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***Terra Nullius* Overturned, and Differing Views of Tenure.**
What Future for Public Land in Australia?

Aboriginal Territory and Management Rights Stream
SociologyDiscipline

Leasehold land

Forty-two percent of the land area of the Australian continent is held under leasehold tenure. In the state of Queensland, 50% of the land area is held under leasehold. Within that area there are small cities, country towns, road and railways, lakes and watercourses, national parks and so forth, for which different legal arrangements apply. But the other 50% of the land is general freehold tenured (whereby individuals and companies have a right of exclusive ownership) and that area includes the majority of the tenure. This is a variety of legal arrangements (see Appendices I and II) whereby an individual or company enters into agreement with the state or federal government to make use of public land for grazing purposes–by sheep and cattle in particular. In the state of land occupied by cities, much farmland, and so on.

On the grazing leaseholds, land holders have 'usufruct'–in particular, the right to graze their livestock on the natural grass and herbage and sell their product, and in return for this right, they pay a nominal rental to the government. The right though is very limited. It permits them only to take custodial possession of designated areas: to graze stock, to make certain specified 'improvements' to the land, and to build a residence. Interpreting the pronouncement of Earl Grey, the British Secretary of State for Colonies, in 1848, Reynolds (1987: 151) comments:

> By implication all future settlement was to be governed by the principles spelt out by Grey and indeed they were embodied in all pastoral leases let in Queensland, Western Australia and the Northern Territory during the second half of the nineteenth century.
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> The squatters' rights were tightly circumscribed. They were far less than those of the freeholder.... The pastoralist had only an exclusive right to pasturage or the right to exclude other squatters and their animals. He was permitted to enclose and deny access to any land actually under cultivation, but in most of Australia such areas were likely to be very small. Aboriginal rights were more extensive. On any but enclosed and cultivated land they could come and go as they pleased, they could camp where they chose and pursue all their normal economic activities.

As regards the leaseholder's rights, in the state of Western Australia, for example,

> The Land Act of 1933 (WA) ... states that a pastoral lease 'shall give no right to the soil, or to the timber, except as may be required for domestic purposes, for the construction of airstrips, roads, buildings, fences, stock-yards, or other improvements on the land so occupied' (Trotter, 1997: 10).

The public still has the right of access with approval, and servants of the State are empowered to visit the property to ensure that the conditions of leasehold are being met.

The evidence indicates that in general, leasehold has not been rigidly policed, and in many cases not even effectively policed (Taylor, 1997: 23, citing Qld Dept. of Lands), and the level of being left alone which the graziers have enjoyed has encouraged them in their belief that they are in fact full controllers of the land which they farm and have the equivalent of freehold tenure over it.

The landscape of the Australian continent was assumed to be empty–*terra nullius*–upon the arrival of Europeans to the east coast, first with Cook in 1770 and then again when their first settlement was made at Port Jackson in 1788. And although that situation obtained in law for almost 200 years, more recently that appreciation of Australian land tenure arrangement was overthrown by court decision in the historic *Mabo Judgement* of 3rd of June 1992. The presiding judges ruled that a specific form of tenure, 'Native Title', existed over all the land of Australia when the white settlers arrived, and that title had been lost by declaration of sovereignty; but only as the encroaching colonial government took possession of the continent for colonists' purposes and in the process dispossessed the Aboriginal people were their common law rights 'extinguished'. The judgement suggested, however, that those common law rights continued to exist in parts of the continent that had not been specifically alienated by the Europeans and that one place in which such native title might continue to exist was on land held under pastoral and other types of leases throughout the Commonwealth.

Due recognition of the circumstances of Aboriginal 'ownership' of the Australian continent prior to white settlement was canvassed by the judges and the conditions of Native Title were laid out in considerable detail in that judgement. The *Wik Judgement* of 1996–in which the Wik (and Thayorre) people challenged the suggestion that Native Title had been extinguished on leasehold tenure–established that in certain circumstances and having due consideration for the rights of graziers on acknowledged grazing leasehold, native title did continue to exist on leasehold territory within the Commonwealth and that, in consequence, groups of Aboriginal people were entitled to make claim to Native Title over areas which were also the subject of grazing title under the leasehold arrangements of the states (Hiley, 1997).

The fact that graziers who hold leasehold tenure regard themselves as *de facto* owners of the land they farm has conditioned them to believing that only one type of access right could exist for any particular piece of rural landscape. They have set themselves to resist, both individually and politically, any other claims but their own on that same land.

Using legislative documents, Government and newspaper reports, and some interviews, this paper examines, from a sociological point of view, the rights and obligations associated with a variety of tenure types and the implications of their obtaining over the same blocks of land; those issues which might be made conflictual when different tenure types apply to one piece of 'property'; and the ways in which access to property–especially as rural, landed property–articulates with claims to social esteem and right to a decent life in a culturally varied society. The longer-term possibilities for different claimants to continue to use land for living space, for agricultural production, and for mining while lifestyles, production processes, and markets change is considered in this paper in light of recent practice and new circumstances. The paper argues that the changed legal situation forces Australians to develop a new relationship to property–on, with, and under the landscape.

The Changed Land Tenure Situation: Mabo/Wik decisions

Historical investigation of the circumstances of institution of leasehold tenure (Reynolds, 1997) has revealed that when the Colonial governments established pastoral leases they

aimed to establish three principles of what they regarded as government "management" of Crown Land:

- this was NOT ownership;
- this was a lease for a limited time; and
- allowance should be made so that Aborigines–as 'wanderers' within the landscape–would remain on the land, despite the concomitant grazing of that country by the sheep and cattle of the leaseholders.

In Bromley's terms, the state (in this case the State of Queensland) holds a common property right (on behalf of all the people of the State) over the land which is then leased to graziers, in the sense that this is ***a state-property regime*** (Bromley, 1997: 7)–a ***government common***–and the government makes a claim against the graziers on behalf of the citizenry, the rents they are required to pay.

