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Mabo and the Rural Sector

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> ...the economic activities and energies of England of 1800 would shatter the social and economic customs of the aboriginals. Tragically, the largest region of nomads in the world was now face to face with the island which had carried to new heights that settled, specialized existence that had arisen from the domesticating of plants and animals. People who could not boil water were confronted with the nation which had recently contrived the steam engine.
>
> ...on the east coast the white sails of the English ships were a symbol of a gale which in the following hundred years would slowly cross the continent, blowing out the flames of countless campfires, covering with drift-sand the grinding stones and fishing nets, silencing the sounds of hundreds of languages, and stripping the ancient aboriginal names from nearly every valley and headland. (Blainey 1976, pp.253-254)

> The rapid decline in [Aborigines'] numbers was partly because they were of little use to the European. The early European explorers and even the graziers who followed them found that the aborigines were excellent guides, even in country which was unknown to them. Their knowledge of how to find water was particularly important in the arid interior. Almost all of the major exploring expeditions were accompanied by aborigines and it is doubtful if they would have been successful without the assistance of natives. However essential such a service was, it was supplied by a very limited number of people and was required only for a short period of time.
>
> ... the major requirement for the new European pastoral industry was precisely the same as that of the hunting and food-gathering aborigine: both required a large area of land. The two systems of land use could not be practised at the same time in the same region. (Davidson 1981, p.37)

1. Introduction

The High Court's *Mabo* decision (*Mabo and Others v State of Queensland*) asserted Aboriginal common law rights to vacant Crown land with which they had a continuing and traditional association as "native title". The impact of the High Court's decision was contrary to the only previous case on Aboriginal land rights (in a lower court), although the argument used was similar to the earlier case in many respects. In adjudicating on the claim by some Murray Islanders to ownership of their land, the statutory majority of the High Court attempted to provide a systematic framework by which all land claims could be assessed, not just the particular claims in the Torres Strait. However, because some issues - e.g. minerals, forests and riparian rights, leasehold land - did not arise in the specific context of the Murray Islands, some uncertainty remained as to the exact implications of the decision in mainland Australia. If land rights claims under *Mabo* principles were to be pursued on the mainland, it would have occurred as a succession of individual claims to specific tracts of land.[1] The uncertainties of existing title, and the uncertain application of High Court's enunciated principles in the *Mabo* decision, convinced the Commonwealth Government of the need for a legislative response to the High Court's judgement.

Four issues concerning the Mabo decision are examined in this paper. The first is the essential invisibility of Aborigines in discussions of Australian agricultural and resources policy (section 2). There has been surprisingly little written by agricultural economists about Australian Aborigines, even though there are as many Aborigines as there are farmers and, at least until recently, Aborigines were largely rural dwellers. Further, even before the *Mabo* decision, Aborigines had become more important to decisions about the use of rural resources. Because Aborigines have been invisible to agricultural economists it is not surprising that agricultural economists have been invisible in the *Mabo* debate.

The second issue canvassed in this paper concerns the implications of the *Mabo* decision for the efficient allocation of resources and, more importantly, its implications for economic welfare (section 3). It is shown that the *Mabo* decision is more likely to result in increased social welfare than an alternative policy of ignoring Aboriginal land rights. This conclusion had also been argued in the Industry Commission's (1991) report on mining, but economists - including those of the agricultural persuasion - appear to have ignored this work.

The third issue concerns using "public choice" concepts to explain the evolution of the debate over the *Mabo* decision (section 4). It should come as no surprise that the course of the *Mabo* debate can be largely explained by the expected economic impact of the *Mabo* decision on interest groups. This expected impact comprised the costs of interest groups' organising to take advantage of the potential benefits this decision presented, or to counter its perceived threats. The one surprising public choice aspect of the *Mabo* debate is that Aborigines were able to avoid their interests being immediately swamped by the interests of non-Aboriginal Australia. In small measure, the Prime Minister's elevating the issue in his

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[1] Good discussions of the *Mabo* decision are contained in Commonwealth of Australia (1993a) and the June 1993 issue of the *Sydney Law Review* (vol.15, no.2); Stephenson and Ratnapala (1993) contains several early legal responses which largely take a highly critical attitude to the High Court's decision. Reynolds (1992) presented an extensive historical assessment of the legal background to the decision.

Redfern Park speech (Keating 1992) and maintaining emphasis on the issue throughout 1993 - even to extent of threatening parliamentary sittings during the Christmas break in order to force the Senate to conclude debate on the Commonwealth Native Title Bill - assisted the Aborigines' cause. However, the principal reason that Aborigines avoided being swamped is that - despite serious differences of opinion within their community on both strategy and tactics - they evolved into an effective lobby group.

The fourth issue concerns the propaganda campaign waged against the notions of inalienable and communal native title (section 5). Most of the arguments against such forms of title appear to be deliberate attempts to muddy the waters by appeals ostensibly to neoclassical economics principles which suggest non-attenuated property rights as the best title for Aboriginal land. This argument conveniently ignores the context in which native title under *Mabo* principles was formulated.

2. Aborigines and agricultural economics

Using the third edition of *Agriculture in the Australian Economy* (Williams 1990) as a guide, Australian agricultural economists exhibit almost no attitude to Australian Aborigines. The index records just five references to Aborigines. Three of these references are in chapters by non-economists; one other reference merely lists Aboriginal affairs as part of the new wider scope of interests of farmers' trade unions; and the final reference is to Aboriginal diets.

Shaw (1990, p.3) noted that:

> This [European] expansion also caused grievous 'collisions' with the Aborigines, as the latter were pushed off lands which they had occupied for generations [sic], and despite the verbal regrets expressed by some officials, by 1850 they had been almost exterminated in south-east Australia, victims of disease and white aggression.

These "'collisions' with the Aborigines" were, almost from the outset of European settlement, a matter of *local* - although not British Colonial (*cf.* Reynolds 1992) - policy to eliminate Aborigines from agriculturally productive land. By the end of the nineteenth century, Aborigines had effectively been marginalised to then-unproductive land. The history of *subsequent* "collisions" reflects later discoveries that land into which Aborigines had previously been marginalised had, with the development of technology or changed patterns of product demand, become productive for agricultural, mining, recreational and sometimes defence purposes. Aborigines have occupied Australia for at least 1,600 generations, and perhaps for as many as 4,000 generations.

In distinguishing between "broad" and "narrow" views of the legitimate scope of rural politics, Warhurst (1990, p.109) noted that the contemporary Labor Government advocated a broader view which:

> says not only are there rural interests - such as education, health and the needs of rural women - which are distinct from rural industries as such [sic], but all Australians have a legitimate, even overriding, interest in the politics of rural areas, in matters such as environmental conservation and Aboriginal land rights, which impinge directly on rural areas.[2]

Warhurst expanded this argument with respect to Aboriginal land rights in noting that:

> Aboriginal land rights ... will also remain on the political agenda for the remainder of this century and beyond. Land claims will impinge sometimes on the agricultural community as they have done on the pastoral industry in the Northern Territory and in some States. The Aboriginal land rights lobby is not as powerful as its environmental counterparts so its claims seem likely to be less significant for rural politics, though still important. (Warhurst 1990, pp.123-4)

In retrospect, Warhurst's (1990, pp.123-4) comment on the likely impact of Aboriginal land rights substantially understated the significance of this movement. The High Court's *Mabo* decision of 1992 (*Mabo* 1992) dramatically changed the *political* character of the land rights landscape, although the implications for Aboriginal land tenure in practice have yet to be tested.

Notwithstanding this argument, Campbell and Dumsday's chapter on "Land Policy" in Williams (1990) contains no reference to Aborigines. In the historical section of their chapter, there is no recognition that the *converse* of European settlement was the expropriation of the Aborigines' land. By contrast, Davidson (1981) outlined the economic rivalry between Aborigines and British invaders for the land resource.[3] Once exploration had been completed, Aborigines had no goods or services - other than land -

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[2] In the same way as rural political groups have maintained a significant impact on urban Australia through strong support for conservative social mores.

[3] Davidson does have one serious lapse in this chapter:

to trade with the invaders. Despite the British Colonial Office's insistence that Aborigines' rights in land be respected, the invaders were determined to ignore such rights (*cf.* Reynolds 1992). Aborigines' lack of tradeable commodities and their insistence that the land and its produce - including introduced livestock - was theirs to use, made "grievous 'collisions'" unavoidable. The devastation wrought by introduced diseases (*cf.* Butlin 1993) and superior European military technology made Aboriginal defeat inevitable. This defeat was not only military, but also economic and cultural, and left to Aborigines only those lands for which non-Aborigines had no use, and some access to land where the impact on non-Aborigines was inconsequential. Startlingly, in the more contemporary material, Campbell and Dumsday do not mention the development of Aboriginal land rights and extensive grants of land to Aborigines by 1990, especially in the Northern Territory (under the *Aboriginal Land Rights (Northern Territory) Act 1976*). Aborigines are similarly absent from Dumsday, Edwards and Chisholm's chapter on "Resource Management", again despite their increasing access to land and conflicts over mining access in the Northern Territory (*cf.* Industry Commission 1991).

MacAulay et al's chapter on "Food and Fibre Consumption" in Williams (1990) draws from the 1983 National Dietary Survey to note that:

> However, as a group Aborigines have the most problems associated with diet-related disorders. Some of the identified areas of concern are maternal health, low rates of breast feeding and excessive rates of alcohol consumption. In New South Wales Aborigines are ten times more likely to be hospitalised for alcohol-related disorders than are non-Aborigines, while under-nutrition in Australian children is common only in the Aborigines.
>
> Intensive studies of the nutritional diets of low-income groups are not available. (MacAulay et al 1990, pp.269-270)

These authors failed to appreciate that the health and nutritional status of "Aborigines" varies enormously. The poor health status of significant numbers of Aborigines is most likely to arise not principally because they are *Aborigines*, but because most Aborigines are poor, marginalised, the victims of two centuries of cultural and economic repression (*cf.* Human Rights and Equal Opportunity Commission 1988, chapter 2; Royal Commission into Aboriginal Deaths in Custody 1991, vol. 2; Australian Bureau of Statistics 1993, cat. 2740.0) and - in many instances - living trapped between two cultures. In these situations, it is hardly surprising that their health and nutrition is less than satisfactory. In the case of the Toomelah Aborigines, the policy process failed them miserably with regard to provision of basic services (*e.g.* water, sewage, roads) which non-Aboriginal Australians assume as of right (*cf.* Human Rights and Equal Opportunity Commission 1988). Elsewhere, rural Aborigines have been the victims of a malign neglect - *e.g.* the use of asbestos tailings at Baryulgil in northern NSW for "road construction and surfacing, in land fill and topdressing around private homes and in 'sand' pits for the local school" (Human Rights and Equal Opportunity Commission 1990).

Given the low-income status as Aborigines as a group, it is surprising that they are not even mentioned in Musgrave's "Rural Adjustment" chapter in Williams (1990).[4] Indeed, despite work by the Poverty Commission in the 1970s into non-farm rural poverty (mentioned in passing in Musgrave 1990, p.251), the bulk of this chapter emphasises *farm* adjustment. Despite agricultural economists having a rich theory to comprehend and explain the process of farm adjustment, agricultural economists have apparently not attempted to use these tools to address structural adjustment in the Aboriginal community (*cf.* Davidson 1979). Because of poverty among Australian Aborigines, some non-government aid organisations such as Community Aid Abroad/Freedom from Hunger (CAA/FFH) have re-focussed some of their total aid effort to include Australian Aborigines (CAA *Annual Review 1990/91*). The fact that CAA/FFH has re-directed some of its aid effort to a domestic group is not mentioned in Hewson *et al's* chapter on "Agricultural Aid in the Australian Economy" in Williams (1990).[5] Aborigines also fail to appear in Lewis' chapter on "Rural Population and Workforce" in Williams (1990) despite 70 per cent of the estimated 265,000 Aborigines in 1991 living outside capital cities (ABS 1993, Table 1.2).

Reflecting the general invisibility of Aborigines in the Australian agricultural economics literature, agricultural economists have distinguished themselves by self-effacement in the *Mabo* debate. In the

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> As the Australian aborigines had no written language, all knowledge of their history, social organization and systems of land use has to be based on the observations of Europeans who were familiar with them during the early period of British settlement, on archeological evidence or on recent investigations of anthropologists. (Davidson 1981, p.29)

Why not ask Aborigines themselves about their own "history, social organization and systems of land use"?

[4] Perhaps this lack of mention simply reflects the general attitudes to poverty among Australia's ruling class, as typified by remarks attributed to Australia's Head of State (*Sydney Morning Herald* 20.6.88, p.1):

> "Somewhat superfluously, Bob Hawke told the Queen that Mr Howe [Minister for Social Security] was particularly concerned with the problems of poverty.
>
> "'Yes, it's such a drain on the taxpayers,' Her Majesty replied."

[5] It is not coincidental that the work by the late Fred Hollows, and continued by the Hollows Foundation, to save sight in poor countries such as Eritrea and Vietnam was pioneered among Australian Aborigines.

following section, conventional economic methods are used to show that the original *Mabo* decision of the High Court, and its effective implementation by legislatures, is likely to increase Australian economic welfare.

3. Economics of *Mabo*

3.1 Time-less and certain

The allocation of Australia's resources between black and white Australians can be illustrated in a conventional Pareto welfare economics diagram (Figure 1). In a 2-factor, 2-commodity, 2-person world, the original possible utility combinations are represented by the OB0 segment of the Y-axis. Aborigines had a refined production technology, well-adapted to exploiting Australia's resources (Davidson 1981, p.36; and Ponting 1992, pp.20ff on hunter-gatherers generally) and, prior to European colonisation, only black preferences mattered. Thus the relevant social welfare function is that of black Australians (e.g. line b0b0), and the Pareto optimal allocation of resources is point B0.

At their first settlement, European Australians understood production conditions poorly, and produced little initially.[6] Combined Aboriginal and European production, for example, might have offered utility possibilities in early years of European settlement represented by the utility frontier B0W0. As Europeans learned to better exploit the land, their production possibilities improved, shifting the utility possibilities frontier to, for example, B0W0* (Figure 1). Conversely, as Aborigines were dispossessed of their land, resources and culture, their command over resources declined and even their production technologies depreciated;[7] over time, the utility possibilities frontier contracted to B0*W0*. Once Europeans had effectively colonised Australia and had dispossessed Aborigines from the better-watered areas, the only preferences that counted in the implied social welfare function were those of whites (e.g. line w0w0). The optimal allocation of resources - ignoring Aborigines - was therefore point W0* (Figure 1).

