the description of native title as a single set of rights would align it with a fee simple interest, thereby confusing the cultural origins of each interest.¹²⁵ However, defining native title as a collection of rights has encouraged courts to regard native title as a statutory interest, along with the articulation of native title rights as a matter of statutory interpretation. As a consequence, ‘the body of the common law dealing with native title is rendered irrelevant because the legislation is treated as having superseded the common law.’¹²⁶

The increasing emphasis given to the statutory articulation of native title may also be a consequence of the fact that the body of common law dealing with native title — that is, the doctrine of tenure and estates — is incapable of providing any effective guidance for the articulation of a proprietary interest that does not emanate from the Crown. In this respect, if tenure were abolished it would remove the common law restrictions that impede pluralist expressions of property and expand the proprietary horizons of the common law.

This would encourage the development of a common law native title jurisprudence, a prospect alluded to by the High Court in *Yanner v Eaton*, where Gummow J noted that

native title does not exhibit the uniformity of rights and interests of an estate in land at common law and ‘ingrained habits of thought and understanding’ must be adjusted to reflect the diverse rights and interests which arise under the rubric of ‘native title’.¹²⁷

Indeed, if the common law origins of native title are to be effectively articulated, they should not be ‘confined to the common lawyer’s one-dimensional view of property’.¹²⁸ The first stage in this process is the construction of a historically accurate *and* culturally responsive land system.

2 *Conflict and Variance: The Extinguishment Tests*

One of the enduring consequences of retaining the doctrine of tenure post-*Mabo* is the inevitable conflict between tenured estates issued by the Crown and customary native title interests. In *Mabo*, the High Court made it clear that native title could be extinguished by the valid exercise of Crown power. The acquisition of sovereignty brought with it ‘the power to create and extinguish

¹²⁴ Beaumont and von Doussa JJ in the Full Federal Court decision of *Western Australia v Ward* (2000) 99 FCR 316, 349–50 defined native title as a bundle of personal rights. This was upheld on appeal to the High Court in *Ward* (2002) 213 CLR 1, 262 where the Court held that it was a mistake to assume that native title is a single set of rights.

¹²⁵ (2002) 213 CLR 1, 191 (Gleeson CJ, Gaudron and Hayne JJ).

¹²⁶ Noel Pearson, *Land Is Susceptible of Ownership* (2003) Cape York Partnerships, 7 <<http://www.capeyorkpartnerships.com/noelpearson/pdf/nphighcourt03.pdf>>.

¹²⁷ (1999) 201 CLR 351, 383 (citations omitted).

¹²⁸ *Ward* (2002) 213 CLR 1, 95 (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

private rights and interests in land within the Sovereign's territory'.¹²⁹ Hence, native title rights may be extinguished absolutely or to the extent of any inconsistency.¹³⁰ Accordingly, a significant concern for the courts and the legislature alike has been the formulation of a balanced 'conflict assessment' methodology. As summarised by Kirby J in *Wik*, the decision in *Mabo*

did not declare that thenceforth native title would be recognised. It held that native title had always existed. It had survived the advent of the sovereignty of the Crown in Australia. It was recognised by the common law. It would be enforced unless clearly extinguished [by the exercise of sovereign power]. Thus the search must now be conducted to find indications of extinguishment.¹³¹

The question of whether a mere exercise of power will extinguish native title or whether extinguishment will depend upon the type of grant issued is a vexed one. If the courts uphold extinguishment wherever the Crown exercises power and issues a grant, it leaves little scope for the recognition of native title rights. In practical terms, this approach to extinguishment *effectively* promotes the Crown to paramount lord.¹³²

This was clearly recognised in *Wik*, where the majority held that the granting of pastoral leases did not automatically result in the extinguishment of native title; native title rights could coexist with rights flowing from pastoral leases.¹³³

The *Wik* decision alluded to the political foundation of radical title, describing it as a fiction created 'for property purposes'.¹³⁴ Toohey J felt that radical title should not be transformed into absolute title, so as to extinguish native title rights, without first proving that the legal rights associated with such an exercise are directly inconsistent with those existing under native title.¹³⁵ The 'inconsistency of incidents' test was ultimately approved by the Court. Hence, Crown grants inherently inconsistent with native title, such as those grants conferring exclusive possession, would necessarily extinguish native title.¹³⁶ This test was subsequently approved by the High Court in *Ward*, which noted that the test was 'an objective inquiry which requires identification of and comparison between the two sets of rights.'¹³⁷

The 'inconsistency of incidents' extinguishment test assumes that the exercise of sovereign power will not *automatically* extinguish native title rights. The conferral of a Crown tenure does not *necessarily* elevate radical title into absolute beneficial title. Where a traditional lease has not been granted, it defies logic to suggest that the mere exercise of sovereign power could, in itself, confer

¹²⁹ *Mabo* (1992) 175 CLR 1, 63 (Brennan J).

¹³⁰ This is now codified in the *Native Title Act 1993* (Cth) ('NTA'). See below n 140.

¹³¹ (1996) 187 CLR 1, 230 (citations omitted).

¹³² This approach to extinguishment was described in *Wik* as the 'exercise of sovereignty test': *ibid* 126 (Toohey J), 168, 204 (Gummow J).