It seems that the Native Title rights place this government common into question and this is the basis of the consideration at the heart of this paper. *The Mabo judgement* permits Aboriginal people of Australia to make land rights claim also against 'national' and 'public' parks, coastal and off-shore fishing grounds and possibly waterways and riparian land on the continent itself (Stephenson, in Appendix I). Certainly, this is the interpretation that Justice Brennan in an additional opinion to the Mabo judgement expressed, and it is one that Aboriginal people have been investigating as a logical extension of the rights they had restored under *the Mabo judgement*. The *Wik judgement* reinforces these three principles, drawing attention to the fact that Native Title does continue to exist as a common law right at the same time as leasehold tenure is being exercised by graziers holding right of access from the government.

The outcome of these judgements is having profound effects on the nature of rural property in Australia. Its implications for the Australian legal system are momentous and the implications for Australian farming appear to me to be equally so. Herein lies the second thrust of this paper which is concerned with the primacy of agriculture within the Australian economy and with an argument about the consequences and potential consequences of the Mabo and Wik judgements for the nature of rural society in Australia, and (by extension) for the nature of the overall social structure of Australia. I argue that the nature/distribution of land holding in Australia has had a profound effect on the nature of rural society and that the status "rural property holder" has carried huge social approval reflected in high prestige within the rural area where the landholding occurs and also within the wider Australian society which for almost a century and a half was based almost exclusively upon agricultural production. The argument begins with a consideration of the nature of tenure.

Property (Rights and Obligations of Tenure)

> Discussing property, Bromley (1997) treats
> ...four broad types of resource management regimes...: (1) state-property regimes; (2) private-property regimes; (3) common-property regimes; and (4) non-property regimes (alternatively called open access):
> *A. State-Property Regimes*
> State-property regimes are those where ownership and control over natural resource use and management rest in the hands of the state through various government agencies. Individuals and groups may use the natural resources, but only with the approval of the administrative agency responsible for carrying out the wishes of the larger political community....
> *B. Private-Property Regimes*
> .... Here the range of discretion open to the owner(s) is fairly extensive and… includes the right to control, the right to transfer, the right to use, and several other aspects signifying relative autonomy for the owner. Note that private property does not necessarily mean individual property....

> *C. Common-Property Regimes*
> .... A common-property regime entails exchange rights, entitlements over the distribution of net economic surplus accruing to the group, a management sub-system, and authority mechanisms as necessary components of the enforcement system....
> *D. Open-Access Regimes*
> Open-access regimes are devoid of any property rights they represent situations of unowned resources (*res nullius*).... Open access results from the absence, or the breakdown, of a management and authority system whose purpose is to introduce and enforce a set of norms of behavior among participants with respect to that particular natural resource (Bromley, 1997: p.7–11).

Public land, in the sense we are talking about it here, is thus *State Property*. National forests, national parks, and military reservations fall into this category, too. The state either directly manages these resources or leases them to 'users'. While, state property regimes deny the user the kind of total control which private property regimes imply, nevertheless, many state property regimes, by their very nature, convey secure expectations for some interests.

Talking about the rights which attach to property control, Bromley (1997: 4) comments,

> When one has a right in something it means that the benefit stream arising from that situation is explicitly protected by some authority system. The authority system gives and takes away rights by its willingness or unwillingness to agree to protect one's claims in something. To have a property right, therefore, is to have secure control over a future benefit stream. And it is to know that the authority system will come to your defense when that control is threatened. The thing of value to you is the benefit stream and this benefit stream is the property interest that individuals seek to have protected with property rights.
> The degree of protection afforded by a particular structure of property rights is always relative to other social concerns and priorities. While property rights in land are usually more secure than property rights in other assets, this is not universally so across different cultures.
> We see, therefore, that the structure and content of rights are social decisions. Rights are socially constructed to serve some collective purpose.

"[T]o have a right is to have the ability (the capacity) to require the state (with its coercive power) to come to your defense (Bromley, 1997: 6)". Common law rights, which the Mabo Judgement reaffirms for indigenous Australians, are the strongest claims to protection by the State of person and property, and having them now over land means that 'Native Title land holders' ought to be entitled to have those rights protected by the full force of the law. That some members of the public freely talk about 'extinguishment' of these rights suggests massive insensitivity to 200 odd years of dispossession, and a continued intention, after all that time (McGrath, 1995), to deny the protection of the State to some of its citizens.

Bromley's final contribution to this discussion (Bromley, 1997, pp. 5–6) is to point out:

> [T]he idea of rights has both a rhetorical element and a legal element; rights are both prescriptive (normative) and descriptive. These two domains are clearly interdependent. After all, the law is simply a manifestation of the normative realm of human associations. What at one time is expressed as an 'ought' or a 'should' becomes, through the legislative process, a 'must' in a subsequent time. Rights are simply the socially sanctioned and enforced normative elements of civil society. Property rights extend that legal force to the realm of objects and benefit streams.

> As to what the new law might make possible for land use, our minds are capable of better than merely to envision conflicting claims over territory. But let's look first at one extant claim over territory, grazing tenure.

Land Tenure, Class and Status

Encel's paper, "Broad Acres", is a study of the upper echelons of the grazing community in Australia in 1970. He claims that his chapter–from his own book, *Equality and Authority: The Study of Class, Status and Power in Australia*–is intended "...to show how the rural community makes its distinctive contribution to the general pattern of class, status and power in Australia (Encel, 1970: 294)." A distinction is often made in sociology among three dimensions of social power: class, status and party, which are associated with power arenas based on property, social esteem and 'political' organisation. These ideas derive from the German sociologist, Max Weber (1958).

Encel points out that a pastoral aristocracy grew up in Australia from the time when John MacArthur established that wool could be profitably grown in this country. Indeed it is possible to argue that even prior to MacArthur's successful attempts to market Australian wool in Britain members of (for instance) the NSW Corps–the infamous *Rum Corps*–were attempting to establish themselves as (displaced) English country gentlemen, in the Australian environment with the use of convict and 'ticket of leave' labour to work their rural estates. And, more particularly, after MacArthur's marketing success, many landholders in Australia–W.C. Wentworth among them–were keen to establish themselves after the model of the British landed aristocracy. Many more, of course, weren't; they wanted just to make the money and run–back 'home' to England.