The economic effect of making native title available to Aborigines is depicted in Figure 2. Because a grant of native title for land under *Mabo* principles presupposes a continuing and traditional association of an Aboriginal group with this land, native title is simply unavailable to non-traditional Aborigines. These Aborigines' land asset is in most cases zero, and their non-land income is generally low. Their welfare level is commensurately low: depicted as point Z in Figure 2a. The unavailability of native title to non-traditional Aborigines means that there are *no welfare implications* for them - nor for non-Aborigines with whom they have economic relations - of the *Mabo* decision.

The economic situation of "traditional" Aborigines, for whom native title is available, is depicted in Figure 2b. Suppose they currently have access to land corresponding to point Z. Voluntary bargaining between Aborigines and non-Aborigines could lead to efficient outcomes on the segment *ab* of the contract curve in Figure 2b. Traditional Aborigines' land access is, however, not secure: the Aboriginal experience over 206 years of white settlement has been that, as non-Aborigines want additional land, they take it. Except for very recent examples such as land rights legislation in the Northern Territory and South Australia, Aborigines' continued access to lands currently available to them is very insecure.[8] Aborigines have had every reason to expect that, if non-Aboriginal Australia finds a valuable use for their land, Aborigines will lose their current rights to this land. Without secure property rights, Aborigines have had every reason to anticipate future losses of land access, such as represented by point Z' in Figure 2b, with voluntary bargaining access only to segment *mn* of the contract curve, yielding lower utility to Aborigines and higher utility to others. *If* the *Mabo* decision (or subsequent legislative action) provided *secure* property rights - which is, after all, a necessary condition for an efficient market economy - native title would prevent *future* expropriation of Aboriginal land, and a non-voluntary reallocation of resources from Z to Z' (Figure 2b).

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[6] The back cover of Butlin (1993) notes "Professor Butlin claims that it was not until 1850 that combined black and white production exceeded the 'value' of black production in 1788", but I cannot find this argument in the text.

[7] Their technologies depreciated because they were tied closely to their culture; as Aboriginal culture came under severe pressure from Europeans, so too their technologies were also threatened. Butlin (1993) argued that, along with physical appropriation of land, introduced diseases (especially venereal diseases and smallpox) were a major cause of this dispossession.

[8] It has been suggested that, following the Northern Territory land rights legislation, the then Queensland Government converted Aboriginal reserves to national parks or wilderness areas to preempt future land rights legislation. The first *Mabo* case decided invalidated Queensland legislation which - while the *Mabo* case was before the courts - would have converted the disputed land into Crown land.

The social welfare implications of the *Mabo* decision for traditional Aborigines are illustrated in Figure 3. With the utility possibility frontier B0W0* corresponding to the contract curve in Figure 2b, the highest level of social welfare attainable is SWF_1 (given by Z* in Figure 3). The segment *ab* of the utility possibility frontier B0W0* (Figure 3) corresponds to the segment *ab* of the contract curve in Figure 2b, and represents the level of welfare attainable with traditional Aborigines' current access to land. Without secure property rights, social welfare declines if Aborigines lose existing access to their land: only segment *mn* of the utility possibility frontier B0W0* (Figure 3) - corresponding to segment *mn* of the contract curve in Figure 2b - would then be attainable by voluntary trade. Thus, not only do secure property rights secure a higher level of welfare for Aboriginal people but also - with an egalitarian social welfare function - secure property rights for traditional Aborigines also secure a higher level of *social* welfare.

From Figure 3 it can be seen that - in a 2-person world - a *Mabo*-induced policy that re-defined the social welfare function from w0w0 to SWF_2 and simultaneously permitted a shift from point W0* to the segment *ab* has unequivocally increased social welfare. This conclusion could be over-turned in practice if the numbers of Aborigines and non-Aborigines affected resulted in a potentially large increase in Aboriginal welfare weighted by relatively small numbers being offset by a non-Aboriginal welfare loss weighted by relatively large numbers. No evidence of such an effect has yet been identified *once allowance has been made for trade between Aborigines and non-Aborigines* - i.e. the correct comparison is made between social welfare at W0* and segment *ab* respectively, and not W0* and B0. A *general* presumption against *Mabo* on economic grounds can therefore only be made if Aborigines' own articulated preferences are ignored. This conclusion does not require that all Aborigines have a common - or white - set of beliefs and aspirations; it is an empirical matter of their own articulated preferences.

3.2 Resource effects vs. wealth transfers

Implicit in the foregoing argument about native title is the assumption that the level of output is independent of the initial assignment of property rights. Suppose, as in Figure 4, the initial assignment of land property rights is to Aborigines and the corresponding level of non-land income is given by the vertical height of the Edgeworth-Bowley box ($O^AA=O^{NA}B$). The contract curve CC' indicates the bargaining possibilities available; with the initial assignment of rights at Q, Aborigines and non-Aborigines have available the segment *ab* of the contract curve CC' for voluntary trade.

Now suppose that non-Aborigines could, if they controlled the land resource, increase non-land income (*e.g.* by mining). Then, with an initial assignment of rights Q' (i.e. Aborigines have no rights to land) the relevant Edgeworth-Bowley box has vertical height $O^AA'=O^{NA*}B$ (Figure 4). The relevant contract curve is then DD' and, for the initial assignment of rights Q', segment *a'b'* of this contract curve is feasible for voluntary trade.

The welfare implications are illustrated in Figure 5. Corresponding to the contract curve CC' is the utility possibility curve B0W0*, and corresponding to the contract curve DD' is the utility possibility curve B0*W0**. The initially available voluntary trades from Q are contained in the segment *ab* on the utility possibility curve B0W0*; corresponding voluntary trades from Q' are contained in the segment *a'b'* on the utility possibility curve B0*W0**. Depending on the size of shift of the utility possibility curve from B0W0* to B0*W0**, and the shape of the social welfare function, social welfare may have been increased or decreased by the re-assignment of property rights *even if non-land income has unequivocally increased.* It will clearly be an *empirical* matter as to whether or not the increased non-land income from the re-assignment of property rights offsets in welfare terms the reduction in Aboriginal welfare.

However, the argument encapsulated in Figures 4 and 5 assumes that with the trade from the initial resource allocation in favour of Aborigines (Q in Figure 4), there would be *no increase* in non-land income. Clearly, the principal reason that non-Aborigines want access to traditional Aborigines' land is for the productive opportunities not directly available to traditional Aborigines - e.g. mining. Thus, the initial trade from Q to the segment *ab* of the contract curve CC' (Figure 4) will be accompanied by an increase in the vertical height of the original Edgeworth-Bowley box; with this trade, the height of the box will increase to some amount between $O^AA=O^{NA}B$ and $O^AA'=O^{NA*}B$ (Figure 4). In this case, there will be a utility possibilities curve lying between B0W0* to B0*W0** (Figure 5), and the available voluntary trade segment with the initial assignment of property rights at Q (Figure 4) will be some segment of a third utility possibilities curve lying "north-west" of the initial segment *ab* (Figure 5). Aborigines will, therefore, be unequivocally better off if the increase in non-land income occurs via a voluntary trade in property rights. Further, since the effects on Aborigines' welfare is severe if the

increase non-land income occurs via expropriation of Aborigines' property rights, increasing non-land income by allowing Aborigines to trade voluntarily with non-Aborigines to effect this income change is likely to increase *social* welfare more than if the increase in non-land income occurs via expropriation.[9]

The conclusion of this argument is that, to allow the greatest increase in *social* welfare from the creation of native title, this title should encompass the rights to use *all* the attributes of the land, including minerals. The principal route for negating this conclusion is to argue that Aborigines' preferences do not count.[10]

3.3 Risk and uncertainty - whose uncertainty?

Not only have non-Aboriginal Australians worked "themselves into positive paroxysms of guiltlessness" in response to the *Mabo* judgement (Wootten 1993a), they have also lashed themselves into positive paroxysms of uncertainty. Claims about uncertainty have principally emanated from the mining lobby - e.g. "The law of property is now in a state of disarray" (Morgan 1992, p.5) and "The implications of the *Mabo* decision for the resource industry in the shorter term at least lie in the morass of uncertainty" (Ewing 1992, p.12). So dramatic was the situation that the National Party's Deputy Leader "said uncertainty among industry 'should not be allowed to continue for a moment longer'" and a moratorium should be placed on *Mabo*-style claims (Chamberlin, 1993, 19 May). The Federal Opposition claimed that "The overriding objective at the present time is to secure existing titles and remove any doubt as to the validity of those titles" (Hewson 1993). There was also a wonderfully ambiguous statement by Mr L. McIntosh of the Australian Mining Industry Council:

> Unfortunately, following the COAG meeting, the genie of investment uncertainty is now out of the bottle and many wild and spurious claims are being made which are extremely unsettling to investors. (McIntosh 1993, p.13)[11]

The ultimate demonstration of supposed uncertainty came during the fracas over the Wik people's land claim on Cape York. The opening bid by the bauxite miner, CRA/Comalco, was an ambit claim to totally eliminate uncertainty *for the mining company*:

> The Queensland Premier has called for complementary Commonwealth-State special legislation to validate Comalco's Weipa titles so that certainty can be restored. We [CRA/Comalco] firmly support the Premier's position. Because of the possibility of such legislation, itself, being challenged, it would need to be backed by government indemnities, in favour of lenders and investors. But with the prospect that State legislation to give security to the project would breach the Commonwealth's Racial Discrimination Act, there will need to be complementary Commonwealth legislation to overcome this potential hurdle. (Gill and Dowling 1993)

The were some, however, who recognised that there were uncertainties other than the existence of native title:

> Federal Opposition Deputy Leader Michael Wooldridge warned yesterday that plans to legislate around the High Court's *Mabo* land title decision were dangerous. ... Dr Wooldridge said the legislation could be challenged in the courts and create the worst possible scenario - continued uncertainty in the mining industry and continuing litigation. (Meertens 1993)

As the implications of the *Mabo* decision have been explored, considerable emphasis has been placed on the effect of the High Court's decision on the certainty - more particularly, *un*certainty - of economic decision making on land potentially affected by *Mabo*. Fears about uncertainty have been used to justify the Federal Government's decision to legislate concerning the Macarthur River mining venture in the Northern Territory; Comalco's plans to purchase the Gladstone power station from the Queensland Government and upgrade the nearby aluminium smelter (because of a land claim in the area of Comalco's Weipa bauxite deposits); and also surface in concerns about resource access more generally (e.g. Anderson 1993a,b).[12]

The issue of uncertainty following *Mabo* should be seen in its proper context. Prior to *Mabo*, and except where land rights grants had been made with certainty of tenure (*e.g.* Northern Territory), Aborigines occupying Crown land such as reserves had no certainty of tenure. Aborigines' settlements could - and were - relocated at the whim of government, especially where alternative landuses became attractive, such

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9 Despite miners' reported difficulties with access to prospects under the 1976 land rights legislation in the Northern Territory, it is understood that - even before *Mabo* - the gold miner North Flinders had bargained with local Aborigines for exploration and mining access in the Tanami Desert (*cf.* section 5.3).

10 It might be argued that traditional Aborigines have no preference for non-land income, therefore their utility curves in, for example, Figure 5 are vertical lines yielding only corner solutions on the upper horizontal side of the Edgeworth-Bowley box. Such an argument requires empirical proof.

11 Were "wild and spurious claims" being made *for native title*, or were there "wild and spurious claims" *about investment uncertainty*?

12 Pre-*Mabo*, similar concerns were expressed in the peculiarly titled religious tract *Shrinking Australia* (Australian Mining Industry Council 1990a).

as the exploration and/or exploitation of mineral resources.[13] Thus, prior to *Mabo*, resource developers were able to obtain resource security from government, and thus ultimately society as a whole had certainty in the use of land. The cost of this certainty was, however, *total uncertainty* for Aboriginal occupiers of lands.

Traditional Aborigines' - and non-Aborigines' - utility possibilities illustrated in Figure 4 should, therefore, be seen in a risky context. The traditional Aborigines' land title is not, therefore, a single point such as Q or Q' but, rather, a probability distribution along the bottom side of the box. The feasible voluntary trade segment of the contract is, similarly, not a unique segment such as *ab*, but a probability distribution of such segments along the contract curve CC'. Because traditional Aborigines' access to land *under native title* is confined to that land non-Aborigines have not previously wanted for agricultural or pastoral purposes, there is no possibility of expanding traditional Aborigines' existing access to land under native title. Thus, given continuing demands for land for non-agricultural purposes (e.g. mining), traditional Aborigines' expectations about their likely future land holdings must be that they are less than presently. Further, following an initial expropriation of land for use by non-Aborigines, traditional Aborigines would expect that this encroachment would be continuing, and not simply once-for-all. Thus, the burden for traditional Aborigines is that their long-run expected land holding must be zero (i.e. Q' in Figure 4). It is rational for traditional Aborigines to expect that eventually they will lose *all* their land. Thus, without native title, traditional Aborigines must expect that eventually they will be left with no resources, none of the land resource which is central to their culture, and a low living standard essentially based on charity or the social security system.

3.4 Dynamics

Aboriginal society

In contrast to conventional *static* neoclassical analysis, for Aborigines - and, indeed, any group in poverty - "bygones" are *not* bygones, and "sunk costs" are *not* sunk costs.[14] Current wealth - a function of past access to resources - determines the level of access to those services which most of non-Aboriginal

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[13] And, under State legislation any land could be resumed, perhaps not even with compensation. This appears to be the basis of the Wik people's current claim against the Queensland Government. As a particular example, the settlement at Mapoon - part of the Cape York bauxite deposits - came under severe pressures in the late 1950s and early 1960s as the Queensland Government sought development of this resource. Aborigines leaving the settlement were not permitted to return - e.g. pregnant women going to the nearest hospital at Thursday Island to give birth were refused re-entry to Mapoon even if their families were there. Finally, armed police entered the settlement under the cover of night in November 1963, rounded up the inhabitants, burned their houses and other buildings, and transported the inhabitants to other settlements (Roberts 1975, Roberts et al 1975). In NSW, Aboriginal occupation under title reached a peak around 1910, but subsequently much of this land was resumed (Goodall 1988).