¹³³ *Ibid* 166 (Gaudron J), 131 (Toohey J), 204 (Gummow J), 250–1 (Kirby J).

¹³⁴ *Ibid* 234 (Kirby J).

¹³⁵ *Ibid* 127–9.

¹³⁶ *Ibid* 84–8 (Brennan CJ), 100 (Dawson J agreeing), 167 (McHugh J agreeing), 126 (Toohey J), 171 (Gaudron J), 185–6 (Gummow J), 243 (Kirby J).

¹³⁷ (2002) 213 CLR 1, 89 (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

a *plenum dominium* on the Crown.¹³⁸ This conclusion ensured that the exercise of Crown sovereignty remained separate to the question of extinguishment, thereby giving native title rights greater durability.¹³⁹ It also highlighted the fact that in a pluralist property system, Crown grants do not have the security traditionally associated with feudal tenure.

This is not to suggest that native title can override Crown tenure. Where a freehold tenure is granted, both statute and the common law have confirmed that native title will be completely extinguished and compensation may be payable.¹⁴⁰ In this sense, the extinguishment process has rendered native title rights highly vulnerable; in the words of Kirby J in *Fejo*, '[s]o fragile is native title and so susceptible is it to extinguishment that the grant of such an interest, without more, "blows away" the native title forever.'¹⁴¹

The extinguishment tests which have evolved under common law and statute clearly prioritise Crown tenure rights over native title rights.¹⁴² One of the primary rationalisations is that native title does not hold the same status as a common law estate because it is not a Crown tenure. According to Brennan CJ, the weakness of native title derives from the fact 'that it is not an estate held from the Crown nor is it protected by the common law as Crown tenures are protected against impairment by subsequent Crown grant.'¹⁴³

This reasoning highlights the structural inequality associated with the implementation of native title within a feudal tenure framework. Native title is more susceptible to extinguishment because it has been attached to a feudal land system that is incapable of conferring structural equality upon indigenous and non-indigenous title.¹⁴⁴ The reasoning is also inconsistent with the established

¹³⁸ This approach should be contrasted with that of the minority in *Wik* where Brennan CJ (Dawson and McHugh JJ agreeing) held that an 'executive act which creates rights in third parties inconsistent with a continued right to enjoy native title extinguishes native title to the extent of the inconsistency': *Wik* (1996) 187 CLR 1, 85 (Brennan CJ), 100 (Dawson J agreeing), 167 (McHugh J agreeing).

¹³⁹ For an interesting discussion on this, see generally Perry and Lloyd, above n 98, 59–60.

¹⁴⁰ See *Fejo* (1998) 195 CLR 96, 128 (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ) in which it was held that 'the argument that a grant in fee simple does not extinguish, but merely suspends, native title is an argument that seeks to convert the fact of continued connection with the land into a right to maintain that connection.' See also the *NTA*, which, when introduced, provided a complete code for the enforcement and regulation of native title rights that existed when it came into force. Section 11 clearly states that '[n]ative title is not able to be extinguished contrary to this Act.' This protects native title because native title can only be impaired or extinguished in compliance with the Act. There are a range of different categories set out in the *NTA* which validate the different grants of the Crown. Validation gives them priority over native title, thereby reversing any previous priority which native title holders may have claimed under the *Racial Discrimination Act 1975* (Cth). 'Category A' past acts extinguish native title completely and this category includes freehold estates: see *NTA* s 15.

¹⁴¹ (1998) 195 CLR 96, 155 (citations omitted).

¹⁴² See especially Kristin Howden, 'The Common Law Doctrine of Extinguishment — More than a Pragmatic Compromise' (2001) 8 *Australian Property Law Journal* 209, 211. See also Richard Bartlett, 'The Proprietary Nature of Native Title' (1998) 6 *Australian Property Law Journal* 77, 78–9.

¹⁴³ *Wik* (1996) 187 CLR 1, 84.

¹⁴⁴ See especially Kent McNeil, 'Racial Discrimination and the Unilateral Extinguishment of Native Title' (1996) 1 *Australian Indigenous Law Reporter* 181, 193 who argues that a proprietary interest which is not derived from the Crown is not necessarily more susceptible to destruction or expropriation.

common law tradition of protecting all established, pre-existing rights and interests in land, irrespective of their source.¹⁴⁵

There is, however, a fundamental utility associated with an extinguishment test based upon proven rather than assumed inconsistency. The approach of the majority in *Wik* bore a strong resemblance to an allodial examination of rights. The majority insisted on the importance of examining the meaning of a ‘lease’ within its specific social and historical context.¹⁴⁶ This allowed the Court to accept that the granting of statutory pastoral rights was a function of ‘the physical, social and economic conditions of the new colony, in particular [the practice of] the disposition of large areas of land (often unsurveyed) for a limited term for a limited purpose’.¹⁴⁷ The preparedness of the Court to move away from the ‘highly artificial importation of feudal notions into Australian legislation’,¹⁴⁸ and examine a broader spectrum of rights and interests founded upon context rather than inherited presumptions, illustrates the potential of the common law to overcome the constraints of a Eurocentric framework.