Of those who did remain, an accompanying social structure grew up around their massive land holdings. For instance,

> ...William Archer, head of one of the pioneer landed families of Queensland, wrote in 1860 that the town of Rockhampton had developed a definite social structure in which the landowners played a distinctive and leading role. After them came the 'upper-middle class' of government officials, bankers, lawyers, doctors and agents; then the large shopkeepers and employers and finally a class of small shopkeepers, mechanics and manual labourers (Encel, 1970: 295).

Others, Encel says, had their influence on the capital cities as compared with the provincial centres like Rockhampton:

> They established permanent houses in the city.... The squatters formed the centre of the urban social elite, and the 'Collins Street farmer' (in Sydney, the 'Pitt Street grazier') became the byword [e.g., Durack 1980; 1985]. 'The towns and villages arranged themselves as a social hierarchy. In this the squatter was at the apex, for though he did not live in the town he provided local storekeepers, doctors, bankers and lawyers with their most reliable business and his influence was important in shire and municipal councils.... Beneath the squatters in a series of delicate gradations, devised by wives were the parson, priest and minister, the bank manager, the doctor, the lawyer and the newspaper owner.'

The way of life established at this period has persisted into contemporary Australia, and seems likely to remain, with some changes, so long as wool growing retains its importance in the economy (Encel, 1970: 297).

Land ownership, or land control if not necessarily ownership, created the basis of links between families.

> The ownership of land, the need to preserve estates and the desire to add to existing holdings, have always been a powerful force in securing alliances between landed families (Encel, 1970: 304).

The point here is the link between land holding and social structure, not just of ruralia but for the whole of the Australian continent and within the developing Commonwealth. What

I am arguing below is that in rural Australia (and overlapping into urban Australia as well), power which devolves to people who own property is considerable and it is usually associated closely to the way we apportion social status or esteem to individuals and social groups–families for example. The argument runs that the more property one controls the greater is one's economic power, the power to affect local decision-making in regard to access to work and the benefits that derive from working or owning. One need not own vast amounts of property to be entitled to esteem within our society, which is rather more complex than that. Nevertheless, it has been the case that ownership of property is intimately linked with high social position. The ability to command the socially desirable goods and services by dint of access through wealth is a well-known feature of our society, but it is possible for one to be (for instance) a member of an 'old family' which has fallen on hard times economically but nevertheless been able to maintain a level of genteel social approval for the fact that its fortunes were once different from what they are now.

Often one branch of the family remained in grazing while another became involved in city trade. Some families were able to bring this pattern to the continent, while others developed it as scions of a particular grazier began to take over control of the parental property (Crew, 1964: 170, 194; Encel , 1970: 304-306) . But grazing also came to be supported by international capital (May, 1994) and gradually capital became co-owner of the large rural estates. This is especially true in Queensland and the Northern Territory (e.g., Anon., 1997: 60). Tax concessions (economic) and status considerations (social) also encouraged business ventures from the city to the countryside–that is, successful city business people established themselves on grazing properties and large rural holdings very often with the view to 'writing off' some of their profits by losing money in the rural branch of their economic activity, and also with a view to successful business people availing themselves of the high status associated with land ownership, especially large-scale land ownership. Graziers became active in politics too, Encel points out, particularly for two reasons: one concern was to keep the price of labour down–and by enacting labour legislation from the state and federal parliaments they were able rather effectively to maintain a low cost for labour. Their second concern was a fear of government intervention in control of agricultural trade–for instance, in the matter of controlling the sale price of wool (Encel, 1970: 316-317). (An example of this was the Australian Wool Board which went defunct in the early 1990s).

Concerning one aspect of the price of labour issue, the peripheral part played by aborigines in this makes interesting reading. In her book, *Aboriginal Labour in the Cattle Industry*, Dawn May (1994) discusses the roles that Aborigines have played in the cattle industry in northern Australia over the last 100 years or so (see also McGrath,1995: 179). In her analysis (184–5), May divides the incorporation of Aboriginals into the cattle industry into three phases:
The first of these, she suggests, covered the period up to 1919 and during this time the industry gradually encroached on Aboriginal land and began to make use of Aboriginal labour for property maintenance and stock work. The (cattle) industry in that period, she claims, was not economically viable and so the skill of Aboriginal people–at very low cost to the industry–was used to maintain a level of viability. In return, the Aboriginal people were paid very poorly but were able to retain a contact with the land they regarded as theirs on a seasonal basis and to maintain traditional bush skills which not only stood them in good stead in the off-season but made them valuable employees while they were at work.

After 1919 the industry began to move into a new phase as a commitment to the Imperial link–supplying beef markets in Britain. The State, particularly the state of Queensland, began to operate to control the labour of Aboriginal people even more stringently than before and their labour was regulated from reserves by government officials.

In the third phase of the development of the industry (or "articulation of Aboriginal and Capitalist systems", as May says) began to emerge in the 1950s as labour began to be replaced by capital. A determining factor in this was the Equal Wage Case which equated

the price of labour for Aboriginal and for white workers in the beef industry. "Currently, Aboriginal people engage in the cattle industry on much the same basis as white workers (May, 1994: 174)". But before the inauguration of equal wages (May 1994: 185) "the creation of a submissive work force, secured at well below award rates for over a century, must surely rank as a form of industry assistance without equal."

> In the past, the major attraction of station work for Aboriginal people was the opportunity to remain on their own land and care for it as much as they could. Since the 1970s some have been able to achieve these goals by other means. The purchase of cattle stations, the outstations movement and management of national parks have allowed them to pursue a more traditional form of land use (May, 1994: 174).

Returning to the main line of argument, however, in regard to desire of farmers to keep the government out of controlling the prices of their product, the graziers and the smaller farmers part company. This is "the big-man little-man schism" and, of it, Bunning (1986) says:

> Like most groups of communities, Australian agriculture has separate and distinct factions. They are the broadacre dryland 'dry' faction (wool, wheat and meat producers) and the intensive irrigated wetland 'wet' faction (dairy, horticulture, chicken meat and egg producers). When the [National Farmers' Federation] was formed, most producer groups in the 'wet' faction did not join the NFF, or took out 'associate' membership status. The basis of the factional difference is one of pragmatic philosophy.
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> The dry group is generally against protection of Australian industry and is export dependent. The wet faction supports protection from import competition as they sell most of their product on the domestic market and benefit from the considerable protection of their domestic price structure. The anti-protection or dry faction has had the upper hand in the NFF since its inception and retains that position, campaigning strongly for the removal of any Australian barriers to 'open market competition'.

