Note - Private Ownership of Territory under International Law: *Ure v Commonwealth*
[2015] FCA 241

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I INTRODUCTION

The Federal Court of Australia’s recent decision in *Ure v Commonwealth*¹ (‘*Ure*’) represents an interesting vehicle for considering issues regarding sovereignty, authority, territory and title. Raising the spectre of international law granting proprietary rights over territory occupied by private persons, this litigation’s potential ramifications for the doctrine of estates, acquisition of territory rules, and international legal personhood far transcend the pending appeal to the Full Court of the Federal Court of Australia. Broadly supportive of the decision, this note is designed to supplement and contextualise Justice Yates’ reasoning, and to canvas various alternative submissions possible upon appeal.

This note commences by outlining the factual background underpinning this dispute. It then considers Yates J’s application of the ‘act of state’ doctrine, arguing that *Ure* continues the clarification of the principle evident following *Habib v Commonwealth*.² Consideration is then given to the possibility of a customary international legal rule or foundational principle permitting individuals to ‘occupy’ territory, concluding that substantial impediments hinder the applicant’s claim. Presuming these are overcome, the note then considers the more significant evidence supporting the existence of a duty, tempered by doctrines of colonial law and property law, requiring new sovereigns to recognise pre-existing property rights.

I FACTUAL BACKGROUND

*Ure* was a special case filed in the Federal Court of Australia pursuant to the Federal Court Rules 2011 (Cth) rr 30.01, 38.01. The applicant, Ms

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² (2010) 183 FCR 62 (‘*Habib*’).

Doreen Ure, alleged that her predecessor-in-title, Mr Alexander Ure, had acquired, by 19 March 1970, ‘full proprietary rights in the Islands and adjacent waters and seabed’ surrounding Elizabeth and Middleton Reefs, approximately 200km north of Lord Howe Island. The special case proceeded upon the assumption that these territories were both terra nullius and res nullius at all relevant times.

The applicant submitted that various acts conducted in Mr Ure’s private capacity amounted to effective occupation of these territories, establishing ‘ownership’ under international law. The applicant sought a declaration that the ensuing proprietary rights subsisted until their incorporation into Australia, contemplating a subsequent claim based upon the ‘acquisition on just terms’ power in the Constitution s 51(xxxi).

The Commonwealth of Australia responded by alleging that the Crown had acquired the territories by the critical date identified above. Consequently, it was submitted that the ‘act of state’ doctrine thus rendered the matter non-justiciable.

Materially, the questions reserved regarded whether:

a) following these submissions, was the matter justiciable?; and

b) if yes, could the applicant establish that proprietary rights could accrue, in these circumstances, under international law?

Yates J responded to these questions on 17 March 2015, determining that the ‘act of state’ doctrine did not preclude consideration of the case, but that the applicants could not demonstrate that international law permitted territorial occupation by private individuals. The applicants filed a notice of appeal on 2 April 2015.4

II ACT OF STATE

As McTiernan J indicated in the Seas and Submerged Lands Case, ‘acquisition of territory by a sovereign state for the first time is an act of state which cannot be challenged, controlled or interfered with by the courts of that state.5

In Ure, the Commonwealth invoked this principle to challenge the application’s justiciability, alleging that their submission that sovereignty had been asserted over the Islands meant that the Court was obliged to accept this characterisation of the Crown’s historical actions as ‘acts of

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4 Federal Court File No NSD343/2015.
5 New South Wales v Commonwealth (1975) 135 CLR 337, 388 (‘Seas and Submerged Lands Case’).
state’ effective to acquire the territory in issue, thus necessitating the application’s dismissal.6 Yates J dismissed this argument, reasoning that acceptance of this defence would vest the submissions with ‘a quality of conclusiveness that an allegation in a pleading does not possess’.7 It is submitted that this correctly reflects the principle’s operation, and further contributes to its recent clarification.