[14] Fischer (1993, p.4) expressed the commonly held view that "All I am saying is that these things are relative and the horrors of the past were not caused by this generation of Australians." It is still within living memory, however, that Aborigines were only enrolled as Australian citizens by the 1967 referendum (in which they could not vote), of being confined to particular reserves and places, of not being permitted to own property; of having their land taken for mining irrespective of their wishes and, in the case of the Mapoon people, having their houses burnt to prevent a return (Roberts 1975, Roberts et al 1975). The basis of the Wik peoples current claim is just such dispossession. Or of having asbestos tailings used for construction and fill (Human Rights and Equal Opportunity Commission 1990), or being bounced around in the policy circus like human footballs (Human Rights and Equal Opportunity Commission 1988). Wootten (1993a) commented:

> We hear a lot about guilt these days, but only from people who are denying their guilt. Some say they should not be called upon to do justice for Aborigines because they are not personally responsible for what happened to them. They work themselves into positive paroxysms of guiltlessness. In what other sphere do we regard guilt as the only reason for action. Should Granville Sharp and Wilberforce have ignored slavery because they had not caused it?

In November 1993, on the combined anniversaries of "Crystal Night" (1938) and the initial demolition of the Berlin Wall, the Speaker of the German Bundestag said:

> Whoever believes [he can] escape the history of his nation by saying [he did] not ... participate will be wrong. He wants to break with things he cannot break with. History does not discharge anybody. We are all involved and have to take it over as a heritage and at the same time as a charge. The present generation has not made itself guilty of former crimes. But today we would fail if we would not take the responsibility for those days. What matters is to learn from the past in order not again to become guilty some day...' (Professor Rita Süssmuth (1993), "No final line to draw", Speech given at the German Bundestag, 9 November, reported in *Das Parliament* 42, No.46-47, p.7, Bonn, 12-19 November, slightly edited from a translation kindly provided by Professor D. Manegold, Institut für Landwirtschaftliche Marktforschung der Forschungsanstalt für Landwirtschaft, Braunschweig-Völkenrode)

In commenting on notions of guilt, Hulme (1993, pp.56-57) argued:

> ... I have enough trouble bearing, and properly bearing, personal responsibility for what I myself have done. I am perfectly willing to bear in addition my responsibility as a citizen to help bring about whatever is proper in this age to repair ills now existing.
>
> I read again and again that we must not blame present-day Germans for what Hitler did in the war ... One wonders whether Deane and Gaudron JJ. would say that Germany bears a national legacy of unutterable shame, for the Holocaust.

We might reflect that nationality does not confer immunity from crimes against humanity and that, where such crimes have occurred, it is necessary "to take it over as a heritage and at the same time as a charge".

Australians take for granted, and which provide the means for participation in desired social activities. In particular, current access to resources allows the current generation to transmit to subsequent generations a desired inheritance in terms of material and cultural wealth.

Other dynamic aspects affect miners and pastoralists. To the extent that, under *Mabo*, Aborigines gain title to minerals, miners would be affected. However, what would happen in this case is that the *title* to minerals would transfer from the State in question to Aborigines. Unless the rate of exploration and exploitation differed between Crown and Aboriginal ownership, there is unlikely to be a major difference between mineral exploration under present institutional structures, and alternative structures under *Mabo*. Bartlett (1993) argued that overseas experience with native title suggests that aboriginal peoples are at least as willing to allow mineral exploration as is the state. Indeed, to the extent that the state is provided with greater knowledge and better bargaining power, it might be reasonably expected that Aborigines might be more easily convinced to allow exploration and mining than the state. The major caveat to this argument is that, where sites are involved which are important to Aborigines in a cultural sense, they may be less willing to permit exploitation than the State would be. However, in this case, it could well be argued that - irrespective of title - exploitation should not be permitted when part of society's cultural identity is at stake.

To the extent that *Mabo* enhances the ability of at least some Aborigines to access a utility trajectory in the future which is superior to that which they currently enjoy - and does so at the cost of at most minor reductions in the welfare of non-Aboriginal Australians - then the *Mabo* decision is more likely to increase Australia's welfare than to reduce it.

Non-aboriginal society

One of the conventional arguments against government regulation of the economy is that governments intervene inappropriately and distort resource allocation. Because government has extensive powers of command, it is likely that the degree of distortion grows over time. If government can ever be induced to relinquish its powers, the adjustment process can be severe because the degree of distortion is so great. Thus, for example, economists warn against long-term reliance on price controls - the most spectacular current examples being the enormous disruptions being experienced in the former command economies of Eastern Europe and the former Soviet Union with the demise of central planning. Similar arguments may be made in a more general social setting - for example, with regard to Aboriginal land rights. The longer Australian society refuses to face reality over demands by Aborigines for access to sufficient land to exercise their cultural aspirations, the harder and costlier the eventual adjustment will be. Except possibly in the Northern Territory, Aboriginal aspirations for land are far from being met, and the failure to meet these aspirations is likely to breed growing resentment amongst Aborigines. The greater the degree of this resentment, the more difficult it may be in the future to separate grievances over land from more general grievances (e.g. relating to sovereignty) fed by failure to acknowledge the legitimacy and desirability of land claims.

4. Public choice - who does what to whom and why

In its *Mabo* judgement, the High Court - having decided to recognise native title - was extremely generous to *non*-Aboriginal Australians. The Court refused to consider the issue of sovereignty. Contrary to *Australian Capital Television v Commonwealth*, handed down less than four months after *Mabo* (McGill 1992), the Court found that native title existed only in the common law (which could be overcome by statute) rather than as an implied guarantee in the Constitution (which could not). The Court refused to specify the content of native title, which provided the opportunity for it to specify content at some later date; similarly, in a common law context, the existence and content of native title could only be assessed on a case-by-case basis, giving legislatures time to extinguish native title or the Court itself time to reconsider the practical effect of its original judgement. Further, since *Mabo* did not directly raise mining issues, no conclusion was reached as to whether or not native title encompassed mineral rights. Through its judgement, the Court provided a "statute of limitations" on native title claims by indicating that validly alienated land was only subject to compensation after enactment of the Racial Discrimination Act in 1975.[15] Small wonder that Wootten (1993a, emphasis added) commented that "the Mabo decision ... was the *minimum* that could have been given with any decency."

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[15] The Wik peoples' claim in Cape York is interesting partly because it attempts to use the notion of fiduciary duty to avoid the statute of limitations implied by the starting date of the Racial Discrimination Act.

4.1 Selective constitutionalism or selective amnesia?

In the present debate about the High Court's *Mabo* decision, a delightful irony of the contemporary context has been overlooked. The *Mabo* debate is taking place at the same time as a high phase in the republican debate as to whether or not Australia should sever its constitutional ties with the United Kingdom.[16] There is considerable congruence between groups and individuals that oppose the *Mabo* decision, and those who wish to maintain the constitutional link with the British monarchy. The irony is that, from Britain, Australia inherited *two* great traditions. The first of these traditions was the Westminster parliamentary structure [illegible]aded by a constitutional monarchy.[17] The second great tradition inherited from the United Kingdom was the common law - judge-made law - where, if parliamentary statutes provided no guidance for the resolution of legal disputes, judges could and did "make" law through their decisions.[18] To revile the Australian High Court for continuing the common law inheritance from England, while at the same time demanding retention of the monarchical link, suggests a blindly selective choice as to which British links to maintain.[19,20]

Western Australia provides a particularly pertinent example of this irony. The opening of the 1993 Annual Conference of the Western Australian Division of the Liberal Party was characterised by a (somewhat undistinguished) rendition of "God Save the Queen". During the ensuing debate on *Mabo*, the Western Australian President of the Party, Mr Bill Hassall, said "We challenge the legitimacy of the decision" and argued that the High Court has "no right" to make the law.[21,22]

4.2 Induced institutional innovation

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16 It might be argued that the two debates are closely related - it is, perhaps, impossible to move towards an independent republican future without laying the ghosts of white Australia's treatment of Aborigines.

17 In this constitutional monarchy accidents of birth, marriage, death and genetics - rather than demonstrated ability - constituted the selection criteria for the Head of State. In Australia's case, there was an additional selection criterion: that the Australian Head of State would, almost inevitably, *not* be an Australian citizen, but would be a foreigner (unless a British monarch had been born in Australia, or had at some stage migrated to Australia and taken out citizenship).

18 Hulme (1993, pp.25-29) criticises some of the High Court judges for lack of "judicial restraint" for carrying the *Mabo* judgement beyond the Murray Islands.

19 The USA, on the other hand, maintained the common law tradition while dispensing with the British Head of State!

20 In cautioning about breaking "our almost invisible threads to the United Kingdom", McLachlan (1993, p.5) asked: "When the Crown does not own the land, who will own it?" Since the High Court in its *Mabo* judgement had gone to considerable lengths to distinguish between sovereignty and beneficial ownership, it is hard to see how this could arise in the mind of a senior parliamentarian nearly 12 months later. Since polities without crowned heads, such as the United States of America which shares a common monarchical origin with Australia, clearly contrive to manage publicly owned lands, it does not seem impossible that the same could be achieved in Australia.

21 Mr Hassall was not alone. "Mr Court continued his attack on the High Court [over *Mabo*] ... 'Should the High Court be interpreting the law or making the law?' Mr Court said. 'I think there is concern about the direction that the High Court goes in relation to these issues. Courts are there to interpret the law; the elected members of Parliament are the people who make the laws and that's how it should be.'" (Tickner and Queket 1993)

22 It would be unfair to associate all Western Australians with such reactions to the High Court's *Mabo* ruling. Chaney (1993) argued: "Up to the Mabo case the courts had supported a legal fiction that Australia was not owned at the time of settlement. That this was a fiction was clear from the Gove land case where Judge Blackburn describes in detail the complex traditional relationship Aborigines had with the land. The law just chose not to give it any legal recognition. Well, the highest court in the land has changed its mind. It has not created a legal fiction, it has abolished one." The leader writer in *The West Australian* commented: "Fred Chaney said in this new[illegible]aper on Tuesday [that], the High Court - in acknowledging that Aborigines occupied Australia before European settlement - did not create a legal fiction, but abolished one. That victory for truth deserves universal acclamation" (*West Australian* 1993). Bartlett (1993, p.15) argued that "*Mabo* did not bring about a change in the law. It merely afforded the first explicit statement [concerning native title law]. It came so late only because legislative action throughout Australia had forestalled litigation." And not all anti-High Court sentiments came from the West: at the Darwin Press Club, Senator Bronwyn Bishop, reflecting a Bjelke-Petersen-like understanding of the doctrine of the separation of powers, is reported to have said: "In my view, the High Court has overstepped the line of the separation of powers and has made law" (Chamberlin 1993, 6 July, p.2). On 23 October 1993, Opposition Shadow Special Minister of State Reith revealed himself as an unreconstructed 1975 conservative:

> There are a number of possible reform options for the Parliament. Without expressing any preference, or necessarily endorsing any of them, they include everything from ... or its [*i.e.* the High Court's] complete abolition. In my view there is a clear message for the Court and that is to be mindful of the impact of its decisions.

Since the High Court is established under Chapter III (ss.71-80) of the Commonwealth Constitution a Government could not, by an executive act or even by statute, abolish the High Court (if only because of the judges enjoying tenure until their 70th birthdays), although it could no doubt make the Court's life difficult. Cross-vesting of jurisdictions between the superior courts of the States and the Commonwealth in the late 1980s made it possible for any case, including constitutional ones, to be heard in the State Supreme Courts. It is not difficult to imagine the consequences of abolishing the High Court - such as 6 completely different interpretations of s.92! Given the generally conservative nature of the legal profession, it is very interesting to consider the profession's likely response to an all-out attack on the country's premier court. In his attack on the High Court for "usurping the role of Parliament", it is curious that the first supporting quotation Reith used was from the Chancellor of the University of Sydney, a former Professor of English.

Ruttan (1978) argued that it is helpful to see institutional change in an induced innovation context. Induced institutional innovation may simply be seen as incorporating some dynamics into economic theories of regulation. Ruttan argued that, where economic forces change the profitability of institutional structures, the existing "equilibrium" balance of forces that led to the existing set of institutions also changes, and these changes will lead to the development of a new institutional structure. Where *exogenous* institutional change occurs - e.g. the High Court's *Mabo* decision - this institutional change also changes the value of factor rewards, and similarly unleashes forces for further institutional change.

The *exogenous* institutional change of the High Court's *Mabo* decision led to major perceived changes in the value of land. These changes help explain the lobbying of groups such as miners to preserve their existing titles, and by Aborigines to claim land under *Mabo* principles, and attempts by both groups to extend these principles (cf. section 4.5). There also appears to have been deliberate distortion of the likely changes arising from the *Mabo* judgement as those who have perceived they could be detrimentally affected by the decision set out to engender fear to facilitate the construction of a grand coalition to induce governments to nullify this judgement. These artificially-engendered fears were probably unnecessarily heightened by some possibly ill-considered claims by Aboriginal groups almost certainly not justified by the *Mabo* decision, although it is easy to understand why such claims have been made[23] (cf. section 4.6). The response to institutional change will also depend in part on interest groups' resource costs of seeking particular outcomes. And it doesn't take an economist to realise that non-Aboriginal groups are likely to be better resourced than Aborigines, particularly traditional Aborigines most affected by the *Mabo* decision.[24] Although there had been reported tensions between Aborigines directly involved in the Aboriginal and Torres Strait Islander Commission (ATSIC) and the Council for Aboriginal Reconciliation, and other Aborigines - e.g. Charles Perkins' claims about "an unrepresentative elite" (*Sydney Morning Herald 1993*) - these differences appear to have been at least partially thrashed out at the Eva Valley meeting in early August (Mackinolty and Chamberlin 1993, 6 August).

Because of the local nature of traditional Aboriginal society, and because dispossession since European settlement has contributed to fragmentation of Aboriginal groups, the cost of creating an effective unified Aboriginal response to *Mabo* was likely to be high. Conversely, since the miners already had effective lobby groups, and could link into lobby groups similarly affected by *Mabo* such as pastoralists, their costs of organising to minimise the effects on them of the decision is likely to be low. It is not surprising to observe, therefore, that the outcome of the *Mabo* response process generally favoured non-Aboriginal groups by switching the focus of the debate away from native title and towards a primary focus on *non*-Aboriginal titles.

