

## **AUSTRALIAN NATIVE TITLE AND CUSTOMARY/NATIVE LAND IN COUNTRIES OF THE USP REGION**

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### **INTRODUCTION**

This paper has its beginnings in a conversation that took place at this Law School in February of this year during the course of a visit to this Law School by a group of students from the University of New South Wales Law School. I had launched into a presentation about customary land, when one of the visiting students put up her hand, and inquired, ‘What is customary land?’; to which one of her companions responded, ‘It’s like native title.’ I concurred, and continued on my presentation, but afterwards I thought that I really should check and see how alike these two forms of indigenous tenure of land—the native title of Australia and the customary land of island countries of the South Pacific—really were.

Not having lived in Australia or being very familiar with Australian native title, I thought that I should enlist the services of one more knowledgeable about native title than myself, and Leon Terrill who had spent some time here several years ago as an Australian volunteer before returning to Australia to join the University of New South Wales, kindly agreed to assist with comments upon this presentation.

### **CUSTOMARY LAND IN COUNTRIES OF THE USP REGION**

There are twelve countries that make up the USP region, ie, the Cook Islands; Fiji; Kiribati; Nauru; the Marshall Islands; Niue; Samoa; the Solomon Islands, Tokelau; Tonga; Tuvalu; Vanuatu. In all of these, except Tonga, there is land which is held by indigenous people of those countries in accordance with their traditional customs and practices.

In five of these eleven countries, ie Cook Islands, Samoa, Solomon Islands, Tokelau, and Vanuatu, land that is held by indigenous people in accordance with the rules of custom is called customary land. In three of these countries, eg Kiribati, Fiji and Tuvalu, such land is called native land. In Marshall Islands and in Nauru, land that is held by indigenous people is just referred to as land, and in Niue it is called Niuean land. In this paper, all land which is held by indigenous people in accordance with their traditional customs and practices will be referred to as customary land.

That is not to say that in all eleven countries of the USP region where customary land exists, that such land exists to the same extent, and in the same quantities and proportions. In most countries, such as Cook Islands, Marshall Islands, Nauru, Niue, Solomon Islands, Tokelau, Tuvalu and Vanuatu, almost all the country, about 95-98%, exists as customary land. In Fiji and Samoa the proportion is rather less, about 85-90%; and in Kiribati, where about 40% of the land is owned by the State, the proportion that is customary land is considerably less, about 60%. But in all eleven countries that contain customary tenure of land, such tenure constitutes the majority of the land in the country.

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## **SIMILARITIES BETWEEN AUSTRALIAN NATIVE TITLE AND USP-REGION CUSTOMARY LAND**

### **Customary basis**

At the outset, it is clear that both native title as it exists in Australia, and customary land as it exists in countries of the USP region, have one very important and fundamental point of similarity: their basic features, their incidents, are based upon the customs and practices of the indigenous who inhabit these countries.

Thus in *Mabo v Queensland (No 2)*<sup>1</sup>, Brennan J, with the concurrence of Mason CJ and McHugh J, said:

Native title has its origin in and is given its content by the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory. The nature and incidents of native title must be ascertained as a matter of fact by reference to those laws and customs.<sup>2</sup>

Deane and Gaudron JJ added: ‘The content of the traditional native title recognized by the common law must, in the event of dispute between those entitled to it, be determined by reference to the pre-existing native law or custom.’<sup>3</sup>

As regards customary land, there are many statements in the relevant legislation and Constitutions of the eleven countries of the USP region relevant to this discussion, making it clear that the rights and obligations of indigenous people with regard to customary or native land are based upon customs and traditional practices. Since 1905, Section 3 of the *Native Lands Act* of Fiji has stated: ‘Native lands shall be held by the native owners thereof according to native customs as evidenced by usage and tradition. Subject to the provisions hereinafter contained such lands may be cultivated, allotted and dealt with by native Fijians amongst themselves according to their native customs.... Section 12 of the *Native Lands Ordinance* of Tuvalu, and Section 58 of the *Magistrates Court Act* (Kiribati) make it clear that the appropriate court in both countries ‘shall hear and adjudicate in accordance with the provisions of the Land Code, or where the Land Code is not applicable, the local customary law, all cases concerning land, land boundaries and transfers...and any disputes concerning the possession and utilization of native land.’

In Nauru, Section 3(1) of the *Customs and Adopted Laws Act 1971* provides:

The institutions, customs and usages of the Nauruans to the extent that they existed immediately before the commencement of this Act shall, save in so far as they may hereby or hereafter from time to time be expressly, or by necessary implication, abolished, altered or limited by any law enacted by Parliament, be accorded recognition by every Court and have full force and effect of law to regulate the following matters -(a) title to, and interests in, land, other than any title or interest granted by lease or other instrument or by any written law not being an applied statute; (b) rights and powers of Nauruans to dispose of their property, real and

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<sup>1</sup> (1992) 175 CLR 1.