The approach of the majority in *Wik* must be clearly contrasted with that of the dissenting judges: Brennan CJ, McHugh and Dawson JJ. Their Honours felt that the statutory leases automatically conferred the right to exclusive possession and that this right was fundamentally inconsistent with native title.¹⁴⁹

Brennan CJ further rejected the suggestion that native title rights could be suspended for the duration of the lease, concluding that the conferral of a lease automatically results in the Crown acquiring a reversionary estate which necessarily prevents any subsequent revival of native title.¹⁵⁰ This approach is reflective of a feudal system because it assumes that the ownership of a grantee ‘is not purely and simply his own, since it is held of a superior lord, in whom the ultimate property resides.’¹⁵¹

Brennan CJ reinforced his assumption that the mere exercise of sovereignty will extinguish native title and transform radical title into a *plenum dominium* by observing that the Crown grant is effectively ‘carved out from either an estate or the Crown’s reversionary title.’¹⁵² Following this reasoning, wherever the Crown intends to confer a right which identifies with the characteristics of a traditional estate, native title rights will be absolutely extinguished. Brennan CJ felt this approach was imperative for feudal tenure:

¹⁴⁵ Ibid 214.

¹⁴⁶ See, eg, *Wik* (1996) 187 CLR 1, 108–12 (Toohey J).

¹⁴⁷ Ibid 122 (Toohey J).

¹⁴⁸ Ibid 244 (Kirby J).

¹⁴⁹ Ibid 82–4 (Brennan CJ), 100 (Dawson J agreeing), 167 (McHugh J agreeing).

¹⁵⁰ Ibid 89–94.

¹⁵¹ Blackstone, above n 29, vol 2, 105.

¹⁵² *Wik* (1996) 187 CLR 1, 91.

It is only by treating the Crown, on exercise of the power of alienation of an estate, as having the full legal reversionary interest that the fundamental doctrines of tenure and estates can operate. On those doctrines the land law of this country is largely constructed. It is too late now to develop a new theory of land law that would throw the whole structure of land titles based on Crown grants into confusion.¹⁵³

For Brennan CJ, ‘radical title’ connoted the Crown’s *dominium directum* or ‘paramount lordship’ over all lands in the realm. Upon the issuing of any land grant, the grantee automatically acquires a *dominium utile*. Hence, a radical title burdened by native title can only exist where the Crown has not exercised *any* grant. Under such an approach, native title rights are only enforceable over unalienated Crown lands.

Further, Brennan CJ’s conception required some trigger for the automatic conversion of radical title into *plenum dominium* to allow the ‘post-*Mabo*’ tenure system to function. If the process was incremental rather than automatic, requiring a direct examination of the legal character of the rights, the certainty of tenure and Crown sovereignty would be undermined. In this way, his Honour reinforced the primacy of feudal tenure over non-Crown interests, with the effect of sustaining a withering regime.

This interpretation fails to advance a balanced approach to inter-cultural property regulation. Instead, it validates the rejection of equality before the law by failing to fully respect the rights of native title holders.¹⁵⁴ It perpetuates the vulnerable and externalised status of native title purely to uphold the fictional, antiquated presumptions associated with feudal tenure.¹⁵⁵

Kirby J in the *Wik* majority felt that this interpretation was unfair and did not represent the peculiar characteristics of Australian land grants. His Honour held:

Now a different source of title must be accommodated by the recognition of the continuance of native title as a burden on the Crown’s radical title. Something more is needed to remove that burden, and to extinguish native title, than a mere exercise by the Crown of rights of dominium in respect of the land. Native title might be subject to extinguishment. However, it is not as fragile as the first theory propounded.¹⁵⁶

To invent the notion, not sustained by the actual language of the *Land Acts*, that the power conferred on the Crown to grant a pastoral leasehold interest was an indirect way of conferring on the Crown ‘ownership’ of the land by means of the reversion expectant involves a highly artificial importation of feudal notions into Australian legislation. It would require much plainer statutory provisions to convince me that this was what the Queensland Parliament did ...¹⁵⁷

¹⁵³ Ibid 93.

¹⁵⁴ Bartlett, ‘The Proprietary Nature of Native Title’, above n 142, 85.

¹⁵⁵ See Patricia Lane, ‘Native Title — The End of Property as We Know It?’ (2000) 8 *Australian Property Law Journal* 1, 37 where she notes that it is ‘no longer sufficient to rely on “ingrained, but misleading, habits of thought”’ and the ‘challenge’ for the legal system will be ‘to negotiate the interaction of the new law and the old, to develop a land law that is truly Australian’ (citations omitted).

¹⁵⁶ *Wik* (1996) 187 CLR 1, 235.

¹⁵⁷ Ibid 244.