4.3 The lawyers

Lawyers' reactions to the High Court's *Mabo* decision has been as varied as in the wider community. For example, Howard (1993a,b), most of the legal readings in Stephenson and Ratnapala (1993), Connolly (1993) and Hulme (1993) are condemnatory of the decision whereas Nettheim (quoted in Pearson 1993) is apparently delighted by the decision, and Wootten (1993a) gave "a cheer for the Mabo nudgers" while arguing that "the *Mabo* decision ... was the minimum that could have been given with any decency."[25] While Nettheim may have been delighted by the judgement, he also cautioned that "The *Mabo* legacy remains vulnerable until embedded in Constitutional or other instruments capable of withstanding political counter-pressures" (Nettheim 1993, p.29). Intriguingly, since *Mabo* is widely held to have finally dispensed with the doctrine of *terra nullius*, Gibbs (1993, p.xiv), former Chief Justice of

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[23] cf. Wootten (1993b)

[24] Brennan (1993b) noted:

> The only well-resourced Aboriginal organisations are those that owe their existence to government ... But [their representatives] are unlikely to command universal approval from Aboriginal groups suspicious of governments doing prompt deals with miners and pastoralists wanting to clarify doubts about their titles. ...
>
> Mabo, the republic debate, and the approaching first century of Federation provide real opportunities and dangers for an already overstretched Aboriginal leadership which has never had the resources nor the unanimity of mind about outcomes or processes to readily achieve its objectives.
>
> Without real Aboriginal leadership at a national level which is seen to be acceptable to diverse local Aboriginal groups, many opportunities will be lost. The miners and pastoralists are united not out of ideological purity but because their self interest demands it.
>
> The greater the opportunities for Aboriginal rights breaking onto the national agenda, the tougher the demands on Aboriginal leaders. The stakes are now high, not only for the Aborigines, but also for the miners and pastoralists.

[25] Despite rejoicing that "Happily the High Court is not composed of economists", Wootten's (1993a,b) two essays on *Mabo* are profound analyses of the issues raised by Mabo and elegant rebuttals of some of the grosser myths about Aborigines, *Mabo* and the law.

the High Court, claimed "the expression 'terra nullius' seems to have been unknown to the common law."

A major concern of some legal commentators with the *Mabo* judgement was that the High Court - quite explicitly - overturned what had widely been believed to be the accepted law of property on colonisation and the judgement was seen as inventing new law on land title. For example, it was argued in Ewing (1992, p.8) that Justice Blackburn in *Milirrpum v Nabalco Pty Ltd* "had found that, while it was possible that native title might have applied to Australian territory, it was extinguished on the acquisition of sovereignty by the Crown" (*cf* also Connolly 1993, p.9). However, the High Court explicitly argued that it was applying English common law at the time of European settlement of Australia in determining the status of land title. The Court's view, reflecting historical evidence such as Reynold's (1992, 1993), appears to be that the common law which applied *at the time of European settlement of Australia* had been so widely misinterpreted that justice required a radical reassessment of native title.[26] On this view, *Mabo* is to be seen as recognising that native title *always existed* and has only been validly extinguished in certain circumstances.[27]

Bartlett (1993, pp.14-15) claimed that there was no declaration in Australian courts upon native title *per se* at common law until Justice Blackburn's decision in *Milirrpum v Nabalco* in 1970. Bartlett argued that Blackburn's reasoning in this case explicitly rested on how native title had been applied in other English common law jurisdictions. Bartlett argued that Blackburn "grossly misinterpreted" US law,[28] that a judge of the Canadian Supreme Court had described Blackburn's analysis of Canadian law as "wholly wrong", and had misapplied New Zealand law. Bartlett (1993, pp.14-15) concluded:

> Blackburn J's analysis of the native title at common law in all three jurisdictions was hopelessly flawed and wrong. And it was clear that it was wrong at that time as commentators made clear. The High Court soon after opined that the decision in *Milirrpum* was "an arguable question if properly raised.

The above legal responses may also be seen as part of process within the legal profession which may, by intellectual or professional influence on the current or future High Courts, or by public choice processes affecting government, bring about modifications of the original *Mabo* decision.

Because appeals to the U.K.'s Privy Council had effectively ended from all Australian legal jurisdictions by the 1980s, the Australian High Court is the final arbiter of all Australian law, including common law. In an economics and policy context, the key issue of the *Mabo* decision is that, since the High Court's *Mabo* decision is not able to be appealed, it appears to be unassailable except to the extent:

(a) native title is *validly* extinguished by State and/or Commonwealth Governments, with compensation for extinguishment after 1975;

(b) the Commonwealth's *Racial Discrimination Act 1975* is repealed or sufficiently amended, permitting the *States* to extinguish native title without compensation (cf. Brennan 1993a, p.30), except to the extent required by existing State legislation (cf. *Mabo* 1992, n.659 per Toohey J) although this existing legislation could, of course, be amended to eliminate the need for such compensation;

(c) the Commonwealth Constitution is amended to permit extinguishment of native title without compensation;

(d) a subsequent case enables the High Court to "distinguish" the *Mabo* case from other cases, by finding that the facts of *Mabo* are different from those of other cases, thus enabling the Court to essentially develop or refine its approach to native title (*cf.* Forbes 1993, p.207).

That is, the Court's decision can be taken as given, and the economic implications of this decision explored; or, alternatively, the economic implications of the *Mabo* decision could be compared with the economic implications of policy actions which seek to wholly or partially negate the principles enunciated in *Mabo*. In this paper, both options are explored.

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[26] The present High Court has not been averse to thorough reappraisal of the law - e.g. its radical revision to the "settled" law on s.92 (cf. Coper 1992, and the critical comment on this revision by Connolly 1993, p.3) - although the Court recently passed up the chance to do similarly on s.90, possibly in response to the harsh criticism it attracted after the *Mabo* decision (Coper 1993).

[27] Elegantly explained by Chaney (1993) (*cf.* footnote 22)

[28] Ironically, US common law on native title was established in an 1823 Supreme Court case *Johnson v McIntosh* (Bartlett 1993, pp.8-10), some 200 years after first settlement of continental North America. Australia, likewise, took about 200 years from first settlement to acknowledge native title in *Mabo*.

4.4 Non-Aborigines

Non-Aboriginal responses to the *Mabo* decision have largely been concentrated at the apoplectic end of the hysteria spectrum. McGauran ([1993, p.1]) commented that "In June last year, the High Court of Australia rocked the foundations of the social and economic future of the nation." As the *Mabo* debate intensified in 1993, politicians and others gorged themselves on spite against Aborigines. Sadly, the Prime Minister's plea that "... we should ignore the isolated outbreaks of hysteria and hostility of the past few months" (Keating 1992, p.4) has, with a few honourable exceptions, been largely ignored by non-Aborigines.

Several other streams of consciousness about *Mabo* may also be noted; these include:

1. *contributors to uncertainty*. One of the alleged problems of *Mabo* is that it has created uncertainty about land title in Australia (e.g. Morgan 1992, p.5 quoted at the head of this paper). Others appear to have set out to deliberately engender further uncertainty, possibly to exacerbate further tensions and divisions in the community. For example, Mr J. Anderson, Opposition Spokesman on Primary Industry commented that "Forests are almost entirely on Crown land and the industry needs to know quickly whether native title might apply to those forests and what that might mean" (Anderson 1993b) - but, since forests are a *dedicated use* rather than *vacant* Crown land, it is most unlikely they would be affected by the *Mabo* judgement. The same spokesman also claimed that "Forests are almost entirely on crown land and the industry is concerned that if the States lose control of them it could endanger the environment and possibly reduce the supply and increase the price of timber" (Anderson 1993a) without ever identifying why Aboriginal control of forests would endanger the environment, let alone reduce timber supply. Further, he argued that "If forestry departments can no longer control our forests, who will ensure they operate on a sustainable level" when it is an arguable case as to whether or not forestry departments actually do operate forests on a sustainable basis (e.g. Ecologically Sustainable Development Working Groups 1991, p.30).

2. *pseudo-historical*. Mr. H.M. Morgan of Western Mining Corporation has consistently argued against the High Court's decision on *Mabo* decision. Despite Wootten's (1993b) claim that "Morgan, who represents nobody, gets enormous publicity for every silly statement he makes", it is worth examining some of Morgan's claims because they represent a common theme amongst the arguments of those who resolutely deny the legitimacy of the *Mabo* decision. For example, Morgan (1992a, p.4, emphasis in original) claimed that:

> The annexation [by Cook in 1770] and the proclamation of Arthur Phillip's commission was based on the understanding that Australia, unlike New Zealand, or North America, was 'terra nullius'. ... [Terra nullius] did not mean, necessarily, that a country settled under terra nullius had to be uninhabited. It could also mean that if the inhabitants of a newly discovered country were at such a primitive state of development that no treaty with them was possible, then terra nullius also applied. The Aborigines of 1770 were, as Cook and Banks discovered, sparse in number, had few or no clothes, and built only the most primitive of shelters. ...
>
> ... But the C18 facts were that as far as Cook and Banks could observe, and they were painstaking, accomplished and eminent observers, the Aborigines possessed, if they possessed at all, only the most primitive social organisation, only the most rudimentary social structures, and a culture which did not allow them to form a political structure beyond the immediate kinship group.

The logic of Morgan's conclusion turns on Cook and Banks being "painstaking, accomplished and eminent observers" of "the C18 facts". But Cook and Banks only traversed the east coast of Australia, and made two major landings; they saw *nothing* of the interior, and *conversed* with no aborigines (neither spoke an Aboriginal language). Therefore Banks and Cook - "eminent observers" though they might have been - knew *next to nothing* of "the C18 facts" of Aboriginal populations (cf. Reynolds 1992, pp.31, 53-54). Reynolds (1992) systematically demolished the arguments that eighteenth century English and international law supported expropriation of Aboriginal land in Australia.

On the issue of Aborigines' being "at such a primitive state of development", even a dedicated anti-*Mabo*-ist like Hulme (1993, p.38) was prepared to acknowledge Blainey's argument from *Triumph of the Nomads* that "the standard of living of the Australian aborigine in say 1800 [compared] favourably enough as against that of the great mass of Europeans." Despite this *economic* similarity, (Hulme 1993, pp.38-41) argued that the social structure giving rise to this economic

comparability was defective compared to the incomparably superior European system and justified expropriation of Aborigines' land.

3. *on disease*. Hulme (1993, p.52) introduced his criticism of Deane and Gaudron JJ's "unusually emotive" language in *Mabo* in the context of their argument that "the conflagration of oppression and conflict which was, over the following century, to spread across the continent to dispossess, degrade and devastate the Aboriginal peoples and leave a national legacy of unutterable shame" (*Mabo* 1992, p.79, per Deane and Gaudron) as follows:

> I have been asked by a great historian where the High Court got its "facts" as to the Australian mainland. The particular point he had in mind was the entire absence of recognition that the great slayer of Aborigines has been disease... (*cf.* Butlin 1993)

Except for the final clause, Deane and Gaudron's argument is remarkably similar to Blainey's (1976) conclusion which heads this paper. The point of Hulme's argument seems to be that, since disease rather than military conflict eliminated many Aborigines, there was no "conflagration of oppression and conflict" which dispossessed, degraded and devastated Aborigines. By inference it was acceptable for European settlers to dispossess Aborigines, individually and socially weakened by disease, of their lands - conveniently ignoring that Aborigines had their own inheritance laws by which to pass on property. A modern analogy to Hulme's inference might that, supposing a neighbour's family had succumbed to AIDS, I could justify my seizure of their land on the basis that many of them have died, are dying or will die in the near future. The "oppression and conflict" upon which Deane and Gaudron remarked is not absent simply because disease was a major killer.

4. *merely insensitive*. In discussing Comalco and the Wik peoples' land claim in the Weipa area, and Comalco's proposed purchase of Gladstone power station and smelter upgrade, Paul Lyneham commented, in his weekday fielding of Dorothy Dixers from Andrew Olle, that Comalco might end up with a lot of electricity and no bauxite to smelt (ABC Radio 702, Sydney, 21.7.93). Lyneham presented no evidence that a successful claim by the Wik people would endanger bauxite mining at Weipa. Similarly, Quentin Dempster made the unsubstantiated comment during the "7.30 Report" on 13 August 1993 that "Gladstone was utterly dependent on $1,700m Comalco investment going ahead" and that Comalco would pull out of Gladstone if the Wik people's claim was successful.

5. *benefiting lawyers*. No doubt lawyers have done very well out of *Mabo* and its aftermath, and will continue to do so as native title claims are made and tested. Commentators such as the Victorian Premier, appear to be concerned that *Mabo* will provide a field day for lawyers.[29] Of course, *Mabo* was not the first time that lawyers picked up fees related to land title; in fact they do so *every day* - it's called conveyancing, and a nice little income earner it is too!

6. *cultural superiority*. Ordinary people have also had their say through the letters pages of the press, and also apparently through talkback radio. Such comments have frequently exacerbated *Mabo* tensions.[30] Contributions to quell the hysteria have been substantially fewer.[31]

7. *why bother?* Some reactions to *Mabo* suggested that the contributors were bored that, yet again, Aborigines had refused to assimilate into white society or simply disappear and commit cultural suicide. Opposition Shadow Treasurer, Alexander Downer, referred to the "endless, empty, painful debate about *Mabo*" (ABC Radio National, 19 July 1993, approx. 7:40am). Kitney (1993, 3 September) suggested that many in the Labor Party shared this view:

> The Labor Caucus ... has become impatient about the perplexing inability of the Prime Minister to get the Mabo debate under control and alarmed that he was neglecting the political management of other issues ...

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[29] On ABC Radio's AM Program on 23 July 1993, Victorian Premier Jeff Kennett observed that *Mabo* constitutes "opening up the greatest legal picnic for lawyers of all time" and the inimitable "anon." observed that "The trouble with *Mabo* is that it could lead to 50 years of litigation. This would benefit neither Aborigines, nor Torres Strait Islanders nor post 1788 Australians. Except, of course, the lawyers who can expect to pick up *Mabo* related fees for ever and a day" (anon. 1993)

[30] e.g. "Allegedly [Aborigines] have been here for 40,000 years, but apart from a few scratches on rocky outcrops and some primitive daubs in a few remote caves, they have nothing to show for those years" (Collins (1993) cf., to his credit, Fischer 1993) and "*Mabo*, as it is being interpreted by some, seems to be potentially, just another form of ethnic cleansing, but upside down" (Plowman 1993). PIN (1993, emphasis added) was concerned about "the Aboriginal legal services, which are busy lodging claims *on behalf of tribes no-one knew existed* over huge tracts of Australia", which was presumably a surprise for the Aborigines themselves who had known of their existence for at least 40,000 years.

[31] e.g. "What concerns me, as a citizen, not as a lawyer, is the campaign of disinformation, if not misinformation, currently being spread about the consequences of the High Court's decision" (Sullivan 1993) and "Chicken Littles are running wild, but the sky is not really falling" (Barker 1993).

> And to what end? some asked. Mabo was never going to be an issue which would win Labor votes. It was more likely to be a vote-loser.

To his credit, Downer was one of few Opposition members who took issue with McLachlan when the latter went feral over *Mabo* in November 1993 (Millett 1993, 5 November).