Despite this schism between big and little in agriculture, they are all land holders, the class for whom property determines livelihood, political allegiance, and status (McIntyre and McIntyre 1944). But in the matter of attempting political manipulation, it is pretty obvious that graziers are using other categories of land holders. Not only is this true of the rich grazier organisations–the United Graziers' Association and the Cattleman's Union–but farmer organisations aim to involve any person with an interest in land owning, even suburban dwellers who own a quarter-acre block on which their house is built, promoting the belief that they have 'common cause' in maintaining private ownership of land along with graziers who's private holdings–through free-hold ownership, or lease-hold control of the National Commons–runs into many thousands and often hundreds of thousands of hectares.

For agriculturalists change has been in the context of agricultural restructuring to meet the demands of our incorporation within the Pacific Rim economy (Lawrence, 1994), and the decreasing fortunes of agriculturalists in general (Lawrence, 1987). Most of the prices of 'dry' agricultural products have decreased in the period from the boom years in the early 50s, although wheat, sugar and fruit are currently bouyant. Certainly, since the time described by Encel (1970), the relatively high social position of farmers (in general, but graziers in particular) has been somewhat undermined by 1) the lack of prosperity in the rural areas and 2) changing images of the appropriateness of ruralia to represent the Australian vision of the meaning of social stratification (Mules *et al*., 1994; see also Lawrence & Killion, 1974).

> Many pastoralists feel they are under siege. Wool and cattle prices have been low for years, there's been a run of bad seasons, social structures are changing rapidly, services are contracting and more and more conditions are being imposed on their use of land. Native title is another imposition, another threat, and because it's new, it's not well understood. They naturally are fearful (Farley, 1997: 6).

Adversity notwithstanding, graziers and their high status urban cousins have maintained a high social position within the country, and still land ownership or control of large tracts of rural land remains the basis for considerable social prestige. The status system within the nation, in other words, has been established on the basis of our understood meanings of land ownership and control of land for agricultural purposes.

Inasmuch as the Mabo and Wik judgements call land ownership into question, they also call into question these understood meanings about primacy within the status system in the countryside. Consider the situation now. Institution of the Mabo and Wik decisions—upholding the right of Aboriginal claimants to control large tracts of the country-- would seem to grant them also the right to higher prestige within the Australian social structure. It seems to me that it is this, almost as much as the potential loss of control of their grazing properties, that has been disturbing to the psyches of graziers and is a large part of the basis of their vicious reaction to the implications of the Mabo and Wik judgements.

My considered opinion is that the graziers and their political allies must come to terms with the fact that the legal situation is now different from what it once was–although we must understand that *the Wik judgement* is telling us that the tenure situation is not changed, the interpretation of it is what has been brought up-to-date. But the graziers (even in association with other farmers) are patently a very small proportion of the Australian population (about 1550 families hold pastoral leases in Queensland), infinitely smaller in itself than the Aboriginal population. And their particular political hobby-horse must be absorbed in the greater good of the country and how its resources and potentialities are administered for the benefit of the whole population. Indeed, I seem to be supported in this attitude by Rick Farley (1997: 1), the director of the NFF when the Land Rights Act negotiations were occurring: "That's all history now [he says]. The ground rules have changed and the question now is how best to manage the new legal parameters of native title."

Multiple tenures (Patterns of Meaning)

Bill Mollison (1978), who wrote *Permaculture I* (in association with David Holmgren), has reintroduced into the English language the concept of *palimpsest*, which seems to me to be valuable idea to apply to the understanding of what Native Title superimposed upon existing titles might mean for any particular piece of rural property. Mollison draws attention to the medieval practice of overwriting new material on an old piece of parchment. Scholars were known to do that same sort of thing to metal plaques of various sorts, as well. Palimpsest, then, is the original 'canvas' with all the overwriting creating a patchwork of understandings, a deeply 'ingrained' jumble of uses–Mollison compares this to the kind of landscape that he hopes one might create in *a Permaculture*. It's comparable, for instance, to that old-style European landscape, a forest, wherein various members of the community had rights to collect timber, while the rights of others allowed them to graze their pigs and geese on the acorns, seeds and ephemeral vegetation of various sorts, where (in season) a beekeeper might 'fatten' a hive or two of bees, and hunters might pass through the area harvesting animal and bird life. All were known to have a right (within a governmental system) to operate for their personal benefit from out of the same piece of property. Students of common property would undoubtedly be more familiar with this kind of activity than what the average citizen might be. There's no need though, I think, to believe that we're speaking of 'commons' as such. Land could have been so designated, but the 'overarch' might as easily have been privately owned, and rights been recompensed to the 'lord' at agreed-upon rates.

I would like to turn to one or two examples from the literature just to illustrate this point more: to demonstrate it is a well-established principle in the history of civilized people in various places, and that quite happily-functioning social arrangements can exist in circumstances where differential rights are claimed over the same piece of property.

Let's just stop to say that there can be no suggestion that this discussion has anything to do with the geographical extent of territories–the capacity of indigenous people, here and elsewhere, to recognize and agree with neighbours on the boundariers of their ancestral country (see e.g., Davis & Prescott, 1992: 20)–what is under consideration is the possibility for (legally) defensible claims to exist over the same piece of 'landed property' at one time. One instance–within the British, and for that matter Australian, tradition–which springs immediately to mind is reuse of old graveyards; it is a common practice to bury new bodies on top of old bodies. One assumes the old body does not lose its tenant's right to that particular piece of burial ground, it merely assumes a joint right in association with the occupant above.