The majority decision in *Wik* represents a clear movement away from the strictures of feudal tenure, revealing an increasing judicial desire to embrace a more balanced and equitable system.¹⁵⁸

The difficulties of developing consistency and equality within the tenure regime were alluded to in *Fejo*, where Kirby J held:

The ways in which each of the former colonies and territories of the Crown addressed the reconciliation between native title and the legal doctrine of tenure sustaining estates in land varied so markedly from one former territory to the other and were affected so profoundly by local considerations (legal and otherwise) that it is virtually impossible to derive applicable common themes of legal principle. Still less can a common principle be detected which affords guidance for the law of this country.¹⁵⁹

Kirby J drew a distinction between enforceable native title rights predating Crown sovereignty and subsequent native title rights that had been extinguished and were, therefore, incapable of revival. Once a fee simple estate is granted, the extinguishment is absolute: if the Crown reacquires the land, native title rights cannot be renewed. In this way, Kirby J concluded that native title ‘must adjust to the incidents of [the Australian common] law’.¹⁶⁰ The decision in *Fejo* once again perpetuates the subordination of native title to the common law doctrine of tenure. Whilst the Court acknowledged the difficulties of harmonising tenure and native title, its conclusion that extinguishment by an inconsistent legal estate is complete and final supports the primacy of feudal tenure and implies a sense of ‘ultimate’ Crown ownership. If the focus of the extinguishment test is the character of the estate, when that estate ceases there is no clear justification why native title should not be revived.¹⁶¹

IV AN ALLODIAL LAND MODEL

In *Ward*, Gleeson CJ, Gaudron, Gummow and Hayne JJ warned against the dangers of ‘impos[ing] common law concepts of property on peoples and systems which saw the relationship between the community and the land very differently from the common lawyer.’¹⁶² Their Honours felt that there was

much scope for error if the examination [of native title rights] begins from the common law expression of those rights and interests. Especially is that so if a portmanteau expression used to translate those rights and interests (‘possession, occupation, use and enjoyment ... to the exclusion of all others’) is severed into

¹⁵⁸ See Godden, above n 9, 179 who notes that ‘*Wik* represents a more perceptible change than most’ to ingrained habits of thought. See also Nettheim, above n 116.

¹⁵⁹ (1998) 195 CLR 96, 150.

¹⁶⁰ *Ibid* 156.

¹⁶¹ Kirby J in *Fejo* argues that the revival of native title upon the expiration of a fee simple estate would create ‘a serious element of uncertainty’ and that ‘[t]he absolute nature of fee simple is a central feature of Australia’s land system’: *ibid*. See also Howden, above n 142, 211 who notes in relation to *Fejo* that:

If the test of inconsistency were applied to other property rights it would be found to violate constitutional and common law principles. So why is it that despite the High Court’s adoption of a general rationale of equality, a subordinate status for native title has been declared in the context of extinguishment?

¹⁶² (2002) 213 CLR 1, 93.

its constituent parts and those parts are then treated as they would be in the description of some common law title to land.¹⁶³

Callinan J was even more scathing in his appraisal of the relationship between common law tenures and native title rights, expressing a fear that ‘in many cases because of the chasm between the common law and native title rights, the latter, when recognised, will amount to little more than symbols.’¹⁶⁴ In this respect, Callinan J questioned the purpose of native title, noting that ‘[i]t might have been better to redress the wrongs of dispossession by a true and unqualified settlement of lands or money than by an ultimately futile or unsatisfactory ... attempt to fold native title rights into the common law.’¹⁶⁵

Such comments highlight the increasing frustration felt when attempting to give common law expression to native title within a tenure framework. However, the significance of the recognition of native title by the High Court in *Mabo* must not be forgotten — it validates not only a different perspective to land ‘ownership’, but a distinctive culture and legal identity which had been ignored since settlement.¹⁶⁶ The importance of incorporating indigenous perspectives into mainstream legal consciousness was eloquently outlined by First Nations representatives in Canada:

The inclusion and promotion of our perspective relative to our place in this land would assist in diminishing suffering amongst our people and would provide the foundation upon which we could once again attain harmony among ourselves and with others to share in the abundance of Mother Earth. The stories of my ancestors will not die. Let us give their voices a place reconstructing our world.¹⁶⁷

Native title has been too important to the development and dissemination of indigenous culture within Australia to be removed. The most appropriate and viable solution for a structured and equalised development of indigenous and non-indigenous title is to abolish feudal tenure. As the first part of this article has demonstrated, there are no enduring legal impediments to the removal of the doctrine of tenure, and ultimately its removal is essential for the creation of a responsive bicultural land system.

The land system suggested to replace feudal tenure would be allodial in nature.¹⁶⁸ In essence, the word ‘allodial’ means ownership which is held independ-

¹⁶³ Ibid 95 (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

¹⁶⁴ Ibid 398–9.

¹⁶⁵ Ibid 399. Note also his Honour’s comment that ‘[t]he question then is why the common law of property, which had been regarded as settled for more than a century, should have been changed to recognise sui generis interests in land that had no counterpart in our legal system’: at 399 fn 1103.

¹⁶⁶ See Strelein, above n 108, 123 who suggests that the acceptance of native title is a ‘recognition concept’. However, she notes that ‘[t]he courts have limited and re-defined native title’ in order to ‘make it more familiar to the colonial legal system and take it further away from Aboriginal law.’

¹⁶⁷ John Borrows, ‘A Genealogy of Law: Inherent Sovereignty and First Nations Self-Government’ (1992) 30 *Osgoode Hall Law Journal* 291, 353.