4.5 Policy responses

(i) Federal Government

Despite subsequent claims that the Federal Government was tardy in responding to the *Mabo* judgement, the Commonwealth began to address the issues it raised quite rapidly. Within 4 months of the judgement, an advanced version of an analysis of the judgement was circulating (anon. 1992). Consultations on *Mabo* began in October 1992 (Commonwealth of Australia 1993a, p.10; but cf. Brennan's 1993b comments on involving Aborigines in the consultation process). In December 1992, Prime Minister Keating addressed the *Mabo* issue in his "Redfern Park" speech in the context of the Australian launch of the Year for the World's Indigenous People, the Report of the Royal Commission into Aboriginal Deaths in Custody, the reconciliation process begun by his predecessor,[32] and the part that Aborigines have played in the evolution of the Australian nation (Keating 1992). Auslig (1992) provided a preliminary identification of lands susceptible to native title claims. A discussion paper on *Mabo* in the form of a White Paper was released in June 1993 (Commonwealth of Australia 1993a); this paper evaluated the legal position resulting from the High Court's decision, proposed 33 principles that the Commonwealth believed should underlie any government response to *Mabo*, proposed a system for identifying native title and resolving possible conflicts between native title and existing titles, and dealt with others' uses of resources falling under native title. In its final two chapters, the White Paper also dealt with the wider issue of the consequences of Aboriginal dispossession, and issues of reconciliation. A special meeting of the Council of Australian Governments was held in early June 1993, but was unable to resolve any substantive issues (Millett 1993). Federal Cabinet decided on the form of its proposed *Mabo* legislation in late July, proposing tribunals at Commonwealth and State levels to attempt to overcome States' opposition to Federal dominance; this kind of arrangement had previously been floated in Commonwealth of Australia (1993a) (cf. Chamberlin 1993, 28 July, 29 July). The Commonwealth then ran into considerable, combined opposition within the Aboriginal community arising from the Eva Valley meeting (Mackinolty and Chamberlin 1993, Comford 1993). The Commonwealth also ran into a bitter dispute with the Queensland Government over the Wik people's claim to land around the Weipa bauxite deposits.[33]

In September 1993, the Commonwealth released the outline of its proposed legislation on native title (Commonwealth of Australia 1993b). The proposed legislation appeared to have the distinct merit - *e.g.* in contrast to the proposed Victorian legislation - of seeking to address the issue of native title and, only as a consequence, addressing its extinguishment. The objects of the proposed Bill were identified as:

> the establishment of a mechanism for determining claims to native title; the validation of past grants and acts of government; and the recognition and protection of, and the setting of standards for dealing with, native title. (Commonwealth of Australia 1993b, para.8)

The proposed legislation re-asserted Crown ownership of minerals (para.13), addressed offshore rights (paras.14-17), beaches and recreation areas (paras.18-20). The proposed Bill would validate past grants of title (paras.21-28), provided a series of mechanisms for dealing with native title in the future (paras.29-40 [see Figure 1], expedited procedure paras.41-50, pre-determination paras.55-67), compensation (paras.68-75), and composition and operations of tribunals (paras.75-123). Aborigines were reported as still having major disagreements with the Commonwealth Government over this proposed legislation, as were the Queensland, Western Australian, Tasmanian and NSW Governments (Taylor and Collins 1993). Aborigines' principal disagreement derived from the prospect that, under the Commonwealth's proposals, they had no ultimate right to prevent *any* non-Aboriginal use of native title land.

After torturous negotiations in late October 1993, the Federal Government achieved a general compromise among the "official" Aboriginal negotiators [footnote], the National Farmers' Federation [footnote on

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[32] The concept of "reconciliation" has intriguing interpretations. Mahlab (1993), a lawyer, interprets "reconciliation" in the sense of "being reconciled/resigned *to*", rather than a process of mutual acceptance. "To me, reconciliation means acceptance of a situation by an aggrieved party. ... The process of reconciliation has to take place within the Aboriginal people ... until Aborigines become reconciled to the situation, to the fact that they had their land taken away from them, then I don't think anything is possible."

[33] The Prime Minister's commitment to Mabo - reported as being that "If the Government did nothing in this term of Parliament but get the response to the Mabo case right it would be worth it" - was apparently not shared by others, "the questioning of Keating's preoccupation with the Mabo issue has become more and more hostile" (Kitney 1993).

Rick Farley] and the miners based on the September 1993 proposals (Commonwealth of Australia 1993b). This agreement, announced in Keating (1993a), formed the basis of the draft *Native Title Bill 1993* (and see also the Prime Minister's Second Reading speech (Keating 1993b), and the accompanying *Explanatory Memorandum Part A* and *Explanatory Memorandum Part B*). The process of achieving this agreement is partly documented in (Kitney 1993, 15 October; Ramsey 1993, 5 November).

Since the Government did not have a majority in the Senate, success of its *Native Title Bill* depended on either the support of (one of the parties in) the Coalition, or the support of both the minor parties (Australian Democrats and [Western Australian] Greens). As the Coalition remained implacably opposed to the theme of the Government's response to the *Mabo* decision, the Government was immediately hostage to the Democrats and the Greens.[34] Not surprisingly, the period following the October agreement became a period of political game-playing, as parties dissatisfied by the October compromise sought to improve their positions by further bargaining.[35]

The Western Australian Government's *Land (Titles and Traditional Usage) Act 1993* came into effect on 2 December, extinguishing all native title in that State.

The *Native Title Bill* passed through the House of Representatives where the Government has a majority. Upon its introduction to the Senate, the Bill was diverted for two weeks to that Chamber's Committee on Legal and Constitutional Affairs, with threats of diversion to a Senate Select Committee which could have delayed the Bill for a considerable period. The Committee divided along party lines in its report (Senate Standing Committee on Legal and Constitutional Affairs (1993), *Native Title Bill 1993*, Parliament of the Commonwealth of Australia, Canberra. The deliberations of the Committee are recorded in Standing Committee on Legal and Constitutional Affairs, Reference: Native Title Bill 1993, Senate Hansard, 1 December, 2 December, 3 December and 6 and 7 December 1993). The Senate debate proper commenced shortly afterwards. During a long debate, unusually including a Saturday, the Prime Minister was reported as declaring that Parliament would sit -including Christmas Eve and Boxing Day - for as long as it would take to pass the *Native Title Bill* (Chamberlin, P. (1993), "PM adamant Mabo will pass", *Sydney Morning Herald* 21 December, p.1). The Bill finally passed the Senate during the night of 21 December, and re-passed the House of Representatives on 22 December to ratify amendments made in the Senate. The Act was proclaimed on 24 December 1993, and calls for registrations of interest in land affected by native title were advertised early in January 1994.

(ii) Federal Opposition

The Federal Opposition had its own difficulties in developing a response to *Mabo*. McLachlan (1993, pp.6-8) noted "a most extraordinary decision", "an adventure indulged in by the High Court of Australia" with regard to "hitherto uncontemplated" native title which had "suddenly popped out of the ground, so to speak", thus causing "a great deal of turmoil into the matter of who owns a great part of the land mass of Australia" and putting at risk unalienated Crown land, lakes, forests and other lands, and failing "to take account of the immense damage it would do to the rights other Australians thought they had." McLachlan's *explicit* comments drew attention to the uncertainties that might arise from the High Court's judgement if native title were dealt with on a case-by-case basis, which is the only way the High Court itself could deal with subsequent native title claims. His comments are, however, almost exclusively directed to the interests of *non*-Aboriginal Australians, except for his comments on discrimination among Aboriginal groups because of the different types of title to which they could have been entitled under *Mabo* principles.

In late May, McGauran (1993) devoted an address to the *Mabo* issue. He argued that "the High Court of Australia rocked the foundations of the social and economic future of the nation" (p.1) and had "generated unprecedented uncertainty across the community" (p.2). He articulated deep concerns about the proper way to assist Aborigines improve their welfare[36] and questioned the validity of land rights.[37] McGauran explicitly argued that, despite what Aborigines themselves have articulated, land rights have had no effect

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[34] "But the politics being played by the Coalition on Mabo have concerned the National Farmers' Federation. The President of the NFF, Mr Graham Blight, said that 'if the Coalition pushed the Government too far and can't get any sort of compromise, then we'll end up in the hands of the Democrats and the Greens.'" (Chamberlin 1993, 5 November)

[35] This immediately followed a similar process forced on the Government to permit its Budget to pass the Senate.

[36] "*Mabo*... ... in the manner in which it has been manipulated in recent months ... will not right a historical wrong because cargo-cults ... this time in the form of land and compensation ... cannot and never have achieved anything." (McGauran 1993, p.8, ellipsis as in original)

[37] "And there's still a belief, at least amongst whites, that the possession of land in itself is a central solution to the problems black communities face." (McGauran 1993, p.6)

on Aborigines.[38] In particular, McGauran appears to have been concerned that Aboriginal land rights could concentrate Australian land ownership.[39] McGauran's principal concern seemed to be that acceleration of Aboriginal land rights claims along *Mabo* lines would retard the assimilation of Aborigines into mainstream Australian life:

> And we have lacked the courage of our concerns [with Aboriginal living standards] to use resources to effect changes in behaviour... ...to make funds contingent on joining mainstream Australian society rather than trying to cut a path independent of it. (p.9, ellipsis as in original)
>
> Essentially, *Mabo* has brought us to a point where once and for all we need to decide whether aboriginal communities themselves can survive as defined sub-groups... ...or whether they need to be drawn more pervasively into mainstream Australian culture. There is no halfway house on this issue. (p.11, ellipsis as in original)

McGauran's speech drew a rebuke from the Opposition Leader (Chamberlin 1993, 1 June).

The National Party Leader also achieved notoriety for his address to the NSW National Party State Conference in late June. Drawing in part on the Federal Opposition's then-soon-to-be released "*Mabo* Issues Paper", Fischer (1993, p.4) attracted most publicity for observing that "At no stage did Aboriginal civilisation develop substantial buildings, roadways or even a wheeled cart as part of their different priorities and approach",[40] that "Those in the guilt industry have to consider that developing cultures and peoples will always overtake relatively stationary cultures"[41] and that "All I am saying is that these things are relative and the horrors of the past were not caused by this generation of Australians."[42] Fischer (1993, p.6) also argued that:

> to help restore calm, the actuality of the *Mabo* High Court decision should be trumpeted, particularly the High Court's requirement for a continuing traditional association with the land claimed and the High Courts [sic] finding that freehold extinguished native title.

The Federal Opposition established its *Mabo* position on 28 June. The first substantive paragraph of the Media Release accompanying its "*Mabo* Issues Paper" provides the theme of its reaction:

> The implications of the *Mabo* case present one of the most important challenges *to Australia's investment climate* for decades. (Hewson 1993, para.2, emphasis added)

Aborigines' preferences do not seem to loom very large in these priorities.

In speeches in late October, both the Opposition Leader, and its spokesman on *Mabo*, reiterated the "over-riding principle" of its June position on *Mabo*:

> The overriding objective at the present time should be to secure existing titles and remove any doubt as to the validity of those titles.

However, the High Court went to considerable trouble in its original *Mabo* judgement to insist that Aborigines' common law native title rights survived the assertion of the British Crown's sovereignty. Logically, therefore, the Coalition's "over-riding principle" appeared to assert that both *native* and *statutory* title should be secured, and doubts about the validity of *either* be removed. None of the Federal Opposition's actions, however, revealed any evidence of urgency for the securing of native title.

McLachlan again went feral in early November, being reported as threatening to vote against the Government's *Native Title Bill* irrespective of the Coalition's formal position on the Bill (Kitney 1993, 5

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[38] "It's in this setting that it is stunning to find the Federal Government endorsing a course of action that will open the floodgate to more funding for aboriginal groups... ...and vast new land claims. Money and land mean nothing. They have never changed anything." (McGauran 1993, p.11, ellipsis as in original)

[39] "But whether this willingness [help Aborigines] will long survive a concerted push to allow what is in effect about 1.5% of the population to control vast tracts of land is another issue altogether." (McGauran 1993, p.8) [cf. section 2.2]

[40] Wootten (1993b) noted the "mind bogglingly silly statement that Aborigines had not developed a wheeled cart". In an elegant demolition of Fischer's argument, Wootten observed, *inter alia*, that it probably wouldn't have made much sense for Aborigines to develop a wheeled cart since they had no draught animals. More importantly, (Wootten 1993b) argued that:

> Justice is not a prize for being the most powerful, most technologically advanced or even the most self righteous: rather it is the tribute the powerful will, if they are genuinely righteous, pay to the less advantaged, the more so because they have often built their wealth and power at the expense of the latter.

Or, if Wootten's appeal to justice does not appeal, it might also be observed that the British also didn't invent the wheel and so on this logic they, too, appear to be entitled to have their lands expropriated. However, Aborigines do appear to have invented the boomerang - how, in the pantheon of human invention, is invention of the wheel and boomerang weighed as factors in deciding whether or not expropriation of native title in Australia was justified? It is, perhaps, somewhat unfair to remember this Fischer speech *solely* in the context of inventing the wheel but, on balance, this kind of comment predominates.

[41] Even if this is true as a matter of historical fact, the High Court held that, in the case of settlement of the Australian colonies, dispossession of sovereignty had to be consistent with the English common law under which that settlement occurred.

[42] As argued by Wootten (1993b) the guilt argument is *irrelevant* to an appropriate response to *Mabo* which was about where Aborigines *currently* satisfy criteria of association with land. On the "horrors of the past", see footnotes 13 and 14.

November; Millett 1993, 5 November). Reports persisted that leadership in the Federal Opposition, fuelled by Senator Bronwyn Bishop's unannounced challenge for the leadership, had a substantial impact on the Opposition's handling of the issue (Ramsey 1993, 30 October; Millett 1993, 21 December).

Once the *Native Title Bill* entered the Senate, the Opposition commenced a filibustering action whose objective appeared to be to delay the Bill for as long as possible. One possible, cynical interpretation of this filibuster was that it was aimed at establishing the maximum possible interval between enactment of the Western Australian legislation in response to the *Mabo* ruling, which extinguished native title wholesale, and Federal legislation which, in the case of Western Australia, sought to over-ride this extinguishment. The longer this interval, the more difficulty the Commonwealth was likely to have in the courts in successfully asserting its retrospective over-riding of Western Australian extinguishment of native title.

The Leader of the Opposition's last words on the Bill, when re-introduced into the House of Representatives on 22 December, was that the Bill was shameful.