Equally, we understand that on a road, all sorts of users have the right to pass on the public highway. The clutter of motorcars does not diminish (in normal circumstances) the use-right of pedestrians or bicyclists–on certain parts of the road at least. The same style of cooperating uses, by tourists, hikers and trail-riders, are coming to be more acceptable in our national parks, as well. The principle in question is one of a right of access and use, and any number of individuals can exercise it during a certain period–what McKean (1997: 1) calls "rules of use, techniques of cooperation". Presumably, when all try to exercise a particular right all at once this has to be negotiated and in modern society is usually controlled by *regulations* for use of that particular property. This represents a principle in no way different (bar its complexity) to the separate rights of agricultural leaseholders compounded with those of the government servant who inspects conditions of lease fulfillment, and the mineral prospector (and possible later miner) who seeks subterranean minerals.

Climate of change

During the last fifty years or so (since World War II), considerable change has occurred in Australian industry, two aspects of which interest us most here. One has to do with the replacement of agriculture as the principle or 'basic' industry of the Australian economy, and the other with the declining fortunes of agriculturalists within both our economy and our social system.

Industrial development which began during WWII to provide the basic armament industries continued after the war with the influx of migrants and capital, creating a strong industrial base in the countryside, but much of that benefit had been lost as 'the long boom' came to an end in the early 70s (Broomhill, 1992: 26–40). Much of Australia's manufacturing industry now has been lost either to decrepitude or to migration 'offshore', and the two primary industries, agriculture (in general) and mining, have become the principal bases of the Australian economy.

In the early 70s, Gregory (1976: 71–91) saw the mining boom as a 'danger' for agriculture. In his view–in what came to be called *Gregory's Thesis*–developments in mining and in agriculture would cause exchange rates to move 'against agriculture' and inasmuch as mining was growing at that time, the strain this created within the Australian economy put pressure on international markets for agricultural commodities because of the ways in which mineral ore marketing was causing currency exchange rates to alter.

'Currency deregulation' over the past 20 years has removed some of the pressures that seemed like a concern to Gregory in the 1970s. Nevertheless, both miners and agriculturalists receive considerable concession in regard to the costs of their production from government and through 'loopholes' in the tax system. The graziers and their organization, the National Farmers Federation, cooperated with the Keating government in 1993 to produce the (Commonwealth) Native Title Act. They claim this was on the understanding that Native Title had been extinguished on grazing leases. They protest now, perhaps legitimately, that they feel let down by the Wik judgement which makes that particular point of view untenable, any longer. As an outsider, it seems to me that their having been disabused of a misinterpretation–and apparently one shared by Prime Minister

Keating and his government–that Native Title had been extinguished, is just a fact of life. Laws change, circumstances do too, and in this case, discovering that a mistake had been made does not invalidate the decisions made while that mistake was believed. This does seem a bit disingenuous on the part of the graziers, too, since many leases have come into existence or been renewed since 1970 and farmer (and miner) representatives have expressed every willingness to have them remain in place.

Resolutions

How can we as a citizenry come to terms with the fact of a new legal situation applying in fifty percent of the state of Queensland (42% of the land area of the Commonwealth of Australia)?

It has heretofore been the graziers' lot–by dint of their control of large proportions of the Australian landscape–to occupy a position of high rank within the society. It might be, now that the right of Aboriginal people to that same land has been established–within a context of different rights being exercisable over the same piece of property–that aborigines, as large landowners, should be entitled to the same esteem as (non-Aboriginal) graziers had once held within our social system.

That proposition seems to me to have two problems associate with it: one of them is that Australia is a deeply racist society, and such apportioning of high esteem to Aboriginal people represents a mental leap most white Australians have difficulty making; but the other problem seems to me to be one of more longstanding and we are offered an opportunity at this unique point in our history to alter it. It is that we have established a social structure organised on a basis of control of private property, and current events offer a unique opportunity to replace that system with a new basis of apportioning esteem within Australian society. My belief is that we must reconsider the basis of our social system, the means by which we apportion esteem and the way in which certain groups are treated inequitably.

Without wanting to reduce the amount of esteem that Aborigines as the original owners of this continent are entitled to, I want to seize on the opportunity of the present circumstance to reconsider the basis of our social status system and to suggest some possibilities–ones that might become based on 21st century values and considerations of the kind of society Australia might reasonably be over the next 100 years. In seeking an appropriate basis on which to establish our Republican government and Constitution when we inaugurate them–hopefully within the next few years–what values might we enshrine?

Conflicting Tenure Types and Social Structures

The present situation is clearly one of considerable mistrust and uncertainty, which Farley, now operating as a negotiator, sums up as:

> Many pastoralists feel they are under siege. Wool and cattle prices have been low for years, there's been a run of bad seasons, *social structures are changing rapidly*, services are contracting and more and more conditions are being imposed on their use of land [(Lawrence and Killion, 1994)]. Native title is another imposition, another threat, and because it's new, it's not well understood, they naturally are fearful.
>
> For their part, miners need absolute security of title to safeguard the interests of their share-holders. They also need to generate dividends for shareholders or investment will fall away.
>
> Indigenous people are absolutely frustrated at having first to constantly establish their rights and then fight to have them accepted. The reaction of the non-indigenous community is regarded as mean-spirited–always grudging and looking for loopholes to wind back the gains they make.
>
> The courts have done more to advance indigenous rights than the political system (Farley, 1997:4).

However,

> Many non-Aboriginal pastoralists enjoy cooperative relations with their Aboriginal neighbours, providing an important model for a society based on reconciliation rather than domination and denial (Taylor, 1997: 15).

It behoves us to seize upon such models, and attempt to elaborate their conditions of success.

In international affairs at present, matters of importance are often offered for consideration with suggestions for a 'cooling-off period', a 'political commitment' to finding a solution, and sometimes a 'partial lock-in' where the contending parties agree to closet themselves and continue discussions until a draft agreement is reached. Arguing from a position of administration of common property, Ostrom (1990: 7) proposes, "I would rather address the question of how to enhance the capabilities of those involved to change the constraining rules of the game to lead to outcomes other than remorseless tragedies".