<sup>2</sup> Ibid. 58.

<sup>3</sup> Ibid. 87–88.

personal, inter vivos and by will or any other form of testamentary disposition; (c) succession to the estates of Nauruans who die intestate; and (d) any matters affecting Nauruans only.

In Samoa, Article 101(2) of the Constitution makes it clear that '[c]ustomary land means land held from Samoa in accordance with Samoan custom and usage and with the law relating to Samoan custom and usage.'

In the Solomon Islands, the *Land and Titles Act* provides:

(1) The manner of holding, occupying, using, enjoying and disposing of customary land shall be in accordance with the current customary usage applicable thereto, and all questions relating thereto shall be determined accordingly. Subject to the provisions of this Act, every transaction or disposition of or affecting interests in customary land shall be made or effected according to the current customary usage applicable to the land concerned.<sup>4</sup>

In Tokelau, Article 15 of the Constitution states: '(1) Subject to this Constitution or any Rule of the General Fono, all land is under the control of the Taupulega. (2) Customary land is land held in accordance with the custom of the village.'

In Vanuatu, Article 74 of the Constitution provides that '[t]he rules of custom shall form the basis of ownership and use of land in the Republic'. Article 75 provides: 'Only indigenous citizens of the Republic of Vanuatu who have acquired their land in accordance with a recognized system of land tenure shall have perpetual ownership of their land.'

### **Communal, rather than individual, holding the norm**

Another feature that is common to both Australian native title and customary land of the USP region is that rights to occupation of land are usually held communally rather than individually, so that land is regarded as owned by families, clans, tribes or lines, rather than by individual persons. Occasionally one finds that native title or customary land is owned by one person, but that is usually because that person is the last surviving member of a land-owning group, or is a chief of a landowning group, who speaks on behalf of the group.

Thus, with regard to native title, Deane and Gaudron JJ in *Mabo v Queensland (No 2)* said, 'Ordinarily, common law native title is a communal native title and the rights under it are communal rights enjoyed by a tribe or other group. It is so with Aboriginal title in the Australian States and internal territories.'<sup>5</sup>

Again Brennan J, with concurrence of Mason CJ and McHugh J, commented:

The term 'native title' conveniently describes the interests and rights of indigenous inhabitants in land, whether communal, group or individual, possesses under the traditional laws acknowledged by, and the traditional customs observed by the indigenous inhabitants... [W]here an indigenous people (including a clan or group) as a community, are in possession of land under a proprietary title, their possession

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<sup>4</sup> *Land and Titles Act* (Solomon Islands) ss 239–240.

<sup>5</sup> [1992] 175 CLR 1, 109.

may be protected... A communal native title enures for the benefit of the community as a whole, and for the sub-groups and individuals within it who have particular rights and interests in the community's lands.<sup>6</sup>

With regard to customary land, probably one of the most famous descriptions of the communal aspect of rights to native lands is the preamble to the *Native Lands Act 1880* of Fiji which stated: 'Whereas it has been ascertained by careful inquiry that the lands of the native Fijians are for the most part held by mataqalis or family communities as the proprietary unit according to ancient customs.' This led on to the definition of 'native owners' which has appeared in the *Native Lands Acts* of Fiji from 1905 to the present day: "'Native owners" means the mataqali or other division or subdivision of the natives having the customary right to occupy and use any native lands.'

In recent times, in Samoa, it seems there has been a significant trend towards individualized holdings of customary land. The Bureau of Statistics reported in 2009 that

... a dramatic change toward individual land tenure has been occurring in Samoan villages since well before World War II... [T]he change in tenure systems has proceeded to the point where the majority of village lands is now held by individuals rather than extended families and is inherited directly by those individual's children.<sup>7</sup>

In all other countries of the USP region which contain customary land, however, although accurate statistics are not available, anecdotal evidence indicates that there has not been a similar movement towards individual ownership of customary land, and that the great majority of customary land is still held communally.

### **Diversity of customs**

A further feature that is common to both Australian native title and customary land of countries in the USP region is that the customs and practices upon which the rights and obligations of indigenous people in relation to such land are based are often not uniform throughout the country.

The variety of traditional aboriginal customs in Australia was not something that came very much to the fore in the arguments of counsel or the judgments of the members of the High Court in *Mabo v Queensland (No 2)*. But it was noted by Deane and Gaudron JJ:

The content of the traditional native title recognized by the common law must, in the event of dispute between those entitled to it, be determined by reference to the pre-existing native law or custom... The content of such a common law native title will, of course, vary according to the extent of the pre-existing interest of the individual, group or community.<sup>8</sup>

As regards customary or native land, there are some countries, especially the Polynesian countries of the Cook Islands, Niue, Samoa, Tokelau and Tonga, where customary practices of indigenous people are remarkably uniform throughout the country. But there are other countries in the USP region, such as Kiribati, the Solomon Islands and Vanuatu, where there

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<sup>6</sup> Ibid. 57, 61.