(iii) States

Little-effect States

Tasmania, New South Wales and Victoria are likely to be relatively lightly affected by native title for two reasons. Firstly, except for the Western Division of NSW, most private land in these States is freehold and most Crown land has a dedicated use (*e.g.* forestry, wilderness) and therefore not susceptible to native title claims. Secondly, pressure of settlement on Aboriginal populations was intensified by resettlement of Aborigines on lands outside their traditional clan or nation areas (e.g. for NSW see Goodall 1988, p.191). Thus, even where Aborigines in these States have *a* current association with land - e.g. on reserves - it may be extremely difficult for them to prove a *traditional* association with this land.[43] Perhaps because history has largely "solved" the native title problem for non-Aborigines in these three States, two of them - NSW and Victoria - were quicker than other States to develop legislation in response to the *Mabo* decision (cf. (v) below).

Unclear States

While South Australia[44] and the Northern Territory have large areas potentially claimable under native title, these jurisdictions appear to be less open to native title claims. Much of the land that could have been claimed under native title has already been granted to Aborigines under various forms of title (cf. Auslig 1992).

Since the ACT is held as leasehold land, this may explain the readiness of the Commonwealth Government to accept that leasehold extinguished native title.

Although Queensland has a large Aboriginal population, its Aborigines have been largely confined to relatively small reserves (Auslig 1992) and thus the area of land claimable under native title appears to be quite small (*cf.* footnote 8). As revealed by the extraordinary fracas over the Wik people's claim in the Weipa area, Queensland appears to be more susceptible to land rights claims under breach of fiduciary duty where reserves were created with the State as a "trustee" for the Aboriginal population.[45] The *Native Title (Queensland) Bill 1993* was drafted on the assumption that the Commonwealth's Native Title Bill 1993 would be enacted by the Federal Parliament (State of Queensland 1993, p.1).

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[43] Kennett did not think that any native title claims would succeed in Victoria (Chamberlin 1993, 10 June).

[44] South Australian Premier Lynn Arnold commented on ABC Radio National news broadcast 7.00am 10 September 1993, that he opposed the States sharing the burden on *Mabo* compensation, and that he opposed discrimination in favour of Aborigines to the extent that they had rights to object to development.

[45] "Native title was not extinguished by the creation of reserves nor by the mere appointment of 'trustees' to control a reserve where no grant of title was made. To reserve land from sale is to protect native title from being extinguished by alienation under a power of sale. To appoint trustees to control a reserve does not confer on the trustees a power to interfere with the rights and interests in land possessed by indigenous inhabitants under a native title. Nor is native title impaired by a declaration that land is reserved not merely for use by the indigenous inhabitants of the land but 'for use of Aboriginal inhabitants of the State generally.'" (*Mabo* 1992, p.48 per Brennan, J.)

Large-effect State

Of all the States, Western Australia probably has the largest area of land open to claim under the *Mabo* decision (Auslig 1992). This situation arises because it was settled later than other areas, because much of its land area is unsuitable for agricultural and pastoral uses and therefore freehold or leasehold grants were not made (about 40 per cent of the State was vacant Crown land), and because pastoral leasehold carries in many cases the right of access for Aborigines for traditional activities.

Particularly in Western Australia, the political response to *Mabo* has been two-fold. The first response has been to deny that the High Court had the right to make the decision it did (cf. section 4.1). However, even if this proposition is correct, it ignores the reality that there is effectively no appeal from a decision of the full High Court. Thus the principal avenues open to deny the High Court's decision would be the passing of statutes to nullify the effect of *Mabo* or the litigious approach of waiting for - or manufacturing - subsequent cases which might give the High Court the opportunity to modify, or even overturn, its decision in *Mabo*.

The second response has been to argue that, since the Court erred in its *Mabo* decision, it is up to the people to rectify this error in a referendum.[46] It has not been made clear, however, what form this referendum would take. If it were simply a matter of a referendum question at the Commonwealth or State level which invited a majority of voters to indicate whether or not they agreed with the High Court's decision, little would be achieved. Only if a referendum to change the *Federal Constitution* were successful - which resulted in a new constitutional clause which voided the High Court's *Mabo* decision - would a referendum approach be likely to have a national effect (*cf.* Hulme 1993, p.63).[47]

By its *Land (Titles and Traditional Usage) Act 1993*, the Western Australian Government extinguished all native title in the generally-understood senses of "ownership" and possession, and replaced native title with "statutory rights of traditional usage" (Court 1993). Reflecting the Western Australian Government's consistent view that the High Court was wrong in its *Mabo* judgement, Court (1993, p.1) asserted:

> ... since the foundation of Western Australia, land management has proceeded on the basis of two fundamental principles.
>
> The first is, that on the acquisition of sovereignty over Western Australia, the Crown acquired the absolute ownership of all land within the State. The Crown became the sole source of title to such land, and held the exclusive power to grant title to all land.
>
> The second principle is that no title to land in Western Australia has existed other than title granted by or under the Crown.

The *Land (Titles and Traditional Usage) Bill*, however, recognised that the Crown was *not* "the sole source of title" to land since its section 7 extinguished "any native title to land that existed immediately before" commencement of the Act.

The Western Australian Government's principles on which it based its response to the High Court's *Mabo*, like the responses of most conservative groups, have Aboriginal interests tacked on as an afterthought:

> 1. To ensure that the policy and administration of Western Australian land and natural resources management remain in the control of the State.
>
> 2. To provide for certainty of land title for existing and future title holders. [footnote: Since the Premier asserted that the Crown was the sole source of land title in Western Australia, Aboriginal common law native title is clearly is clearly excluded from the necessity of certainty.]
>
> 3. To provide for timely and orderly project approvals.
>
> 4. To be part of a wider approach which includes strategies to improve Aboriginal standards of living in areas such as health, housing, education and employment. Court (1993, pp.9-10)

Nothing in the Bill dealt with any of the issues identified in principle 4.

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[46] A. Parbo and H. Morgan supported this call (Chamberlin 1993, 6 July), and connection with racism (Lagan 1993).

[47] Hulme (1993, p.63) noted.
It is not merely the calls for the result in Mabo to be reversed by constitutional amendment (as, I presume, by an amendment providing that all title to land on the mainland of Australia shall flow from grant by the established government of the State or territory concerned, and not otherwise).

(iv) Lobby groups

The lobby group most directly affected by the *Mabo* decision - the Aborigines - initially welcomed the decision as a belated recognition of the historical truth that Aborigines were Australia's first settlers. The decision therefore had a symbolic significance to them greater than its capacity to deliver practical land rights. This symbolic significance was reinforced in late 1992 by the Prime Minister's Redfern Park speech (Keating 1992). In the ensuing political debate about the decision, however, Aborigines appeared by mid-1993 to have become very disillusioned about the prospects for *Mabo* either initiating a new enlightenment in non-Aboriginal Australia's relations with Aboriginal Australians, or delivering real advantages through the practical implementation of native title. In addition, the physical dispersion - even fragmentation - of Aboriginal Australia (cf. Brennan 1993b) contributed to a fragmented response until the Eva Valley meeting (Mackinolty and Chamberlin 1993), and a subsequent meeting in Canberra. The fragmented Aboriginal voice - and thus the high costs of united decision making in response to *Mabo* in contrast to the unity of the other principal interest group, the miners - contributed to Aborigines' failure to ensure that the policy response process proceeded at a pace suitable to their interests. The lack of control over pace ensured that, once the horses were stampeded by claims that non-Aboriginal groups would suffer serious losses under native title, it became very difficult to prevent a policy response that did not result in native title being effectively emasculated. After a torrid and very public exchange between the Prime Minister and Aboriginal negotiators in October 1993, a compromise agreement was reached (cf. above). Aborigines appear to have become very conscious of the need for public unity, even while thrashing out internal differences (*e.g.* Mansell in Standing Committee on Legal and Constitutional Affairs, Reference: Native Title Bill 1993, Senate Hansard, 6 and 7 December 1993, p.555).

Although there are still very clear differences within the Aboriginal community over the appropriate response to Mabo, Aborigines are probably a much more effective political force than they have ever been. The emergence of Aborigines as an effective political force may be the most enduring legacy of the *Mabo* debate. If this "cohesion despite differences" can be maintained, Aborigines are less likely in the future to be steam-rollered by the political process and thus will have a better chance of ensuring an equitable future for themselves.

Once the farmers' groups had become convinced that native title was extinguished by freehold or leasehold under the original *Mabo* decision, or accepted governments' assurances that they would secure agricultural and pastoral leasehold under appropriate legislation, the farming lobby appears to have become relatively indifferent to the native title issue. The principal exception to this general indifference has been in pastoral areas of Western Australia where, because of visible Aboriginal populations and large areas potentially claimable, pastoralists became extremely agitated over the prospect of native title claims (Tickner 1993). It is possible that these fierce reactions were deliberately engineered for political purposes.

The National Farmers' Federation appears to have played an honourable role in the second part of the year in negotiating an acceptable legislative response to *Mabo*. Of particular note has been the role of the Federation's Executive Director, Rick Farley, also a member of the Federal Government's Council on Aboriginal Reconciliation, who has been an active negotiator on native title in 1993 despite serious reservations from Western Australian farmers. The NFF appears to have been acutely aware of the fragility of any compromise possible on native title, its President of the NFF, Mr Graham Blight, warning at one stage "that 'if the Coalition pushed the Government too far and can't get any sort of compromise, then we'll end up in the hands of the Democrats and the Greens'" (Chamberlin 1993, 5 November). During the torturous Senate debate on the legislation, Farley was reported as saying that he felt "betrayed, bitter and foolish" after a Government amendment to clarify some rights relating to some renewable mining and pastoral leases was defeated despite three National Party senators crossing the floor (Davies 1993, 20 December).

Of all the interest groups, the mining lobby has been most active, although this reaction has not always been consistent.[48] Their activities appear to have covered the entire spectrum available to lobby groups - they have been involved in discussions with governments, and they have publicised their case widely (e.g. their own *The Mining Review*, and extensive advertisements in the daily press).

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[48] e.g. "Urgent action is necessary for legislation to validate existing titles and ensure that new titles can be granted" (McIntosh 1993, p.14) cf. "AMIC supports a call from Aboriginals to slow down the process and for more debate on the outcome of *Mabo*" (McIntosh 1993, p.12)

4.6 Ambit claims

Much aggravation has been caused by claims to land by Aboriginal groups, ostensibly under *Mabo*, which appear to lie outside the *Mabo* guidelines.[49] In economic terms, however, these claims can be simply understood. Particularly if the cost of mounting a claim is low, and if the potential value of a successful claim is very high, the expected value of the claim may be positive even if the probability of success is very low. For low income groups, such claims make good economic sense.

Further, since part of the High Court's explicit agenda in *Mabo* was to extinguish the *terra nullius* doctrine, ostensibly-*Mabo* claims can also be viewed in a rational although non-economic context. For groups like Aborigines who rightly view themselves as dispossessed - either as the descendants of dispossessed people or, in some cases, themselves dispossessed - the High Court's judgement recognises the undeniable fact that they were the original owners of Australia (cf. Reynolds 1992). Land claims, even if clearly outside *Mabo* guidelines, can be seen as political assertions of original possession. Further, these political assertions may produce not simply verbal recognition of this original ownership (cf. Keating 1992) but practical assertion of this recognition in the form of land grants or other assistance.

But Aborigines were not the only Australians lodging ambit claims post-*Mabo*. The most dramatic ambit claim was CRA's claim for complete certainty over its Cape York bauxite leases. The company supported the Queensland Premier in his call "for complementary Commonwealth-State special legislation to validate Comalco's Weipa titles so that certainty can be restored" and, because any such legislation itself might be litigated, went further in demanding "government indemnities, in favour of lenders and investors" (Gill and Dowling 1993). In economic terms, CRA/Comalco was seeking to ensure that no uncertainty arising out of *Mabo* would fall on itself. Should CRA/Comalco, and others similarly placed, be successful in avoiding *Mabo*-induced uncertainty, the only groups who will bear the cost of uncertainty are society as a whole, through any liability borne by governments, and Aborigines themselves. The fracas over the Wik people's claim at Weipa is a good indication that any costs of uncertainty are most likely to be borne by Aborigines themselves.

Ambit claims, whether of the first or second kind, are clearly very rational responses to a major change in institutional structure. These ambit claims are clearly opening gambits in games with potentially very high stakes for individuals and groups, but are probably zero-sum games for society as a whole.

5. Property rights propaganda

5.1 Property rights

Some commentators have lashed themselves into paroxysms of apoplexy that the type of title granted under *Mabo* is inferior title because it is not unrestricted freehold. Ewing (1992, p.12), for example, commented that "Inalienable title is not so much a benefit to Aboriginal people as a millstone" and ACIL (1993, p.7) argued that "The concept of inalienable [Aboriginal] title is paternalistic and discriminatory". Brunton (1992, p.10) argued that:

> 'Native title' and other forms of inalienable tenure are not only paternalistic, locking people forever into an inflexible situation supposedly 'for their own good', they also destroy the value of the land.

and NSW Farmers (1993, p.[3]) argued:

> The communal ownership aspects of Aboriginal land rights denies Aboriginals the ability to upgrade and efficiently use their land.

These, and similar, arguments can be seen in several contexts:

1. efficient economic outcomes depend on the preferences of all members of the community. Communal ownership of land appears to accord with Aborigines' view of their cultural heritage.[50]

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[49] NSW claims which appear to fall in this category are claims to the southern highlands (shown in Australian Chamber of Commerce 1993) and Wiradjuri people (central west) (shown in Hewett 1993 7 June). Also Mullenjarh claim on Brisbane CBD (Chamberlin 1993 31 May). Claims by Bandjalung (NSW north coast & SE Qld), Kamilaroi (NW NSW), Morowari (are NW to SW of Goodooga) and Arrente (around Alice Springs) (Hewett 1993, 8 July, shows maps, may also be ambit claims). The Wiradjuri people's claim was struck out in the High Court in December 1993 (Curtin 1993, 24 December, Brown 1993, 24 December)

[50] *e.g.* "As Kooris, we need to be ever vigilant to the subtle undermining of our cultural values such as non-materialism, humanitarianism, compassion and that the group is more important than the individual. These and other Koori ideas -such as the proposition that living things might be more important than material wealth - have always been considered subversive by non Koori Australian society." (Foley 1993)

If Aborigines - or some Aborigines - do not want inalienable title, then empirical evidence should be provided of this.