The issues which have been raised so far, then, require us to consider what to do with public ownership; how to re-apportion cost, and returns, to land use; and how to establish a new model of status ascription. I want to begin discussion with a list of possible ways out of the current political impasse:

- do nothing, and accept the existing 'uncertainty'
- recognize land as national estate
- increase rents to an economic level (which may include extinguishing pastoral leases and paying compensation, where possible and appropriate)
- establish a bidding system for access to land, and use it as the basis of a reformed tax system
- learn from international experiences in shared tenures

Within a range of understandings of the words, none of the interest groups mentioned above is entirely content with the *status quo*.

Taylor (1997) adds new dimensions to our understanding of the place of graziers in contemporary Australian society. His particular aim is to demonstrate that graziers are not in fact the independent operators they proclaim (and on which their claim to high status and special social approval is based), but their wealth has been established on government intervention. Historically, they had control of aborigines through a native police force whose job was to annihilate, at the behest of graziers, local aborigines who defended their land claims at that time too vigorously. The point could be made here too–although Taylor doesn't make it in so few words–that, as a result of the government annihilating the aboriginal population {murdering the majority, and locking up the rest, in what Taylor refers to as "concentration camps (Taylor, 1997: 10)" (native reserves)}, land vacated by the aborigines was made available <u>at no</u> personal <u>cost</u> to the graziers as pasture for their flocks and herds.

> Compensation was never paid for land seized, nor was Aboriginal consent sought. Hence all Australia may properly be considered the stolen property of Aboriginal peoples whose descendants retain some legal entitlements under common law. Any attempt to further alienate lands while claims are pending, amounts to dealing in stolen property (Taylor, 1997:16).

Grazier independence has built too, Taylor continues, on the provision of infrastructure by governments, both state and federal; provision of land at very cheap rents–and no policing of the conditions of these rental agreements and by subsidies on agricultural inputs for a large proportion of Australia's history. "The five major components of subsidies, in order of diminishing significance (Taylor, 1997: 22), were:

- funds for 'restructuring', which explicitly favour land concentration into large holdings;
- industry research and development through the Department of Primary Industries and the CSIRO;
- tax concessions;

- interest rate drought relief ...; and
- diesel fuel rebates."

Taylor (1997:22) is careful to point out that the big graziers and the finance companies including the banks and the miners are the rich in rural society, and a clear distinction needs to be made between their position, their politics, and their aims compared with those of small agricultural holders (see also, Nankivell 1992).

I believe we must first give some consideration to the concept of public ownership of land–the state commons, as they were designated earlier–and to the costs of land use as against the returns to land use. As I mentioned before, Taylor (1997) argued that the graziers have for a long period of time had access to the state commons at extremely low cost and it seems clear that their activities have degraded the common weal quite considerably in ways that responsible management will take a very long time to restore, if ever (Lockie and Vanclay, 1998).

One feature of responsible land [state-property commons] management would seem to be that the state should begin to charge reasonable rents to make recompense to the people of the State for the use of *our land*. It would seem clear that such rents would alter the economics of agricultural production in these areas and that might precipitate abandonment of large tracts of grazing country–in the western part of the state, at least. Three issues arise from that:

- displacement of present agricultural–not unusual in Australian 'structural adjustment', and Taylor argues that their production could be replaced by a ten percent increase in production by (mostly freehold) farmers in higher rainfall areas ...
- [W]hy has no-one at this stage suggested we think seriously about extinguish-ing Pastoral Leases.... It is not unusual to have leases terminated and compensation paid (1997)?
- and a maximum of 1500 families is involved, at present, even if every last one left;
- clearing the land for other (possible native title) claimants to make use of it; and
- controlling of feral animals and plants (and thereby producing jobs for their controllers).

Approaching the issue from a slightly different angle,

> Much of land's market value depends on whether it contains important natural resources, is located in a thriving community, or has access to services and infrastructure provided by government. The nineteenth-century American philosopher Henry George argued that all these values were created by something other than private action, and should therefore be captured for public use through taxation (Ingerson, 1997: 3).

Day (1995) has recently pursued this point, also along a *Georgist* line, contributing valuably to another thrust of the historical conjunction of change processes within which Australia is currently embroiled. Why not establish a taxation system, he proposes, based on land taxation, for the very reason that the values created by human association reside within the 'real-estate values' of human settlements? In the context of our developing Republic needing a new basis for taxation, the time of the revolution in thinking about the place of land within our national self-concept might also be the ideal time to reorganize our public revenue raising capability around land as real-estate.

Ingerson proposes a lesson from present US urban experience:

> A few experimental forms of land ownership and management in the U.S.–including land trusts, neighborhood-managed parks, community-supported agriculture and limited-equity housing cooperatives–explicitly avoid the extremes of private or public property. All these 'new' forms of common property...aim to foster or protect specific land uses or groups of users.
>
> These experiments with property rights and responsibilities raise questions that few researchers, either on urban development or on common property, have yet addressed. When and how should local policymakers support experiments with 'common property'? For example, should local and state officials help to

> remove regulatory barriers to group ownership of land, or support new criteria for mortgage financing of group-owned land? (Ingerson, 1997: 3)....

Especially, she considers the work of economist William Fischel (1995) which has applied similar thinking to U.S. local governments' primary dependence on land-based (property) taxes. He sees all residents in a jurisdiction as commoners who share an interest in maximizing local land values.

Again, though, this raises the spectre of a new claim against their land for indigenous Australians at just the time when their rights in land had been made law.

Approaches to Conflicting Tenure Resolution ('Co-management')

Attempting to see his way through the present impass to negotiations based on respect, Rick Farley declares:

> In my view, creation of a negotiating forum and process is the first step. The issues are incredibly complex–two laws and many cultures are meeting. The onus is on all parties to respond in a measured, constructive and respectful way. The outcome will determine whether Australia becomes an harmonious society, or one racked by division and strife (Farley, 1997: 11).

McKean proposes that the way forward for common property management is for us to examine *co-management* and the relationship between common property and commerce (McKean, 1997: 1); and Birkes (1997: 1) points out that "the 'co-management strategy' makes two basic assumptions:

- local people must have a stake in conservation and management, and
- partnership of government agencies and local communities and resource users is essential", and "three key questions seem to define successful co-management (1997: 2):
  1. Are there appropriate institutions, both local and governmental?
  2. Is there trust between the actors?
  3. Is there legal protection of local rights?".