The ‘act of state’ doctrine has enjoyed a fraught existence in Australian jurisprudence, with confusion surrounding its source, nature and scope.8 Perram and Jagot JJ in Habib substantially clarified this position, holding that the doctrine, founded upon international comity and the separation of powers, cannot ‘trump’ the Constitution ss 61, 75 and thus evade judicial review or Constitutional limitations upon executive power.9 Accordingly, Ure joins Hicks v Ruddock,10 Re Ditfort11 and Habib in clarifying the modernising the doctrine, emphasizing that it does not demand unprincipled acceptance of an executive ‘ipse dixit’.

These authorities substantially support Yates J’s conclusion that the doctrine does not prohibit Courts from considering ancillary matters which do not impugn the ‘correctness’ of alleged acts of state. These include whether the alleged acts occurred at all, whether they correctly constitute ‘acts of state’ and, importantly, the ‘legal nature and effect’ of such actions under domestic and international law.12 Ure thus brings the ‘act of state’ doctrine into conformity with approaches governing curial consideration of prerogative powers.13 Yates J’s determination also echoes international authority, mirroring the Supreme Court of Canada’s dismissal of similar submissions made in indigenous land rights litigation.14 Accordingly, following Ure, the ‘act of state’ doctrine appears largely confined to operating as a ‘super choice of law rule’, applying predominantly where Australian courts must determine the ‘validity of sovereign acts of foreign states’.15 The importance of the concept of ‘foreignness’ as a limitation upon the doctrine’s operation was not addressed in Ure.

6 Ure [2015] FCA 241 [19]-[21].
7 Ibid [67].
12 Ure [2015] FCA 241 [72]-[73].
14 Calder v A-G (British Columbia) (1973) 34 DLR (3rd) 145, 211.
III PRIVATE TERRITORIAL OCCUPATION

In answering the second reserved question, the applicants argued that the Spitsbergen Treaty,16 and the Norwegian and American Governments’ treatment of Mr Hagbard Ekerold’s presence upon the Island of Jan Mayen, demonstrate that international law recognises both a ‘permissive’ rule allowing private individuals to obtain territorial rights through occupation of terra nullius, and a ‘mandatory’ rule, demanding respect for those rights following transfers of sovereignty. The applicants alleged that the existence of these rules was further supported by the Supreme Court of Norway’s decision in Jacobsen v Norwegian Government17 and a legal memorandum drafted by Leigh Monroe, John Norton-Moore and Professor James Crawford.

Yates J considered this evidence did not demonstrate adequately extensive or uniform practice, not opinio juris, sufficient to support the existence of either rule alleged.18 His Honour observed that none of these practices demonstrated consciousness of any pre-existing legal rules. Instead, his Honour determined the evidence was ambiguous (Jacobsen), represented a ‘special regime’ which did not reflect any antecedent legal obligations (Spitsbergen Treaty), manifested a proposal for law reform (Memorandum) or did not support the applicant’s claim at all (Ekerold).19 Respectfully, it is submitted that this was the only conclusion open to his Honour on the basis of these submissions.

A Alternative Submissions

However, various alternative submissions may be advanced to support the proposition that either international custom, or ‘general principles of law’ within the meaning of the Statute of the International Court of Justice art 38(1)(c), permit private ownership of territory via occupation of terra nullius. These arguments proceed from the realisation that the institutions of ‘sovereignty’ and ‘territorial title’, whilst related, are divisible.20

Contrary to the arguments often invoked in acquisition of territory discourse, applying the Roman law doctrine of occupation to support such arguments is misplaced, as that doctrine was confined to movable

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16 Treaty concerning the Archipelago of Spitsbergen, opened for signature 9 February 1920, 2 LNTS 7 (entered into force 14 August 1925) (‘Spitsbergen Treaty’).
17 (1940) 7 ILR 109.
18 Ure [2015] FCA 241 [149].
19 Ibid [121], [131], [145]-[147], [152].
20 Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore) [2008] ICJ Rep 12, 80 (‘Malaysia/Singapore Sovereignty Case’).
objects including wild animals, fish and enemy property.\textsuperscript{21} Explicitly
excluded, land only became subject to \textit{occupatio} in later perversions of
the doctrine.\textsuperscript{22}