2. the great bulk of Australia's land mass is in communal forms of title (e.g. Crown land and leasehold) which these commentators argue is inappropriate for Aborigines. Since both *Mabo* and land rights legislation principally envisage the conversion of Crown land to some form of communal Aboriginal tenure, the result in property rights terms is no worse than currently. Further, if it is true that "forms of inalienable tenure ... destroy the value of the land" (Brunton 1992, p.10), it therefore follows that the vast majority of Australia's land mass has *already* had its value destroyed because of the form of tenure in which it is held.

3. *Mabo* does not preclude Aboriginal groups who gain native title from subsequently seeking conversion of this title to some other form by initially ceding such native title to the Crown. Of course, Aborigines seeking such a conversion would want to ensure that their deal with the relevant government was watertight! This possibility was actually canvassed in the *Mabo* judgement: "(x): If native title were surrendered to the Crown in expectation of a grant of tenure to the indigenous title holders, there may be a fiduciary duty on the Crown to exercise its discretionary power to grant a tenure in land so as to satisfy the expectation" (*Mabo* 1992, per Brennan, p.3). This option was expressly recognised in the Commonwealth's legislative proposals (Commonwealth of Australia 1993b, para.29).

4. It does not follow that "communal ownership ... denies Aboriginals the ability to upgrade and efficiently use their land." This argument rests on a bizarre and erroneous interpretation of neoclassical economics. In neoclassical economics it is argued that private, individual property rights are a *sufficient* condition for Pareto optimality. It does *not* follow, however, that such property rights are a *necessary* condition for optimality. Indeed the modern capitalist state relies for its efficiency on notions of communal ownership: the joint-stock company is based on the communal ownership of the company because share ownership only contains the rights to profits in the company (if any) and its residual value (if any) when wound up, as individual shareholders cannot lay claim to particular assets of the company.

5. It is not the *communal* ownership that might have economic implications, but the inalienability of the native title. However, as noted above, the High Court did not envisage native title as being completely inalienable but, rather, involving a special process to convert it to existing forms of title. Aborigines obtaining native title therefore would have future choices as to whether or not - and, if so, when - to seek conversion of their title. The normal objection to inalienability is that it is difficult to borrow against such land because the lender does not have the ultimate security for their loan of selling up a defaulting borrower. However, much of the land likely to be granted native title is likely to be difficult to borrow against anyway - if it had any value, it would already have been alienated to non-Aboriginal Australians.

If particular areas had specific value (e.g. because of (possible) mineral deposits) and if native title carried rights to minerals (which none of the legislative responses to *Mabo* have permitted), then borrowing would have been possible in the form of a *lien* against future production. The mining industry's fervent opposition to private mineral rights, together with governments' normal reluctance to forego future revenue, has precluded this option emerging.

There appears to be a hidden agenda in this opposition to non-freehold forms of Aboriginal tenure. Urgings by non-Aboriginal Australians against the type of land right granted via *Mabo* or land rights legislation might best be seen as the attitudes of participants in the political process who object to the principle of Aboriginal land rights. By urging that native title under *Mabo*, or communal title under land rights legislation, are interior forms of title, commentators may be attempting for political reasons to incite Aborigines to seek freehold title, in the knowledge that the Australian community would not accept such alienation of these lands. It may be that native title under *Mabo* principles is not, in the long run, the optimal form of title for successful grantees. In the short run, however, native title is likely to be superior for them than the alternative of no title at all. And *Mabo* does appear to offer a route to future title which may be superior in the long run - which may be the real foundation of political objections to *Mabo*.

5.2 Property rights in minerals

From statements by its spokesmen (e.g. McIntosh 1993) to a strong advertising profile in the press (e.g. *Sydney Morning Herald* 6, 14, 17 August 1993), the mining industry has been adamant that "public ownership of minerals must be maintained". The mining industry's motives for this campaign are easily understood, but its assertion that "public ownership of minerals must be maintained" (AMIC advertisement, *Sydney Morning Herald* 14 August, p.22) is simply erroneous. Except in a centrally planned economy, minerals only have value because at some stage they are alienated into private ownership. The key issue is, therefore, not the original ownership of minerals but at what *stage* they are alienated into private hands.

The importance of the stage of alienation can be seen by reference to other nations' jurisdictions where original mineral rights are owned by the surface landholder not the state (e.g. Industry Commission 1991b, pp.10-21). This also occurred in the early history of the NSW colony where mineral rights were attached to surface rights. Even in those parts of Australia which currently retain public ownership until the government decides to alienate mineral rights to a mining company, other ways exist to alienate these rights. For example, the government could decide to alienate the rights to exploit any discovered minerals to existing surface landholders, or to others by severing surface rights from mineral rights. In the either case, government could decide to auction mineral rights, or could simply vest them in particular individuals or groups such as miners, holders of native title, environmentalists etc.

In cases where mineral rights were not vested in an individual or organisation directly interested in mineral exploitation, then opportunities would arise for a bargain between the owners of rights and exploration and/or mining companies for the rights to prospect or mine. The *framework* of the bargain would be in principle little different from existing negotiations between government and explorers or miners for the rights to prospect or mine. Whether or not the *outcomes* were different would depend upon the relative preference functions of government and alternative owners of mineral rights. Where, for example, owners of mineral rights have values relating to land additional to the monetary value of mining, the decision as to whether or not to permit mining - and the conditions under which mining would be allowed to proceed - may be more complex than if only the monetary value of potential royalties is paramount. Further, if the time preference rates of owners of mineral rights were substantially different from the state, exploration and mining outcomes might also be different. In all cases, however, as long as the negotiations between mineral rights owners and potential exploiters are *voluntary*, the outcomes will be *efficient*. Whether or not social welfare is raised or lowered by a different set of rules governing mineral extraction is an empirical matter.

5.3 Mining negotiations

The mining industry has claimed that, unless a policy response to Mabo includes retention of property rights in minerals by the Crown, less efficient outcomes will be achieved by Australia (e.g. Australian Mining Industry Council 1990b, Ewing 1992, p.12, ACIL 1993, AMIC newspaper advertisements noted above). Contrarily, in its analysis of pre-*Mabo* land rights legislation, the Industry Commission (1991b, pp.55-80) argued that, where existing Aboriginal title was claimed to be stifling mineral development, it was the *form* of Aborigines' involvement in the bargaining process rather than the *existence* of this involvement that could be argued to be affecting outcomes. In particular, in the case of Northern Territory land rights legislation, it was because land owners on mineable land only had a right to compensation for disturbance that there was insufficient incentive for them to participate fully in a bargaining process over mining development. If for example, *local* Aborigines only obtained a small return for permitting mining but the disturbance to their land and/or way of life was large, there was little incentive for them to agree to mining. If, however, the incentive to allow mining was raised - e.g. by vesting ownership of all minerals in local Aborigines - then there might be a very substantial incentive for them to compare the income benefits of mining with the losses associated with mining. The Commission recommended that:

> the NT and Commonwealth Governments should investigate transferral of mineral rights on Aboriginal land to the traditional owners. The Commission sees granting traditional owners *de jure* rights to any minerals found on their land as a possible solution to a great many of the problems currently being experienced as a direct result of ill-defined property rights. (Industry Commission 199b, p.67)

What applies in the case of statutory land rights legislation applies similarly to the case of native title. The bundling of mineral title with native title to land would encourage Aborigines to agree to mining "in the national interest" because it would also be in their interests. And it would be in their interests in a dynamic sense, not simply a static one, because access to royalties would provide traditional Aborigines with a resource base that would enable them to participate more equally in Australian society.

It is difficult to comprehend why miners would prefer to deal with governments over mineral royalties rather than individuals. In principle, governments ought to be more effective bargainers than individuals: they have more financial and bargaining resources than all but the largest companies, and so ought to be able to extract larger royalties than can individuals, particularly traditional Aborigines. Perhaps it is because supposedly unsophisticated Aborigines have proved tougher negotiators than the miners expected that miners have decided it is preferable to deal with governments. Further, there have always been suspicions that - despite the vast resources available to governments in royalty negotiations - governments may not be as effective in royalty negotiations as theory might suggest (Industry Commission 199b, pp.11-13, 64-65). Bartlett (1993, p.16) claimed that:

> Aboriginal people, judging by North American experience, are likely to be proponents of resource development once given an opportunity to participate.

Indeed, in a backhanded way, ACIL (1993, p.8) might be construed as arguing in favour of minerals vesting in Aboriginal communities:

> It is possible that the so-called veto against mining has been exercised by Aboriginal people because the value they ascribe to retaining their land, undisturbed, in traditional native use exceeds whatever value might temporarily be added by mining. However, it is impossible to be certain whether that assessment has actually been made. Indeed, it seems evident that the communities concerned have never been confronted with a valid choice (that is, they have not been allowed to be exposed to the market).

because the only way of empirically testing whether or not Aborigines are assessing the costs and benefits of mining is to vest the mineral rights in them as landowners.

It is difficult to understand therefore miners' current concerns with *Mabo*. The problem may be that the areas most at risk to *Mabo* are those inhabited by Aborigines least affected by the modern market economy. Aborigines who have little or no demand for the output of modern economies have little demand therefore for the income required to participate in this economy. Thus the miners may have little to offer *these* Aborigines which might induce them to permit mining on their land. But, in economic terms, what this means is that the welfare of these Aborigines would be reduced if they permitted mining. Just because Europeans might disagree with their preference orderings is no reason to belittle or ignore these preferences. The philosophy of the market economy is that individuals' preferences count, no matter what those preferences are. If individuals choose to live a frugal lifestyle then, unless they create externalities for others, welfare is maximised by permitting them their choices. In this case, national *economic* welfare might be less than otherwise, but this is because a significant group values particular producible commodities substantially differently from others in the economy.

The effect of including mineral rights within native title will, however, only remain a theoretical issue. In its *Mabo* judgement, the High Court stressed the importance of traditional associations with the land. Without pre-empting future decisions of the Court, it would not be surprising if, given this emphasis on *traditional* associations, the Court matched traditional uses of the land with grants of native title. For example, native title might only carry with it rights to traditional exploitation of minerals such as the gathering of flints or stones for implement making. More importantly, statutes proposed or enacted by Federal and State Governments as a consequence of *Mabo* strip mineral rights from native title, and give Aborigines an extremely limited role in negotiations over mineral exploration and mining - and indeed, any other activity - on native title land.

6. Conclusion

Despite the past invisibility of Aborigines to agricultural economists, Aboriginal interests became of major - if unrecognised - policy concern to agricultural and resource economists as a result of the High Court's *Mabo* decision. The *Mabo* decision, and the legislative challenge it posed, provided an ideal opportunity for agricultural economists to demonstrate their social relevance in resolving critical economic policy issues - but this opportunity was sadly neglected. This decision also provided a challenge to agricultural economists to use their skills on behalf of a generally impoverished group in Australian society - this opportunity remains open. Agricultural economists have the tools to assist in explaining why Aboriginal society suffers economic deprivation, what policy responses may be appropriate to assisting the economic development of those Aborigines enduring a lifestyle unacceptable to themselves and Australian society, for evaluating the many failures of the policy process which has supposedly been assisting Aboriginal advancement, and for evaluating and explaining the political forces that will inevitably be arraigned against a development process that emphasises Aboriginal interests. Australian agricultural and resource economists ought to recognise the importance of Aboriginal interests because social justice - *i.e.* a satisfactory distributional outcome - is a precondition for an acceptable economic outcome. Like

Community Aid Abroad, agricultural economists do not have to go abroad to apply their skills to assist in raising the living standards of those whose material well-being is far lower than acceptable.

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Figure 1: Welfare Implications of White Settlement