<sup>7</sup> *Samoa Agricultural Census Analytical Report* 11–12 (2009).

<sup>8</sup> (1992) 175 CLR 1, 87.

is a considerable differentiation between the customs of indigenous people in different parts of each country.

Thus in Kiribati, the customs of the central and northern islands provide for land to be owned by families, and for both male and female members to inherit their parents' land, whereas in the southern islands it is usual to find that land is inherited and owned only by the senior males. In the Solomon Islands there are islands, such as Guadalcanal, where ownership of lands is traced through female family members, and there are other islands, such as Malaita, where ownership of lands passes through the male members of the landowning groups. Likewise in Vanuatu, there are areas, such as north Pentecost and west Efate, where females are regarded as the owners of land, and succession to land is traced through female members of a family, whereas in central and south Pentecost and in east and south Efate males are regarded as owners of land, and succession is traced through the male line. In Fiji, there are distinct differences as to landholding between the predominantly Melanesian parts of the main islands of Viti Levu and Vanua Levu, and the eastern islands in the Lau Group and Rotuma to the north, which have been heavily influenced by Polynesian cultures, and Rabi Island off Vanua Levu, which has been sold to the Banabans who are of Micronesian heritage.

## **DIFFERENCES BETWEEN AUSTRALIAN NATIVE TITLE AND CUSTOMARY LAND OF THE USP REGION**

There are, however, some important differences between native title of Australia and the customary land of the USP region.

### **Name**

The most obvious difference between the native title that is recognized in Australia and the customary land that is recognized in countries of the USP region is the name used. The term 'native title', which has been applied to the traditional rights of indigenous people of Australia to land in that country, is not to be found in any of the eleven countries of the USP region.

As mentioned earlier, in five of the countries of the USP region—the Cook Islands, Samoa, the Solomon Islands, Tokelau, and Vanuatu—land which is occupied by indigenous people in accordance with custom is called 'customary land'. In three countries, Kiribati, Fiji and Tuvalu, such land is called 'native land'. In the Marshall Islands and Nauru, it is called simply 'land', and in Niue it is called 'Niuean land'. But in none of these countries is the term 'native title' used to describe the legal relationship between the indigenous people and the land which they occupy and hold in accordance with their customs.

### **Legal basis of recognition**

In Australia, native title was first held to exist as a right to land of indigenous people which was not created by the common law, but was recognized by the common law.

Native title in Australia was held to be those rights to land which the common law of Australia recognized as able to be enjoyed by indigenous people in relation to land. This was something made very clear by the High Court of Australia in *Mabo v Queensland (No 2)*. Mason CJ and McHugh J said:

In the result, six members of the Court ... are in agreement that the common law of this country recognizes a form of native title which, in the cases where it has not been extinguished, reflects the entitlement of the indigenous inhabitants, in accordance with their laws or customs, to their traditional lands....<sup>9</sup>

In his judgment, Brennan J said:

[I]n my opinion, the common law of Australia rejects the notion that when the Crown acquired sovereignty over territory which is now part of Australia it thereby acquired the beneficial ownership of the land therein, and accepts that the antecedent rights and interests in land possessed by the indigenous inhabitants of the territory survived the change in sovereignty....<sup>10</sup>

In their joint judgment, Deane and Gaudron JJ described the coming of the common law to Australia and its recognition of existing interests of indigenous people in land in more detail.

Where persons acting under the authority of the Crown established a new British colony by settlement, they brought the common law with them... It follows that once the establishment of the colony was complete on 7 February 1788, the English common law, adapted to meet the circumstances of the new colony, automatically applied throughout the colony.... The strong assumption of the common law was that interests in property which existed under native law or customs were not obliterated by the act of State establishing a new British Colony, but were preserved and protected by the domestic law of the Colony after its establishment.... The content of the traditional native title recognized by the common law must ... be determined by reference to the pre-existing native law or custom. We shall, hereafter, use the phrase 'common law native title' to refer generally to that special kind of title.<sup>11</sup>

Some months later after the landmark decision of the High Court in *Mabo v Queensland (No 2)*, native title was recognized by legislation enacted by the Parliament of Australia, *Native Title Act 1993* (Cmth), which provided in Section 223:

The expression 'native title' or 'native title rights and interests' means the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where:

- (a) the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and
- (b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and
- (c) the rights and interests are recognized by the common law of Australia.

It is thus clear that Australian native title owes its original legal basis to the common law as determined and applied by the High Court of Australia, and that even although native title in Australia has subsequently been confirmed by legislation, it is still an interest in land that must be recognized by the common law of Australia.

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<sup>9</sup> Ibid. 15.

<sup>10</sup> Ibid. 57.

<sup>11</sup> Ibid. 79–82.