¹⁶⁸ An allodial land model was proposed by the New Zealand Law Commission, *Tenure and Estates in Land*, Preliminary Paper No 20 (1992) 30–1.

ently of any superior.¹⁶⁹ In the context of land ownership, allodial title indicates that the land is held in the possession of the owner without being subject to a feudal superior.¹⁷⁰ Hence, allodial title confers a more absolute and independent ownership because the ‘owner’ is not subjected to any higher authority and has independent control over the land.¹⁷¹

Allodial title does not alter the character of the property relationship. The holder of an allodial title to land would still hold all of the orthodox legal ownership rights associated with the private property relationship, including the right to use and enjoy the land, the right to any income from the land, the right to exclusively possess the land and the right to alienate or dispose of that land in such a manner as the owner should see fit.¹⁷² Similarly, allodial title, like any form of ownership, is subject to the limitations and requirements of the law.¹⁷³ Hence, allodial owners will be regulated by the terms and conditions of private contracts or trust obligations into which they may enter with respect to the land, as well as relevant legislative enactments: allodial owners may be subjected to zoning restrictions, water regulations and private restrictive covenants that touch and concern the land in the same way as a landowner within a tenurial framework. The difference between allodial title and tenurial title is structural and does not involve any shift in the character of individual ownership rights. An allodial owner holds a title rather than a grant and that title carries no presumed relationship with the Crown.¹⁷⁴

The most obvious consequence of introducing an allodial system in Australia would be the abolition of the doctrine of estates. If there is no separation between Crown and individual ownership, then naturally there is no need for a doctrine regulating the interposed system of grants between the Crown and the tenant.¹⁷⁵ The allodial system would effectively make the owner the sole lord of the land and the Crown would have no superior title, fictional or otherwise.

Allodial ownership would, it is argued, provide a more accurate endorsement of both indigenous and non-indigenous expectations. Within an allodial regime, native title would have the same ownership status as other common law and statutory interests because it endures as a ‘burden’ or an encumbrance on the Crown’s radical title. Consequently, native title would acquire a greater sense of

¹⁶⁹ Bryan Garner (ed), *Black’s Law Dictionary* (7th ed, 1999) 76.

¹⁷⁰ See Robert Fowler, ‘The Modern Law of Real Property in New York’ (1901) 1 *Columbia Law Review* 165, 167–9.

¹⁷¹ See Morton Horwitz, *The Transformation of American Law, 1780–1860* (1977).

¹⁷² See generally Kenneth Vandevelde, ‘The New Property of the Nineteenth Century: The Development of the Modern Concept of Property’ (1980) 29 *Buffalo Law Review* 325.

¹⁷³ See especially Buck, ‘Property Law and the Origins of Australian Egalitarianism’, above n 117; A Davidson and A Wells, ‘The Land, the Law and the State: Colonial Australia 1788–1890’ (1984) 2 *Law in Context* 89; Edgeworth, above n 76.

¹⁷⁴ See especially Edgeworth, above n 76, 402.

¹⁷⁵ Note that the abolition of the doctrine of estates does not necessarily entail the destruction of property interests fragmented according to time. See Scottish Law Commission, *Report on Abolition of the Feudal System*, Report No 168 (1999) [9.4] which recommends the abolition of all references to the term ‘estate’ rather than the categorisation of estates. The recommendations of the Commission were largely implemented by the *Abolition of Feudal Tenure etc (Scotland) Act 2000* (Scot). See especially s 73 of the Act for a construction of feudal terms after the abolition of the feudal system.

security and cultural independence; it would not be as amenable to extinguishment because its existence is no longer dependent upon the status of Crown title. Native title would exist in its own right where proven. If the proven existence of native title is inconsistent with that of an alternative common law interest, a more equalised ‘reconciliation’ process, founded upon interactive negotiation rather than blatant extinguishment, is possible.¹⁷⁶ The implementation of land management responsibilities could also be examined in this manner. This type of allodial shift would ultimately encourage a more egalitarian and neutral approach to holding and proving different forms of property ownership.¹⁷⁷

In developing an appropriate allodial land model for the Australian landscape, much can be gained from the experiences of the United States. Despite an established legal foundation in the English feudal system, land ownership in the United States operates under an allodial system. Under this regime, title to property exists independently in the people, subject to specific rights conceded to the government. These rights are more political than proprietary, and include those of taxation, eminent domain and the exercise of regulation under the police power.¹⁷⁸

The allodial land system was introduced in the United States by Thomas Jefferson as a vital component of the move towards republicanism. The allodial system was intended to fully and completely abolish not just the feudal infrastructure, but the entire feudal narrative. The rationale for this was simple: feudal tenure had outlived its ideological usefulness.¹⁷⁹ The emergence of the republican movement coincided with the developing acceptance within the ‘new world’ of property rights as a societal construction, capable of representing and reflecting changing community perspectives.¹⁸⁰

The shift from tenure to allodialism in the United States encouraged a more culturally sensitive approach to Native American rights. The ‘discovery title’ retained by American colonists effectively gave the ‘discovering nation’ absolute title over the land, despite the fact that it was still in the ‘possession of the

¹⁷⁶ For an excellent discussion on the discriminatory character of the doctrine of extinguishment, see Howden, above n 142. See also McNeil, ‘Racial Discrimination and the Unilateral Extinguishment of Native Title’, above n 144.

¹⁷⁷ Allodialism would, for example, be able to accept distinctive cultural perspectives on land if ‘courts must look at both the relationship of an aboriginal claimant to the land *and* at the practices, customs and traditions arising from the claimant’s distinctive culture and society’: *R v Van der Peet* [1996] 2 SCR 507, 562 (Lamer CJ, La Forest, Sopinka, Gonthier, Cory, Iacobucci and Major JJ) (emphasis in original). It is only possible to achieve this if the basic land framework can accommodate diversity.

