

Foreword

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English common law was spread around the world as a result of the British Crown's acquisition of overseas colonies. The common law had been created, and was continually being developed, by English judges whose proprietary worldview was shaped by Norman feudalism and its underlying premise that all land in the realm had originally been occupied and therefore owned by the King. This feudal fiction provided the supposed factual basis for the legal doctrine of tenure, whereby all privately held land was deemed to have been granted by the King and was held of him in return for services.

Reception of the common law in the American colonies, Australia, and New Zealand created serious conceptual difficulties. Feudalism had already lost much of its significance in England by the time the Crown's first American colonies were acquired, and had been further eroded by the Tenures Abolition Act of 1660 and social, economic, and political changes in England by the time Australia and New Zealand became part of the Crown's dominions. The doctrine of tenure endured nonetheless, and was exported to these colonies as part of the common law that was thought to be applicable there. But why would a feudal doctrine that had already lost most of its importance in England be applicable in these colonies? Did the feudal fiction of original Crown occupation and ownership of land apply in the same way it applied in England? What about the Indigenous peoples living in these colonies who occupied and used land in accordance with their own traditions and ways of life, including their own legal orders? Did the common law deny them legal land rights because they did not have Crown grants and could not be accommodated within the somewhat obsolete doctrine of tenure?

While these questions have been posed and addressed more or less obliquely by judges in the United States, Canada and New Zealand, courts in Australia have confronted them more directly, with dismaying results until the High Court's landmark decision in *Mabo v Queensland [No 2]* in 1992. In a line of cases going back to *Attorney-General v Brown* (1847), the doctrine of tenure was held to apply and give the Crown original title to all land in Australia from the time of colonisation. All other titles to land therefore had to be acquired from the Crown by grant. In *Milirrpum v Nabalco Pty* in 1971, Justice Blackburn of the Northern Territory Supreme Court took this approach to what he considered to be its logical conclusion: the Indigenous peoples of Australia, though occupying lands in accordance with their own systems of law, had no land rights that could be acknowledged by an Australian court because they had not been granted their lands by the Crown. In other words, the doctrine of tenure, as interpreted and applied by Australian judges, trumped any Indigenous land rights.

This disturbing conclusion could not stand. As we all know, it was overturned by the *Mabo* decision, in which the High Court held that Indigenous land rights, based on occupation of lands in accordance with Indigenous customs and laws, survived colonisation

and are enforceable in Australian courts, unless validly extinguished. The application of the doctrine of tenure was nonetheless affirmed, but modified to accommodate Indigenous land rights in the form of native title. Instead of giving the Crown a complete beneficial interest in lands occupied by Indigenous peoples, the doctrine conferred a radical title on the Crown. According to the Court, the Crown could convert this radical title into beneficial ownership by appropriating the land to its own use, thereby extinguishing the native title. Alternatively, it could extinguish the native title by granting an interest in the land to private persons or corporations that entitled them to exclusive possession.

The *Mabo* decision left some fundamental questions unanswered. Among them, what exactly is the nature of the Crown's radical title? Is it a property interest, an aspect of the Crown's sovereignty, or both? How could the Crown extinguish native title by appropriation or grant, given the common law's traditional protection of property rights against prerogative power? These are among the fundamental questions that Dr Ulla Secher addresses and seeks to answer in this ground-breaking book. In doing so, she ranges far beyond Australia, drawing on legal history and case law not only from England but also from former British colonies in Africa, as well as from the United States, Canada and New Zealand. Her review of the relevant authorities is comprehensive and impressive, but more importantly her understanding of the case law provides a fresh perspective that leads to a re-evaluation of received doctrines, including the doctrine of tenure. These contributions are stimulating and rewarding, and make this book a rich reading experience.

But Dr Secher is not content with reinterpretation and re-evaluation of existing authorities. These parts of the book serve a more important purpose, namely to develop an alternative approach to Indigenous land rights that avoids some of the problems arising from the law as currently understood, such as the vulnerability of native title to Crown appropriation and grant in Australia. This alternative approach is systematically grounded in a fundamental reconceptualisation of the Crown's title to land in former British colonies, whether they were acquired originally by settlement or derivatively by conquest or cession. For this reason, her approach is not limited in application to Australia; as she convincingly demonstrates, it is relevant to other jurisdictions as well, particularly Canada and South Africa.

In the 20 years since the *Mabo* decision, an extensive literature has been produced on the land rights of Indigenous peoples. This research has contributed enormously to our understanding of the legal impact of colonisation in Australia and elsewhere. With rare exceptions, however, the existing literature does not probe as deeply or question fundamental assumptions as thoroughly as Dr Secher does in her research. She goes to the root of the conceptual problems around the legal nature of Indigenous land rights and their vulnerability to extinguishment in the former colonial empire of the Crown. This book is a formidable contribution that I expect will be influential in shifting legal thinking on Indigenous land rights in progressive new directions.

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