Customary land in countries of the USP region does not trace the basis for its recognition in the legal system to the common law. In all countries of the USP region, the rights of indigenous people to land have been recognized by the written law, that is, legislation or the Constitution.

In many of the countries in USP region, the right of indigenous people to occupy land in accordance with their customs and traditional practices was expressly recognized by legislation from earliest days of colonial or protectorate administrations. In the Cook Islands such rights were recognized in Section 422 of the *Cook Islands Act 1915* (NZ). In Fiji the rights of indigenous Fijians were recognized in Section 1 of the *Native Lands Ordinance 1880*. In Kiribati and Tuvalu, indigenous rights to land were recognized in Section 3 of the *Native Lands Commission Ordinance 1922* (Gilbert and Ellice Islands).

In Niue, which was administered with the Cook Islands until 1965, the rights of Niueans to land were recognized first in Section 422 of the *Cook Islands Act 1915* (NZ), and after Niue separated from the Cook Islands in 1965, by Section 410 of the *Niue Act 1966* (NZ). In Samoa, the customary rights of Samoans to land were recognized in Section 278 of the *Samoa Act 1915* (NZ). In the Solomon Islands, customary rights of Solomon Islanders to land were recognized in Section 2 of the *Solomon (Land) Regulation 1896* (British Solomon Islands Protectorate). All these legislative acts can be seen to have been enacted at a very early stage, in the first few years of the colonial or protectorate administration, and have continued to this day.

In two countries of the USP region, statutory recognition of the rights of indigenous people to land came rather later in their colonial or protectorate period. In Nauru, which became an Australian trusteeship after World War I, the statutory recognition came in 1971 via Section 3 of the *Custom and Adopted Laws Act 1971*. In Tokelau, which became a territory of New Zealand in 1925, statutory recognition of the rights of indigenous Tokelauans to land came in 1967 in Sections 18 to 20 of the *Tokelau Amendment Act 1967* (NZ).

In four countries of the USP region, rights of indigenous people to customary land have subsequently been confirmed by the express terms of their Constitutions: Article X of the Constitution of the Marshall Islands; Article 101 of the Constitution of Samoa; Section 15 of the Constitution of Tokelau; and Articles 73 to 75 of the Constitution of Vanuatu.

So in all of the eleven countries of the USP region that provide legal recognition for customary land, that recognition is provided by the written law, legislation or the Constitution, and in none of these countries has it happened that customary land has been first recognized by the common law, and in none of these countries is it required by legislation that rights to customary land must be recognized by the common law.

### **Continuing connection with the land**

It is clear that in Australia native title to land is regarded as abandoned or extinguished if the original title holders move away from their land. In his judgment in *Mabo v Queensland (No 2)*, Brennan J, speaking with the concurrence of Mason CJ and McHugh J, said that

Native title to particular land .... its incidents and the persons entitled thereto are ascertained according to the laws and customs of the indigenous people who ... have

connection with the land ... Native title to an area of land ... is extinguished if the clan or group ... loses its connection with the land.<sup>12</sup>

This notion that native title to land would be lost if the indigenous people moved away from their land was reiterated by Deane and Gaudron JJ in their joint judgment in the same case: ‘The rights of an Aboriginal tribe or clan entitled to the benefit of a common law native title are personal only .... They can be voluntarily extinguished by surrender to the Crown. They can also be lost by the abandonment of the connexion with the land ...’<sup>13</sup>

The necessity for continuing connection with the land in order to establish native title was affirmed and endorsed by Section 223 of the *Native Title Act 1993* (Cmth):

The expression ‘native title’ or ‘native title rights and interests’ means the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where.....

(b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters....

In some countries of the USP region, it is clear that there is no such requirement of continuing connection with the land for some forms of customary land. In some countries, it is accepted that rights to customary land continue regardless of the fact that the members of the landowning group move away from the land. The following passage from the decision of the Supreme Court of Vanuatu in *Manie and Kaltabang v Kilman*<sup>14</sup> indicates that in Vanuatu loss of connection with the land does not defeat a claim to that land by the original occupiers or their descendants:

In custom, it is accepted that the custom owner is the descendant of the person who first came here and built a *Nasara*. It makes no difference whether they left again for one reason or another, the fact that they were the first occupants of the land and built a *Nasara* there gives them the right to be designated as the custom owners. All parties to this appeal agree to this statement of fact and the custom advisers confirm that such is the case in custom.<sup>15</sup>

The Chief Justice of Vanuatu was discussing in this case the custom of Malekula, but what he said in this case is not confined to Malekula, and is common throughout Vanuatu—the descendants of the first occupiers of land are entitled to claim that land, even although they, or some of their predecessors, have moved away from the land. This of course is one of the factors that makes it so difficult to resolve disputes about ownership of customary land in Vanuatu.