¹⁷⁸ See generally Richard Morris, *Studies in the History of American Law: With Special Reference to the Seventeenth and Eighteenth Centuries* (2nd ed, 1964) ch 2.

¹⁷⁹ As noted by Gregory Alexander, ‘Time and Property in the American Republican Legal Culture’ (1991) 66 *New York University Law Review* 273, 311: ‘Jefferson did not deny that feudal property had ever been introduced into the American colonies. Instead, he argued that its introduction “at a very early period of our settlement” had been an “error in the nature of our landholdings”’, citing Thomas Jefferson, *A Summary View of the Rights of British America* (1774) reprinted in Julian Boyd (ed), *The Papers of Thomas Jefferson* (1950) 121, 132. See also William Vance, ‘The Quest for Tenure in the United States’ (1924) 33 *Yale Law Journal* 248; Edgeworth, above n 76.

¹⁸⁰ See especially Gordon Wood, ‘Thomas Jefferson, Equality, and the Creation of a Civil Society’ (1996) 64 *Fordham Law Review* 2133, 2140.

natives'.¹⁸¹ Nevertheless, Marshall CJ noted that the rights of the Native Americans were not 'entirely disregarded.'¹⁸² His Honour held that the original inhabitants retained a right of occupancy — that is, a title which was good against all but the sovereign and could be terminated only by sovereign act.¹⁸³

The discovery doctrine and occupancy title were undoubtedly products of the social values reflected in the newly evolved allodial regime. It seems probable that had a feudal regime endured, Native Americans, like Australian Aboriginal people, would have been completely denied any title recognition.¹⁸⁴ The discovery doctrine was an appropriate emanation of the allodial system because of its individualised focus and its refusal to accept a distorted application of English common law to the American colonial circumstance.

In accepting the doctrine of discovery and occupation title, the courts accepted the unique and individual character of the American landscape. They were able to adapt constitutional foundations to suit the perceived needs of both indigenous and non-indigenous inhabitants, unconstrained by Imperial doctrines.¹⁸⁵ Marshall CJ specifically noted that the Native Americans were 'the rightful occupants of the soil' and that they existed as 'independent nations'.¹⁸⁶ This language resonates with the individualism characteristic of the new land system.¹⁸⁷

This is not, however, to deny the cruelty and injustice experienced by Native Americans under both the feudal and allodial land regimes. The recognition and advancement of occupancy title did not provide Native Americans with an immunity from exploitation and abuse.¹⁸⁸ The treatment of Native Americans was brutal and unjust. The Marshall Court failed to give Native Americans their full and natural title to the land; occupancy title was never allotted all of the 'sticks' within the common law 'bundle'. The failure to confer a full proprietary title to Native Americans was more a consequence of proprietary convenience than articulated logic. There were certainly no structural impediments to the endorsement of a full title under the allodial regime. In the absence of any presumption of Crown ownership, the allodial system was capable of endorsing

¹⁸¹ *Johnson*, 21 US (8 Wheat) 543, 574 (1823) (Marshall CJ).

¹⁸² *Ibid.*

¹⁸³ *Ibid* 573–4. For a consideration of the effect of the *Johnson* decision, see Eric Kades, 'History and Interpretation of the Great Case of *Johnson v McIntosh*' (2001) 19 *Law and History Review* 67; John Hurley, 'Aboriginal Rights, the Constitution and the Marshall Court' (1982–83) 17 *Revue Juridique Themis* 403, 416–23; Howard Berman, 'The Concept of Aboriginal Rights in the Early Legal History of the United States' (1978) 27 *Buffalo Law Review* 637.

¹⁸⁴ See generally Richard Lazarus, 'Debunking Environmental Feudalism: Promoting the Individual through the Collective Pursuit of Environmental Quality' (1992) 77 *Iowa Law Review* 1739.

¹⁸⁵ See generally Felix Cohen, 'The Spanish Origin of Indian Rights in the Law of the United States' (1942) 31 *Georgetown Law Journal* 1; Philip Frickey, 'Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law' (1993) 107 *Harvard Law Review* 381.

¹⁸⁶ *Johnson*, 21 US (8 Wheat) 543, 574 (1823) (Marshall CJ).

¹⁸⁷ It was clear that the conception of property at this time truly mirrored the dominant social belief in liberty and freedom: see generally Carol Rose, *Property and Persuasion: Essays on the History, Theory and Rhetoric of Ownership* (1994); Thomas Ross, 'Metaphor and Paradox' (1989) 23 *Georgia Law Review* 1053, 1055–63.