The need, then, is for a regulatory regime which will command respect and cooperation. Ostrom (1990: 91–101) proposes that the most enduring common property resource arrangements have been characterised by clearly defined boundaries, congruence between appropriation and provision rules and local conditions, collective-choice arrangements, monitoring, graduated sanctions, conflict-resolution mechanisms, minimal recognition of right to organize, and nested enterprises. Jentoft's assertion (following Scott), that institutions consist of cognitive and normative as well as regulatory structures, emphasises the importance of convincing the community that cooperation is a vital activity–of 'institutionalising' cooperation, indeed:

> ...Dick Scott, a sociologist at Stanford,...argues that '(I)nstitutions consist of cognitive, normative, and regulative structures and activities that provide stability and meaning to social behavior.'
>
> ...[I]nstitutions...not only create restraints. Institutions enable, authorize and legitimize. Institutions empower, they provide licenses and, hence, opportunities. They confer rights as well as responsibilities. They define what is appropriate for a particular person to do, what is required of him, what is morally accepted and justified, and they help him to make sense of the world. Thus, institutions are more that a set of ramifications, a framework within which actors pursue their self-interests in a strategic, cost-benefit manner. Interests are socially constructed, not naturally derived, and institutions define what these interests are, how they are acquired and get internalized by the individual. In short, from our perspective, institutions are not only external to the individual. People also get institutions under their skin (Jentoft, 1997: 1).

As people learn that the social forms our society creates are the responsibility of each of us individually and all of us collectively,

> Decisions are made according to the perception of images of the future and of the consequences of decisions, and they are made according to a value

> structure which is very largely learned, and which depends...on the individual image of identity. A soldier behaves like a soldier, a barber like a barber, ...because each has an image of identity according to which only certain types of behavior are appropriate, that is, highly valued, and other types are not (Boulding, 1977: 286–7; in Hardin).

As it happens,

> In 1992, the Prime Minister, Paul Keating, announced the development of a National Aboriginal and Torres Strait Islander Tourism Strategy.... This strategy aimed to encourage self-management, self-determination and economic self-sufficiency in tourism and to provide a form of tourism that was culturally, environmentally and economically sustainable - requirements which were in line with that government's policy of promoting ecologically sustainable development...(Trotter, 1997: 1, 10).

A couple of examples of these principles in action towards co-management in Australia are outlined below.

> The Cape York Land Council serves nineteen communities on Cape York Peninsula. The Land Council runs land claims under state and federal legislation, and has negotiated a number of joint ventures. With Injinoo Community Council, the Land Council negotiated the buy-back of Pajinka Wilderness lodge. Formerly operated by a subsidiary of Australian Airlines, the lodge is now run by the Injinoo community. Eighty percent of the staff are Aboriginal, and the lodge is Aboriginal owned and managed....
>
> More recently, the Land Council and traditional owners negotiated the Starcke settlement, an agreement with the Queensland government which will see two-thirds of the Starcke lands become a national park. The traditional owners will be involved in management of the park. The remaining third of the Starcke lands will become Aboriginal freehold land, where there are plans to investigate the possibilities of eco-tourism. The traditional owners opposed the setting aside of a mining reserve in Starcke, until a compromise was reached limiting the reserve to fifteen years.
>
> However, south of Starcke at Cape Flattery the Cape York Land Council and Hopevale Community Council have negotiated a joint venture with Mitsubishi to mine silica. Aboriginal communities are aiming for financial independence. Where mining allows for Aboriginal equity and jobs, and is environmentally responsible, we'll consider it (Excerpted from Woodward, 1994).

They seem to be satisfying Ostrom's (1990) proposal that *commoners* must have "shared a past and expect to share a future." They must be capable not just of "short-term maximization but long-term reflection about joint outcomes."

Farley presents yet another model: **The Canadian Approach**

Other countries have faced up to similar issues and their conclusions may provide some lead to Australia. In Canada, a Royal Commission on Aboriginal peoples published its report late last year, entitled 'People to People, Nation to Nation'.

These are some selected extracts:

- 'Seeking a better balance of political and economic power between Aboriginal and other Canadian governments was the core and substance of our work. Progress on other fronts, unless accompanied by this transformation, will simply perpetuate a flawed *status quo*.'
- 'We emphasise the importance of an understanding of history. We cannot expect to usher in a new beginning unless we reckon first with the past.'
- 'It is wrong to suggest that all people should be treated the same, regardless of inequalities in their situation.'
- 'It is wrong to turn a blind eye to the dispossession and racism that distort the circumstances of Aboriginal people and limit their life chances.'

- 'It will take an act of national intention–a major, symbolic statement of intent, accompanied by the laws necessary, to turn intentions into action' (Farley, 1997: 9)....

This paper has argued–"from an historic, moral and practical perspective (Margaret Reynolds, April 2, 1998: 1337)"–that the changed legal situation forces Australians to develop a new relationship to property–especially agricultural property. A range of negotiating possibilities have been proposed and illustrated. Australia is not a country at the point of 'daggers drawn' with regard to solving the considerable problems raised by our recent High Court judgements–our need for new institutions to guide us into our new millenium, but rather we are at a point of being able to choose, differently for different circumstances, a variety of solutions. There can be a society which rejects property as the basis of status apportionment, and reaches for inclusiveness in citizenship rights, and claims against the common wealth.

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Appendix 1

Excerpt from:

INDIGENOUS TO AUSTRALIA: THE MABO CASE AND THE NATIVE TITLE LEGISLATION - THE LEGAL ISSUES IN RECOGNISING NATIVE TITLE IN AUSTRALIA

M.A. Stephenson, BA LLB LLM

...