What is true of the custom of Vanuatu is, of course, not necessarily true of the customs of other countries in the USP region, and it would be unwise to suggest that continued connection with the land is not a requirement for indigenous rights to customary land in some countries of the USP region. But clearly there are some countries in the USP region where continued connection with the land is not a requirement for the recognition of indigenous

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<sup>12</sup> Ibid. 70.

<sup>13</sup> Ibid. 110.

<sup>14</sup> [1980–94] Van LR 343.

<sup>15</sup> Ibid. 343.

rights to customary land, contrary to what is required for the recognition of native title in Australia.

### **Alienability of rights in relation to land**

In Australia, the courts have held that the rights of indigenous people to land under native title are not alienable to persons outside the customary group, except by surrender to the Crown. Thus Brennan J said, with the concurrence of Mason CJ, Deane, Gaudron and McHugh JJ, in *Mabo v Queensland (No 2)* wrote:

Native title over any parcel of land can be surrendered to the Crown voluntarily by all those clans or groups who, by traditional laws and customs of the indigenous people, have a relevant connexion with the land but the rights and privileges conferred by native title are otherwise inalienable to persons who are not members of the indigenous people to whom alienation is permitted by the traditional laws and customs.<sup>16</sup>

Deane and Gaudron JJ in their joint judgment, agreed that native title could not be assigned to persons outside the indigenous group: ‘The rights of an Aboriginal tribe or clan entitled to the benefit of a common law native title are personal only ... The rights are not assignable outside the overall native system.’<sup>17</sup>

Whilst in countries of the USP region, it is true that the rights and privileges that indigenous people have in respect of customary land cannot be transferred, as such, to non-indigenous persons, it is not true that the land which is subject to such rights and privileges cannot be transferred to non-indigenous people by way of gift or sale, and rights to that land be replaced by rights in freehold estates or other rights to land with which non-indigenous people are familiar.

In Fiji, the New Hebrides (now Vanuatu), Samoa, and the Solomon Islands, large areas of land were sold or given by indigenous people to Europeans, before such transactions were prohibited by legislation. In Fiji, Samoa and the Solomon Islands these alienations of customary land were fairly tightly controlled by legislation, so that the total amounts of land that was alienated were not too excessive—approximately 10 percent in the case of Fiji and Samoa, and less than 1 percent in the case of the Solomon Islands. But in the New Hebrides, the acquisitions by foreign planters extended to about 33 percent of the country, that these distributions formed one of the main factors fuelling the flame of independence in the 1970s.

In the Cook Islands, Kiribati, Nauru, Niue, Tokelau and Tuvalu, the amount of land that was alienated by indigenous people was very small indeed, not because that land was inalienable as such, but because the demand for such land by non-indigenous settlers was not great, and because legislation enacted by the colonial and protectorate administrations kept a firm prohibition upon alienations to non-indigenous people, prohibitions which have been retained to the present day.

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<sup>16</sup> [1992] 175 CLR 1, 70.

<sup>17</sup> *Ibid.* 110.

## Radical or ultimate title of Crown

In Australia, the courts have made it clear that the Crown holds a radical or ultimate title to the land of Australia, and that native title exists as a burden or a qualification on that title. To quote again from the judgment of Brennan J in *Mabo v Queensland (No 2)*, speaking with the concurrence of Mason CJ and McHugh J: ‘On acquisition of sovereignty over a particular part of Australia, the Crown acquired a radical title to the land in that part .... Native title to land survived the Crown’s acquisition of sovereignty and radical title.’<sup>18</sup>

This view that native title in Australia exists as an attachment or qualification to the radical title of the Crown was endorsed by Deane and Gaudron JJ in their joint judgment in *Mabo v Queensland (No 2)*: ‘The personal rights of use and occupation conferred by common law native title are not, however, illusory. They are legal rights which ... are binding on the Crown and a burden on its title.’<sup>19</sup>

These words in the judgments of *Mabo v Queensland (No 2)* echo judgments of the Privy Council, such as the advice of the Board in *Attorney-General (Quebec) v Attorney-General (Canada)*<sup>20</sup>, where the Privy Council spoke of native title being a ‘burden’ on the Crown’s proprietary estate in the land of Canada, and in *Amodu Tijani v Secretary, Southern Nigeria*<sup>21</sup>, where the Privy Council spoke of the radical title of the Crown being ‘qualified’ and ‘reduced’ by native title. Thus, native title in Australia is regarded as attachment to the radical title of the Crown, qualifying or burdening that radical title.

The relationship of customary land to the radical title of the Crown in most countries of the USP region has been and is very different.

In two countries of the USP region, the Solomon Islands and Vanuatu, the British Crown did not acquire sovereignty at all, and so the Crown did not acquire radical title and customary land in those countries has never had any relationship with radical title of the Crown.