¹⁸⁸ For an excellent discussion of this issue, see David Wilkins, *American Indian Sovereignty and the US Supreme Court: The Masking of Justice* (1997) who examines federal Indian law cases using critical legal theory.

independent proprietary titles — even those emanating from a different cultural perspective.¹⁸⁹ As noted by Justice Story, '[i]t is difficult to perceive, why [the Indian Nations'] title was not, in this respect, as well founded as the title of any other nation, to the soil within its own boundaries.'¹⁹⁰

The allodial model proposed for the Australian land infrastructure would have many similarities with the American system, although it would need to be adapted to suit the unique character of the Australian landscape and the distinctive impact of the Australian feudal narrative. Furthermore, it is important to be aware of the different motivations behind the removal of tenure in Australia and the United States. In colonial America, the primary reason for the shift to allodialism was dissatisfaction with the inherently hierarchical feudal system. This article contends that in Australia, the primary rationale for a shift to allodialism is the need, following the acceptance of native title rights, to develop a more accommodating land system. Any proposed Australian allodial model must, therefore, ensure that this objective is upheld; that native title would acquire *the same* status and protection as other recognised common law proprietary interests.

Allodialism was introduced to the American colonies through specific legislative provisions enacted at different times in different states. Therefore, the whole process took a number of years. For example, in New York, it was not until 1830 that the legislature abolished 'tenure' and declared all the lands to be allodial in nature.¹⁹¹ The Crown retained sovereignty over all its citizens and the right to exercise royal prerogative. However, the Crown as it had been known became a different entity in post-revolution America.¹⁹² The revolutionary government simply transferred the old feudal powers of the Crown to the political abstraction that came to be known as the state.

The state, as 'phantom King', then had the power, as sovereign representative of the people, to protect the lands within its territory. In effect, the state inherited the *parens patriae* function of the King — that is, the royal prerogative of the King to exercise specific powers and duties as father of the country.¹⁹³

Imbued with these powers, the state was intended to function in a capacity more akin to 'public representative' than superior lord. Accordingly, the ownership of Crown land in the United States came to be governed under 'public trust' principles.¹⁹⁴ The traditional principles underlying the public trust were that all tidelands and lands under navigable water were owned by the original 13 states

¹⁸⁹ For a comprehensive discussion on the shift to an allodial, 'Jeffersonian' perspective during the American republican movement, see Alexander, above n 179, 283.

¹⁹⁰ Justice Joseph Story, *Familiar Exposition of the Constitution of the United States* (1858) 13.

¹⁹¹ See Fowler, above n 170, 167.

¹⁹² See generally Stanley Katz, 'The American Constitution: A Revolutionary Interpretation' in Richard Beeman, Stephen Botein and Edward Carter II (eds), *Beyond Confederation: Origins of the Constitution and the American National Identity* (1987) 23; Horwitz, above n 171, 5–6.

¹⁹³ See Fowler, above n 170, 168–9; *Hawaii v Standard Oil Co of California*, 405 US 251, 257 (1972) (Marshall J). See also Jan Stevens, 'The Public Trust: A Sovereign's Ancient Prerogative Becomes the People's Environmental Right' (1980) 14 *University of California Davis Law Review* 195.

¹⁹⁴ See generally Stevens, above n 193; *Hudson County Water Co v McCarter*, 209 US 349, 355 (1908) (Holmes J).

existing at the time of the American Revolution. Every subsequent state was endowed with similar ownership rights at the time of its admission into the Union.

The states owned these lands subject to a 'public trust' for the benefit of all their citizens, which ensured that particular rights of usage relating to maritime commerce, navigation and fishing and all lawful grants of land by a state to private owners were made in accordance with the state's obligation to protect the public interest from any use that would substantially impair the trust.¹⁹⁵

All vacant land or 'commons' which remained vested in the Crown in accordance with British constitutional theory passed to the state when the states inherited the Crown's power.¹⁹⁶ Radical title has no relevance within the allodial system other than to define the title held by a public trust over unalienated land. In this sense, radical title is a legal postulate for Crown power rather than an indirect feudal emanation, and is capable of migrating to an allodial system. The incorporation of radical title into an allodial model would merely constitute the foundation for authorised regulation by a public trust authority.¹⁹⁷

An Australian allodial model would implement these broad changes as well as dealing specifically with native title interests. To ensure consistency in the treatment of land interests within the proposed allodial model, it is imperative that established native title rights be given the same independent allodial status as non-indigenous title. Hence, until proven, native title would exist as a burden over the radical title of the Crown. Once proven, however, native title would confer upon the indigenous holder full and independent ownership to all the rights making up the native title interest and the Crown would no longer retain any title ownership over the land involved.

Such a conversion would not alter the essential character of native title. Native title would remain an interest recognised by the common law, arising through proof of a continuing relationship and connection with the land. Significantly, however, native title would exist as a title in its own right, with the same status and rights as non-indigenous proprietary interests. The doctrine of extinguishment would not have any specific application to native title because, within an Australian allodial model, native title would receive the same protection as any other common law proprietary title. This would accord with the views of Kirby J in *Wik* where, in discussing the effect of *Mabo*, his Honour noted that 'ordinary common law principles for the protection of a proprietary right' should extend to indigenous inhabitants 'in exactly the same way as the law would protect other Australians.'¹⁹⁸

¹⁹⁵ The public trust concept was created in the Supreme Court's 1896 decision in *Geer v Connecticut*, 161 US 519 (1896). See also *Georgia v Tennessee Copper Co*, 206 US 230 (1907); *Kleppe v New Mexico*, 426 US 529 (1976); *Hughes v Oklahoma*, 441 US 322 (1979).