7. The Concept of Native Title

Native title rights are defined in section 223 of the Commonwealth Act [The Commonwealth Native Title Act 1993 (Cth)] which legislatively adopts the Mabo decision but without codifying or specifying exactly what native title involves. This section provides that native title means the rights and interests of Aboriginal peoples in relation to land and waters where the rights and interests are possessed under traditional laws and customs. The section also requires that the rights and interests are recognised by the common law of Australia. As the common law changes so will the definition of native title and it therefore remains necessary to refer to the common law concept of native title in Mabo and subsequent decisions. The rights or content of native title, that is the rights which relate to the use of the land and its resources, are to be found in the traditional customs and practices of the native community.... The actual content of native title is a bundle of rights which will vary from group to group depending on the traditional customs of the group. These rights would include traditional rights such as hunting, gathering and fishing rights; and as part of the continuing evolution and development of customs this could possibly include rights to commercially develop land and resources.

The precise content of native title rights will depend on the interpretation given to legislation purporting to vest ownership of resources in the Crown. Such legislation may have the effect of impairing or extinguishing native title rights. The Commonwealth Native Title Act 1993 (Cth) provides that a State may confirm ownership of natural resources such as State ownership of minerals, petroleum, quarry materials and fauna, together with the State's rights to use, control and regulate water. Existing fishing access rights are stated to prevail over private and public fishing rights and public access has been preserved to beaches, coastal waters, waterways and other public places. It is stated in the legislation that confirmation of ownership of resources will not of itself extinguish or impair native title rights and interests....

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8. The Relationship of Native Title with other Land Holdings

Pastoral Leases

In Australia the system of Crown leasehold (not freehold) is the basic tenure of many pastoral properties. Grants of pastoral leases are generally considered as extinguishing native title thus no claims can be made over land that was once subject to a pastoral lease no matter for how brief a period of time. However, the question of leases extinguishing native title is currently the subject of argument in the Wik appeal to the High Court. One issue that remains unclear is the question of whether a pastoral lease reserving traditional Aboriginal rights preserves native title itself.

The Native Title Act 1993 (Cth) creates an exception to the extinguishment of native title by pastoral leases. Section 47 enables Aboriginal people who hold a pastoral lease to claim native title and receive the benefits of native title under the legislation. It remains necessary to prove the traditional connection with the land to establish native title rights and this may be a difficulty where a prior pastoral lease has been held by non-Aboriginal tenants. Recognition of native title on pastoral leased land may have implications for mining. For example, where a mining interest is currently undertaken on that pastoral lease any renewal or variation could become subject to a right to negotiate.

National Parks

Native title, under the Native Title Act, could also be claimed in National Parks except where that title has been extinguished by a prior grant of freehold or leasehold before the area became a National Park. The full extent of native title rights in National Parks is not clear. In accordance with section 211 of the Native Title Act 1993 (Cth) native title rights of fishing and hunting for non-commercial purposes may be carried out except where a law controls or regulates hunting and fishing solely in relation to the Aboriginal community. Arguably native title rights may not be restricted by conservation or management plans in National Parks unless regulations governing such plans were directed specifically for the benefit of Aboriginal people. Camping and lighting of fires are generally restricted in National Parks in Australia. Aboriginal burning off, for example burning land to flush out small animals, could be part of the traditional hunting methods of some groups. Aboriginal fires and occupation of native title land in National Parks may arguably be covered by one of the categories of activities (hunting, gathering, cultural or spiritual) in section 211 of the Native Title Act 1993 (Cth) that attract exemption from compliance with permit or licence requirements.

Mining

Under the Native Title Act 1993 (Cth) the creation, variation, renewal and extension of rights to mine and explore on native title lands are subject to the native title holder's right to negotiate. This is not a right that freeholders enjoy in Australia. While the right to negotiate does not necessarily mean a right to a percentage of the royalties, it may allow native title holders to negotiate for joint ventures with a mining company or it could facilitate agreements for the building of facilities that would benefit the whole community, such as hospitals, clinics, schools or housing. It could also encourage agreements for job training or employment of local people. Confirmation of the ownership of minerals by the Crown would be expected to occur in most States.

Appendix II

The Wik Judgement

from "Pastoral Leases and Native Title", in Hiley, G. (1997) *The Wik Case: Issues and Implications*

In essence, the majority of the High Court ruled that a lease granted pursuant to a statute is different from a lease at common law. The distinction is relatively straightforward. A lease at common law is usually in the form of a commercial transaction between two parties and has, as an essential component of the transaction, a transfer of exclusive possession to the lessee. A statutory lease, on the other hand, does not necessarily involve a grant of exclusive possession. In order to determine what is actually granted under a statutory lease, it is necessary to consider the terms of the grant, the legislation under which the grant is made, and, if necessary, the legislative intent.

In applying these principles to native title, the majority found that the pastoral I eases concerned, both by their own terms and in light of the legislation, in not specifically granting exclusive possession to the grantee, left room for the possibility that native title may exist. The court went on to say that whether or not native title continued to exist could only be determined following a factual finding of what the actual native title rights are and whether those rights could co-exist with the grantee's rights. To the extent that there is any conflict in the rights, the rights of the grantee (for example, the pastoralist) prevail. Importantly, the court's ruling is not limited in its terms to pastoral leases. The principles enunciated apply equally to all forms of statutory lease.

Toohey J makes his position clear at 185 of the judgement. His Honour reasoned that in order to determine inconsistency, it is necessary to:

'focus specifically on the traditions, customs and practices of the particular aboriginal group claiming the right'. Those rights are then measured against the rights conferred on the grantees of the pastoral leases; to the extent of any inconsistency the latter prevail It is apparent that at one end of the spectrum native title rights may 'approach the rights flowing from full ownership at common law'. On the other hand they may be entitled 'to cone on to land for ceremonial purposes, all other rights in the land belonging to another group'. Clearly there are activities authorised, indeed in some cases required, by the grant of a pastoral lease which are inconsistent with native title rights that answer the description in the penultimate sentence. They may or may not be inconsistent with some more limited right.

This position is support by Kirby J. His Honour had this to say (at 275):

The search must therefore be one which is first directed at the legal rights which are conferred on a landholder by the Australian legal system. This is because legal title and its incidents should be ascertainable before the rights conferred are actually exercised and indeed whether they are exercised or not. In some cases the grant of such legal rights will have the inevitable consequence of excluding any competing legal rights, such as to native title. But in other cases, although the native title may be impaired, it may not be extinguished. The answer is to be found in the character of the legal rights, not in the manner of their exercise.