Even in the three countries of Fiji, Kiribati and Tuvalu, which were British colonies and subject to British sovereignty, the Crown did not claim title to land that was occupied by indigenous people. Thus, during the time that they were British colonies, native land in those countries existed alongside and outside of land owned by the Crown, not as a qualification or burden on the title of the Crown. Since those countries have acquired independence of course there can be no suggestion of radical title of the Crown, nor indeed of the State.

There were four countries in the USP region, however, where one could say, during colonial times, that customary land was an attachment to, and burden on, the radical title of the Crown. In the Cook Islands, Niue, Samoa and Tokelau, all the land in those countries was initially declared by legislation enacted by the New Zealand Parliament to be owned by the British Crown, but subject to the rights arising under custom or otherwise: Section 354 of the *Cook Islands Act 1915* (NZ); Section 323 of the *Niue Act 1966* (NZ); Section 268 of the *Samoa Act 1921* (NZ); and Section 20 of the *Tokelau Amendment Act 1967*. In those four countries, during earlier times, one could say that customary land was a burden on the radical title of the Crown. However, today that is so only in the Cook Islands. The other three

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<sup>18</sup> Ibid. 69.

<sup>19</sup> Ibid. 110.

<sup>20</sup> (1888) 14 App Cas 54.

<sup>21</sup> (1921) 2 AC 399, 403, 410.

countries, Niue, Samoa and Tokelau, have released their customary land from attachment to the radical title of the Crown.

When Samoa became independent in 1962, Article 101(2) of the Constitution made it clear that customary land is ‘held from Samoa, in accordance with Samoan custom and usage’. Some considerable time after Niue became self governing in 1974, Section 43 of the *Legislation (Correction of Errors and Minor Amendments) Act 2004* made it clear that “‘Niuean land’ means land in Niue held by Niueans according to the customs and usages in Niue’. When Tokelau enacted its Constitution in 2006, Section 15(2) provided: ‘Customary land is land held in accordance with the custom of the village’.

It is only in the Cook Islands that customary land is nowadays stated to be linked to the radical title of the Crown. In all other eleven countries of the USP region, the rights of indigenous people to land have no connection with a radical title of the Crown.

### **Extinguishment by the Crown**

One of the most striking features of Australian native title is its susceptibility to extinguishment by the Crown, by action authorised by legislation which is inconsistent with the enjoyment of native title—such as appropriation of the land by the Crown for use for the purposes of Government, and granting out of freehold estates in that land to non-indigenous persons in Australia—provided that, in all cases, the intention to override native title was clear and plain.

In *Mabo v Queensland No 2*, Deane and Gaudron JJ described the vulnerability of common law native title to adverse action by the Crown, on two occasions in their joint judgment. First they wrote:

[C]ommon law native title ... is subject to three limitations .... The third limitation is ... that common law native title, being merely a personal right unsupported by any prior actual or presumed Crown grant of any estate or interest in the land, was susceptible of being extinguished by an unqualified grant by the Crown of an estate in fee or of some lesser estate which was inconsistent with the rights under the common law native title ... Common law native title could also be effectively extinguished by an inconsistent dealing by the Crown with the land, such as a reservation or dedication for an inconsistent use or purpose ....<sup>22</sup>

Several pages later in their joint judgment, Deane and Gaudron JJ said:

The rights of an Aboriginal tribe or clan entitled to the benefit of a common law title are personal only ... The personal rights conferred by the common law title do not constitute an estate or interest in the land itself. They are extinguished by an unqualified grant of an inconsistent estate in the land by the Crown, such as a grant in fee or a lease conferring the right to exclusive possession. They can also be terminated by other inconsistent dealings with the land by the Crown, such as appropriation, dedication or reservation for an inconsistent public purpose or use, in circumstances giving rise to third party rights or assumed acquiescence.<sup>23</sup>

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<sup>22</sup> (1992) 175 CLR 1, 88–89.

<sup>23</sup> *Ibid.* 110.

In the same case, Brennan J, with the concurrence of Mason CJ and McHugh J said:

Sovereignty carries the power to create and extinguish private rights and interests in land within the Sovereign's territory. It follows that, on a change of sovereignty, rights and interests in land that may have been indefeasible under the old regime become liable to extinction by exercises of the new sovereign power. ... In Queensland, the Crown's power to grant an interest in land .... depends upon conformity with the relevant statute. When validly made, a grant of an interest binds the Crown and the Sovereign's successors .... However, the exercise of a power to extinguish native title must reveal a clear and plain intention to do so, whether the action be taken by the Legislature or the Executive .... Where the Crown has validly alienated land by granting an interest wholly or partially inconsistent with a continuing right to enjoy native title, native title is extinguished to the extent of the inconsistency. Thus native title has been extinguished by grants of estates of freehold or of leases, but not necessarily by the grant of lesser interests (eg authorities to prospect for minerals). Where the Crown has validly and effectively appropriated land to itself and the appropriation is wholly or partially inconsistent with a continuing right to enjoy native title, native title is extinguished to the extent of the inconsistency.<sup>24</sup>

In countries of the USP region, customary land has, as explained earlier, been supported not by the common law, but by legislation or, in some countries, by a Constitution. For this reason, it is not subject to extinguishment by actions of the Crown which are authorized by legislation, such as use of the land for Government purposes, or granting of estates in fee simple over the top of native title, unless the legislation which recognizes and protects the customary land is amended or repealed. Customary land and native land in all USP countries has, by virtue of its statutory base, a legal status that is equal to, and not subordinate to, the statutory power of the Crown to appropriate land for its own purposes and to grant freehold estates in fee simple.