¹⁹⁶ See generally William Nelson, *Americanization of the Common Law: The Impact of Legal Change on Massachusetts Society, 1760–1830* (1975) 126; Stevens, above n 193.

¹⁹⁷ See Barbara Hocking, 'Does Aboriginal Law Now Run in Australia?' (1979) 10 *Federal Law Review* 161; Sir Anthony Mason, 'The Rights of Indigenous Peoples in Lands Once Part of the Old Dominions of the Crown' (1997) 46 *International and Comparative Law Quarterly* 812.

¹⁹⁸ (1996) 187 CLR 1, 251.

V CONCLUSION

There is no established methodology that has evolved for the articulation of historical jurisprudence. In the words of Gummow J in *Wik*:

There remains lacking, at least in Australia, any established taxonomy to regulate such uses of history in the formulation of legal norms. Rather, lawyers have 'been bemused by the apparent continuity of their legal heritage into a way of thinking which inhibits historical understanding.' Even if any such taxonomy were to be devised, it might then be said of it that it was but a rhetorical device to render past reality into a form useful to legally principled resolution of present conflicts.¹⁹⁹

The feudal doctrine of tenure has endured because of the perception that it represents a resilient legacy. This attitude has imbued Australian tenure with an ethereal and rarefied quality; it has always been more of a historical artefact than a legitimate land system.²⁰⁰

The abolition of feudal tenure and its replacement with an allodial land system is long overdue, but has acquired a particular cogency following the recognition of native title. Allodialism would promote individual analysis of different modes of ownership, whether private, communal or customary in nature. This would encourage ownership to be accepted as a contextual creation, dependent upon shifting social realities.²⁰¹ In Western society, the jurisprudential question as to whether property rights are to be regarded as 'undivided' entities or interacting 'bundles of rights' is better mirrored through a culturally neutral system.²⁰² The doctrine of tenure presents proprietary rights as interposed, Eurocentric abstractions existing between the Crown and the grantee. This focus narrows the conceptual boundaries inherent within the notion of land ownership and externalises indigenous cultural identity.²⁰³

Post-*Mabo* courts are increasingly questioning the utility of the tenure system. In *Lansen*, French J noted that tenure has little relevance other than as a prop for the doctrine of estates. Significantly, French J noted that the prerogatives pursuant to which tenure applies are not constitutional and therefore 'may be displaced or modified in content or application by statute.'²⁰⁴ Similarly, in *Wik*,

¹⁹⁹ Ibid 182–3 (citations omitted).

²⁰⁰ See generally Kercher, above n 69, 204 who notes that the nature of Australian land law 'is best explained as a contest between attitudes or visions of law.'

²⁰¹ See Alexander, above n 179, for a discussion of the social and political contextualisation of property interests within an allodial framework.

²⁰² See Alice Erh-Soon Tay and Eugene Kamenka, 'Introduction: Some Theses on Property' (1988) 11 *University of New South Wales Law Journal* 1, 5:

The advantages and disadvantages of following the English course cannot be elucidated by inspecting the core concept of ownership: to follow one course or another is not to make a mistake about the meaning of ownership. It is to construct a legal system along one of several possible lines.

²⁰³ See Motha, above n 43, 83: 'The indigenous peoples' relationship to the land is recognised, but only as a proprietary interest which conforms to the concepts and categories of the dominant normative framework.'

²⁰⁴ *Lansen* (1999) 100 FCR 7, 22.

Gummow J noted that traditional common law conceptions of tenure were displaced by ‘the constitutional settlement of the mid-nineteenth century’.²⁰⁵

Judicial comments of this nature indicate an increasingly allodial perspective on the assessment and regulation of both indigenous and non-indigenous land interests.²⁰⁶ Only the full and absolute abolition of feudal tenure and the open judicial acceptance of an allodial land model will truly result in the ‘present revisiting the past’ to create a land system which will not cause ‘undue collision’, and which is capable of reconciling fundamentally different cultural perspectives to land ownership.²⁰⁷

It is time to break the inexorable Imperial links and develop a distinctive Australian system that recognises each proprietary right independently and with equal foundation. A shift from tenure to allodialism requires a change in entrenched perceptions of sovereignty and ingrained feudal instincts. Systematic change cannot occur until deep-rooted feudal assumptions are abandoned.²⁰⁸ Ultimately, the abolition of feudal tenure and the radical title construct will allow courts to refocus upon the issue of whether native title exists — rather than how it exists.

²⁰⁵ (1996) 187 CLR 1, 189.

²⁰⁶ See Edgeworth, above n 76, 432: ‘indigenous landholders whose rights have not been extinguished do not in any sense hold their land “of” the Crown: their “title”, in whatever form it is held according to their laws, has always been and continues to be allodial.’ See also Devereux and Dorsett, above n 118.

²⁰⁷ These passages are from a quote by Kirby J in *Wik* (1996) 187 CLR 1, 230: ‘In this case the present must revisit the past to produce a result, wholly unexpected at the time, which will not cause undue collision and strife in future.’

²⁰⁸ The need for such a shift was alluded to by Gummow J in *Yanner v Eaton* (1999) 201 CLR 351, 383 where his Honour noted that “‘ingrained habits of thought and understanding” must be adjusted to reflect the diverse rights and interests which arise under the rubric of native title’ (citations omitted).