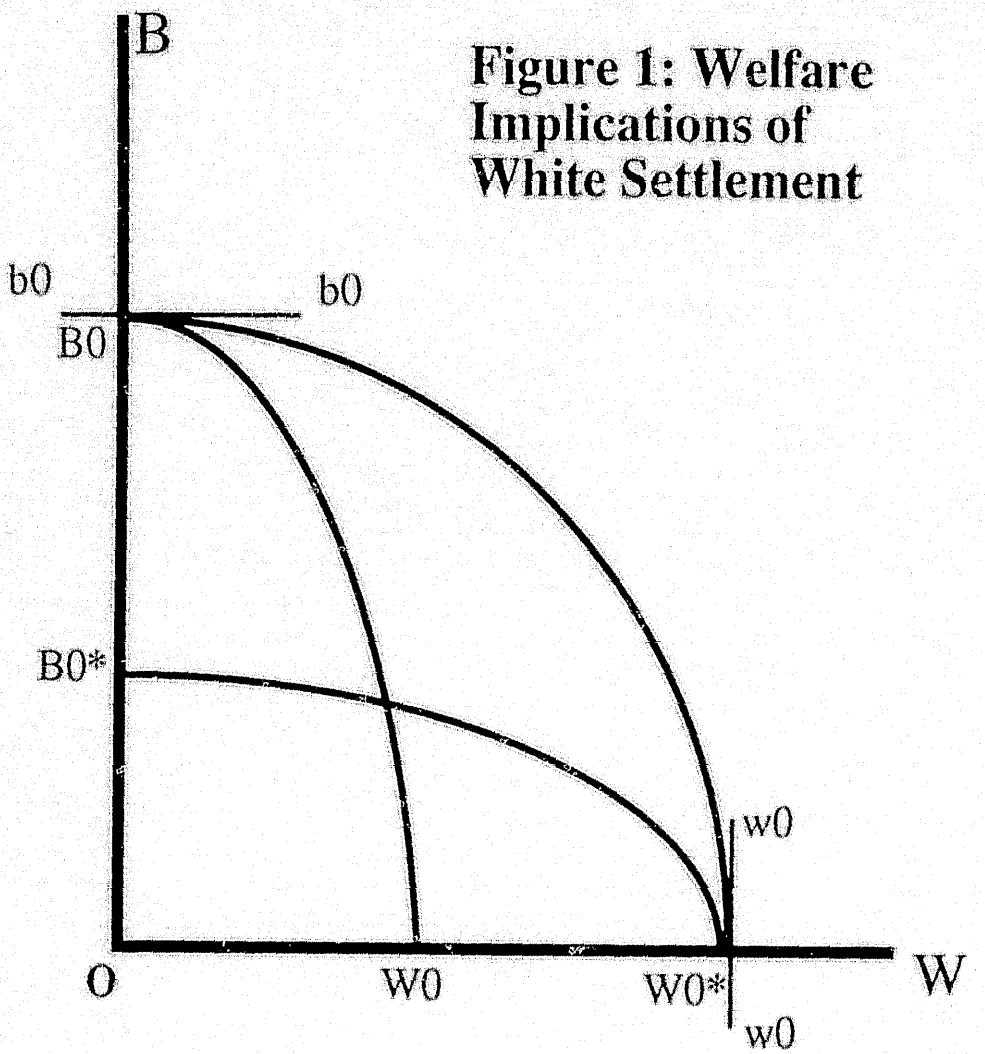


Figure 2a: Mabo and Non-Traditional Aborigines

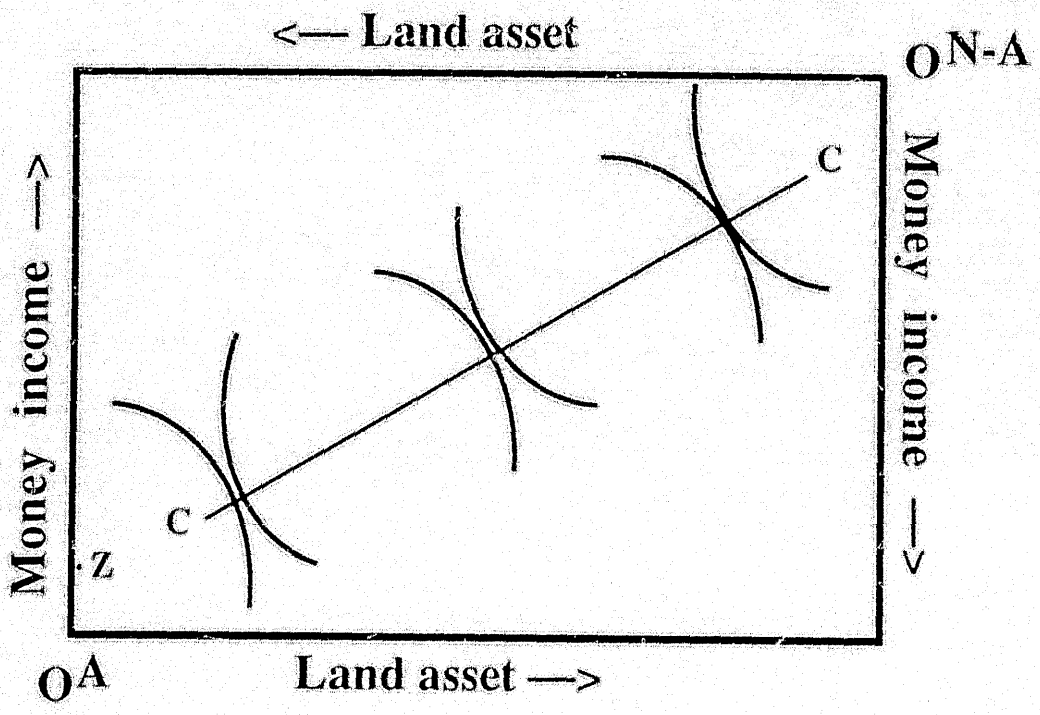
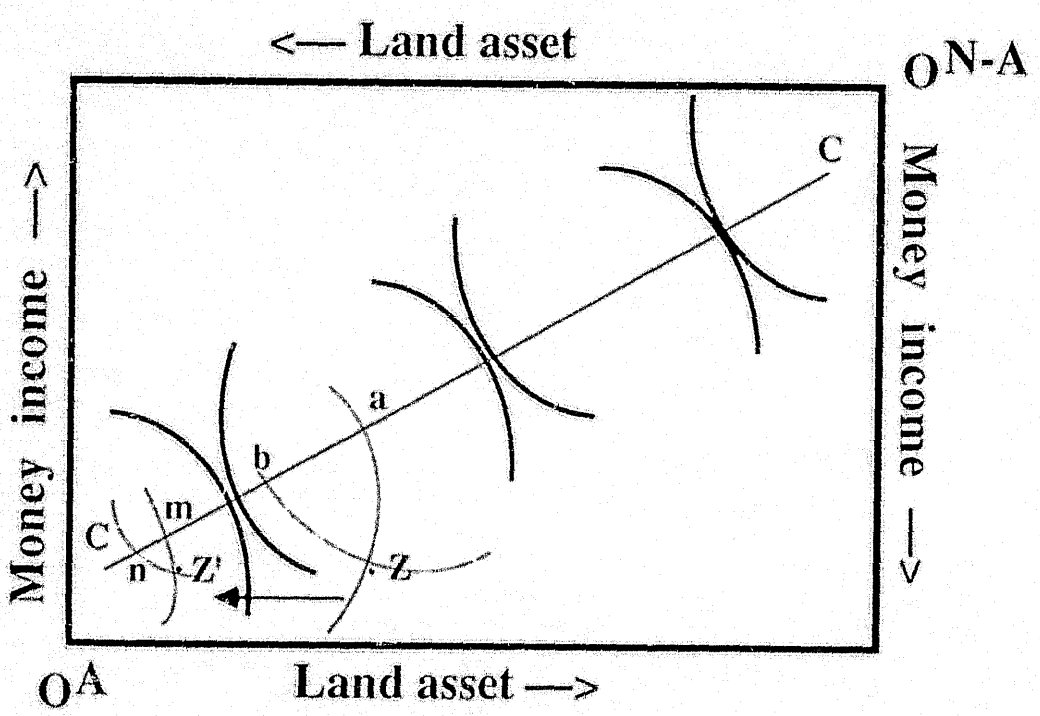


Figure 2b: Mabo and Traditional Aborigines



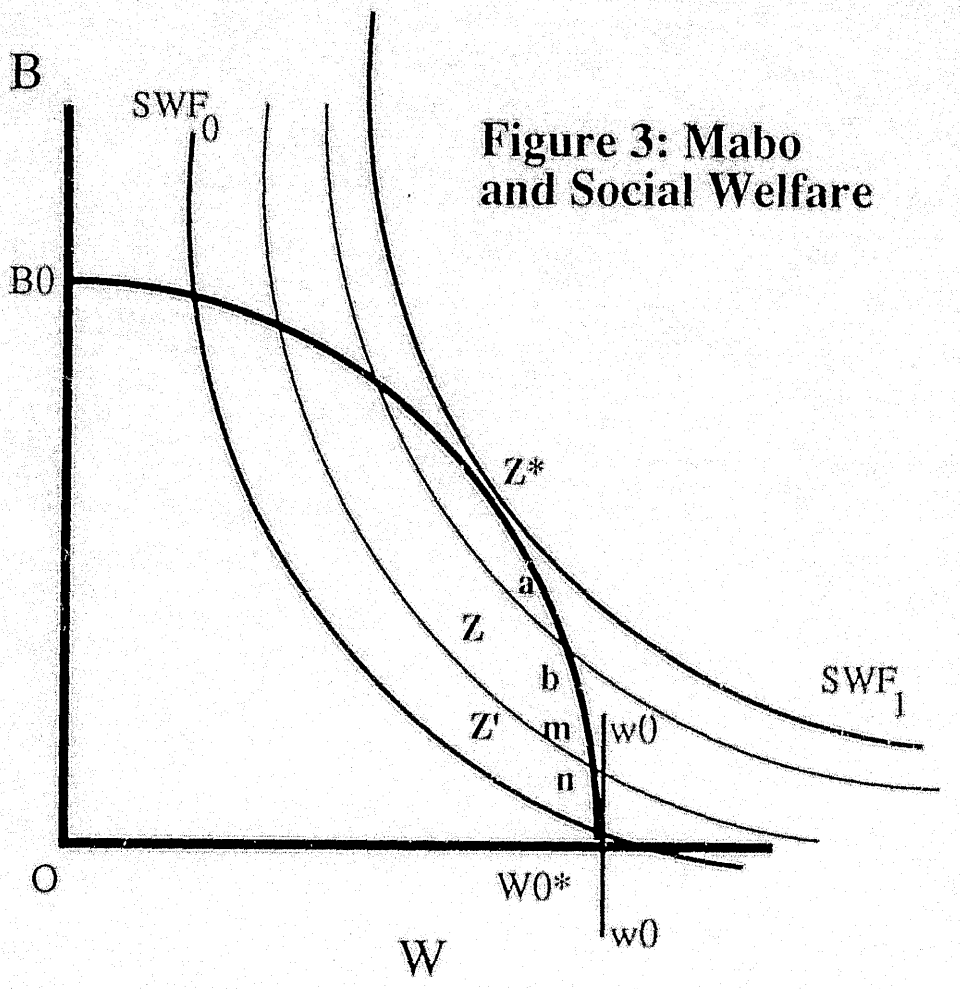


Figure 3: Mabo and Social Welfare

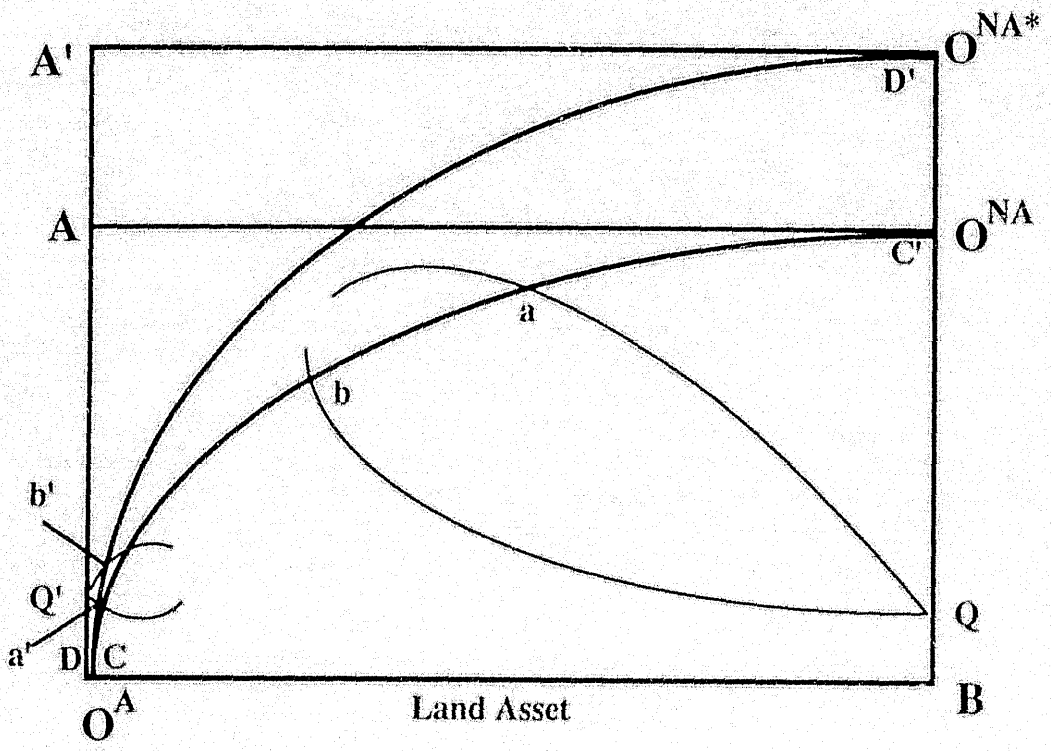


Figure 4: Growth in Non-land Income with Change in Land Ownership

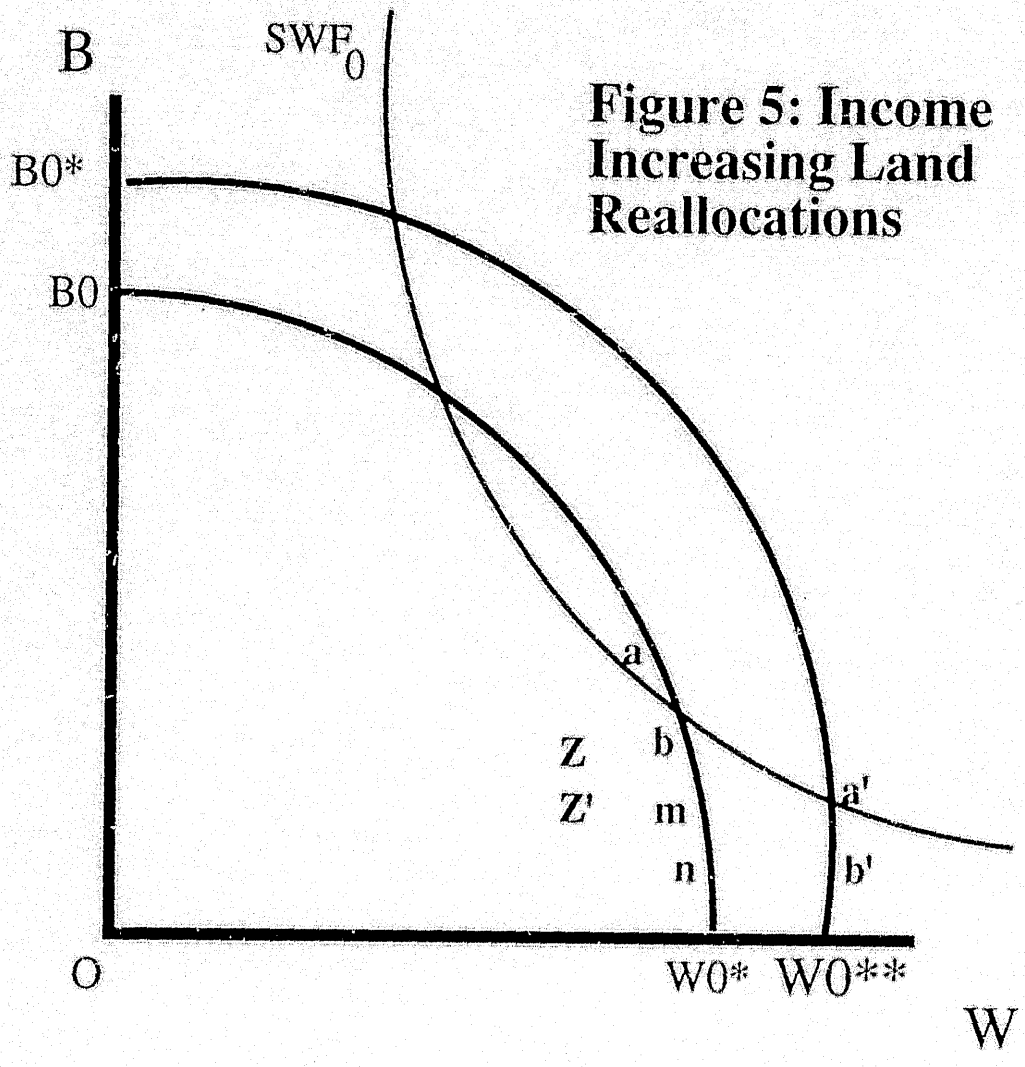


Figure 5: Income Increasing Land Reallocations