By virtue of the statutory base of customary land in countries of the USP region, the Crown, and its successor, the State, is not able to take adverse action against customary land, unless it repeals or amends the legislation that recognizes the customary lands. Since the enactment of written Constitutions which protect rights of property from compulsory acquisition or deprivation without adequate compensation, indigenous rights to customary land have received increased protection.

There are some countries where the Government is expressly authorized by legislation to grant leases over customary land without the permission of the owners of that land, including Nauru, Samoa and Vanuatu, but there has never been any suggestion that such leases have the effect of extinguishing the ownership rights of the custom owners of the land that has been leased. Likewise in Fiji where a statutory body, the iTaukei (formerly Native) Land Trust Board, is expressly authorized to grant leases over native land, there has been no suggestion that the owners of the native land that has been leased out by the Board have been thereby deprived of their ownership of the land.

In other countries where the Government is not authorized to grant leases over customary land, such as the Cook Islands, Kiribati, Niue, Solomon Islands and Tuvalu, if the

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<sup>24</sup> Ibid. 63.

Government were to grant a lease over customary land, one would expect that the lease would be held illegal and void.

It is true, that in all such countries, the Government has, and has had for many years under legislation and recognized by the Constitution, powers to acquire land, including customary and native land, by compulsory acquisition subject to the payment of reasonable compensation. But these powers have in practice been rarely used because of the resentment which they create, and only when really necessary to provide some amenities for the public, such as roads, airstrips, wharves, schools, and administration buildings for central or local government. Certainly they have not been used to override indigenous rights to customary or native land on a general scale, and they have not been used to provide land to be granted off in estates of fee simple overriding indigenous rights to the land.

### **Extinguishment without compensation**

Another striking feature of the landmark case of *Mabo v Queensland (No 2)* was the evenly balanced difference of view between the justices of the High Court of Australia as to whether native title could be abolished or extinguished without the payment of compensation to the landowning group. Mason CJ, McHugh and Brennan JJ considered that native title could be abolished without payment of compensation, whilst Deane, Gaudron and Toohey JJ considered that native title could not be abolished without the payment of consideration.

Later in *Wik Peoples v Queensland*<sup>25</sup> the majority of the High Court held that native title could be extinguished without compensation, but only if legislation clearly and plainly so authorized.

That there should be any uncertainty, or any room for debate, as to whether the indigenous owners of customary and native land should be compensated for the loss of their land, would I believe, in all countries of the USP region that recognize customary land, be greeted with astonishment and disbelief.

It is true that there have been occasions when there have been strong disputes as to what was the appropriate amount of compensation, and when there have been very long and vexing delays in the actual payment of compensation, and when there has been misuse of trust funds established to hold compensation moneys safe and secure for the customary land owners, but never has there been any denial that the indigenous owners of customary or native land are entitled to receive compensation for any of their land which has been compulsorily acquired under the terms of legislation.

### **Proprietary/personal interests in land**

In *Mabo v Queensland* there was significant difference of view as to whether the rights of aboriginal tribes and clans of the customary claimants as regards the land which they occupied could be classified as personal rights or proprietary rights.

Deane and Gaudron JJ were firmly of the view that the rights of the customary claimants were only personal rights, as the following passage from their joint judgment indicates: '[C]ommon law native title ... is subject to three limitations: ... The second limitation is ....

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<sup>25</sup> (1996) 187 CLR 1.

That the title, whether of individual, family, band or community, is “only a personal ... right” and, that being so, it does not constitute a legal or beneficial estate or interest in the actual land.<sup>26</sup>

Dawson J seemed to be of a similar view that the rights of indigenous people to occupy land were purely personal rights, and not proprietary rights, inasmuch as he considered that native title was a form of occupancy by indigenous people which was permitted by the Crown. Thus, Dawson J said: ‘Aboriginal title (and it is in this context that the word “title” is misleading) is an occupancy which the Crown, as absolute owner, permits to continue. The permission may be withdrawn.’<sup>27</sup>

Toohy J, on the other hand, thought that a classification of the rights of indigenous people to land was unnecessary and just produced unnecessary complexity, warning:

Finally, some cases suggest that a power to extinguish traditional rights unilaterally is vested in the Crown as a result of the inherent quality of the title itself. This follows from characterization of the title as ‘a personal and usufructuary right’ as opposed to a proprietary right.... An inquiry as to whether it is ‘personal’ or ‘proprietary’ ultimately is fruitless and certainly is unnecessarily complex.<sup>28</sup>

The other three members of the High Court seemed to hold the same view as Toohy J that classification of the rights of indigenous people to land as personal or proprietary was unnecessary. Thus Brennan J, speaking with the concurrence of Mason CJ and McHugh J, stated: ‘Native title to particular land (whether classified by the common law as proprietary, usufructuary or otherwise), its incidents and the persons entitled thereto are ascertained according to the laws and customs of the indigenous people who, by those laws and customs, have a connexion with the land.’<sup>29</sup>

So in *Mabo v Queensland*, whilst Deane and Gaudron JJ, and it seems also, Dawson J, clearly considered that the rights of indigenous people to the land which they traditionally occupied were personal, and not proprietary, the other four members of the Court, Mason CJ, Brennan, McHugh and Toohy JJ, seemed to have considered that classification of the rights as personal or proprietary was not necessary or significant.

Turning to consider the countries of the USP region which recognize the rights of indigenous people to customary land, the legislative provisions in six countries of the USP region, the Cook Islands, Fiji, Kiribati, Samoa, the Solomon Islands and Tuvalu, refer consistently to the indigenous people as ‘owners’ of that customary land. These are the legislative provisions in the *Cook Islands Act 1915* (NZ), in the *Native Lands Act* (Fiji), and in the *Gilbert and Phoenix Islands Land Code* which is attached as a schedule to the *Native Lands Acts* of Kiribati, and the *Tuvalu Lands Code* which is attached as a schedule to the *Native Land Acts* of Tuvalu; *Alienation of Customary Land Act 1965* of Samoa, and the *Lands and Titles Act of the Solomon Islands*. The *Lands Act* of Nauru which refers to ‘land’ rather than customary land or native land, also refers consistently to ‘the owners’ of land. Article 73 of the Constitution of Vanuatu also refers to the indigenous people as ‘the owners’ of the customary

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<sup>26</sup> (1992) 175 CLR 1, 88.

<sup>27</sup> *Ibid.* 138.

<sup>28</sup> *Ibid.* 194–195.

<sup>29</sup> *Ibid.* 70.

land in that country. So in these eight countries of the USP region, there can be little doubt that the rights of the indigenous people to land are proprietary in nature.

In Niue, where Niuean land is stated by Section 43 of the *Legislation (Correction of Errors and Minor Amendments) Act 2004* to mean ‘land in Niue held by Niueans according to the customs and usages in Niue’, Section 47(1) of the *Niue Amendment (No 2) Act 1968* provides the Land Court with jurisdiction ‘(a) to hear and determine any application to the Court relating to the ownership, possession, occupation or utilization of Niuean land ... (b) to determine the relative interests of the owners or the occupiers in any Niuean land’. These provisions indicate that in Niue, also, the rights of Niueans to land are regarded as interests in the land and so proprietary.

In Marshall Islands, Section 113 of the *Real Property Act 1966* seems to indicate that the indigenous people of Marshall Islands have interests in land which are of a proprietary nature: ‘Section 113 Restrictions upon ownership. Only citizens of the Republic or corporations wholly owned by citizens of the Republic may hold title to land in the Republic; provided, that nothing herein shall be construed to prevent the Government of the Republic from holding title to lands in the Republic’.

There is one country within the USP region where the rights of indigenous people to land are less clear: Tokelau. In Tokelau, Section 15(2) of the Constitution 2006 states that ‘Customary land is held in accordance with the custom of the village’. But at no stage in the Constitution or in the *Tokelau Act* or *Tokelau Amendments Acts* are words used which indicate clearly whether indigenous people of Tokelau have a proprietary interest in land under village custom or only a personal right.

To summarise, in those countries of the USP region which recognize customary land—Cook Islands, Fiji, Kiribati, Samoa, the Solomon Islands and Tuvalu—legislation indicates that the indigenous people of those countries have proprietary rights of ownership of their land. So also in Marshall Islands, Nauru and Niue, where the legislation refers only to land, the indigenous people are recognized as having proprietary rights of ownership to that land. In Tokelau, however, the Constitution is rather more unclear as to whether the people of that country have rights to land, which are of a personal or proprietary nature.

## CONCLUSION

It can thus be seen that although Australian native title and customary land in countries of the USP region share some very basic and fundamental similarities, foundation on custom and communal ownership as the norm rather than individual ownership, yet there are some marked differences, which make Australian native title a more fragile type of holding of land than is provided for customary land in countries of the USP region. That is not to say that Australian native title is without value or significance—only that that value and significance is not as strong in law as that of customary land in USP countries.