Instead, Immanuel Kant’s philosophy provides a stronger foundation for
the applicant’s contentions. Proceeding from primary principles of
autonomy, Kantian theory supports recognition of proprietary rights in
\textit{terra nullius} as a consequence of humankind’s natural law ‘right’ to
manifest one’s ‘external freedom’ by possessing and retaining such
‘objects of choice’ which are not under another’s control.\textsuperscript{23} This ‘freedom
to use’ is transformed into ‘ownership’ through the imposition of a
concomitant obligation on individuals to refrain from infringing upon the
possession of others, as to do so would reduce their freedom.\textsuperscript{24} Kant
specifically extends this reasoning to embrace territory, suggesting the
individual’s physical presence on particular territory, inextricable from
their body mass, manifests ‘possession’ (however fleeting).\textsuperscript{25}

From this foundation, Lockean labour theories of property, and Roman
legal notions of \textit{uscapio}, which attribute property rights on the basis of
concerted effort or ‘long occupation’ respectively,\textsuperscript{26} may develop upon
Kant’s foundation, to support the position that where territory is truly
‘unowned’ (\textit{terra nullius} in its original sense), one is free to ‘possess’ that
territory as an ‘object of choice’. Through ongoing exploitation and use,
this may accrue rights over that territory which demand respect. In this
respect, ‘proprietary rights’ represent a natural law institution operating
both \textit{erga omnes} and \textit{in rem}.

Such philosophy may provide a conceptual foundation unifying the
otherwise disparate recognition of private territorial rights in international
legal philosophy. Emmerich de Vattel presented the clearest such
exposition, arguing that

\begin{quote}
‘[a]n independent individual … may settle in a country which he finds
without an owner and appropriate land as his personal estate. Others who
\end{quote}

\begin{itemize}
\item \textsuperscript{21} Randall Lesaffer, ‘Argument from Roman Law in Current International Law:
Occupation and Acquisitive Prescription’ (2005) 16(1) \textit{European Journal of International
Law} 25, 41.
\item \textsuperscript{22} Ibid.
\item \textsuperscript{23} Sharon B Byrd and Joachim Hruschka, ‘The Natural Law Duty to Recognise Private
Property Ownership: Kant’s Theory of Property in his Doctrine of Right’ (2006) 56(2)
\textit{University of Toronto Law Journal} 217, 221, 241, 248.
\item \textsuperscript{24} Ibid 253-5, 258.
\item \textsuperscript{25} Ibid 263-5.
\item \textsuperscript{26} Lauren Benton and Benjamin Straumann, ‘Acquiring Empire By Law: From Roman
Doctrine to Early Modern European Practice’ (2010) 28(1) \textit{Law and History Review} 1, 14.
\item \textsuperscript{27} Benjamin J Ederington, ‘Property as a Natural Institution: The Separation of Property
from Sovereignty in International Law’ (1997) 13(2) \textit{American University International
\end{itemize}
later on wish to take possession of the entire country can not justly do so without respecting the rights and independence of this individual’.28

Benjamin Ederington, in a rare commentary on topic, identifies analogous statements in writings of Hugo Grotius, Samuel Pufendorf, Lassa Oppenheim and Paul Guggenheim.29 Accordingly, the applicant’s argument for a rule permitting private occupation of Elizabeth and Middleton Reefs is not unsupported in international law. It is acknowledged that, to some extent, reliance upon these provisions is dependent upon the somewhat unfashionable premise that these natural legal doctrines are encapsulated in the ‘general principles of law’ recognised as authoritative sources of international law.30

A number of judicial statements reinforce this position. In the United States Supreme Court’s 1823 decision of Johnson v McIntosh, Marshall CJ declared that, upon discovery, a ‘principle of universal law’ dictated that an ‘uninhabited country’ becomes ‘property of the discoverers’.31 United States v Fullard-Leo32 extended this principle to justify recognition of proprietary rights arising from the private acquisition of Palmyra Atoll. Furthermore, although ultimately disposing of the information via adverse possession, in A-G (British Honduras) v Bristowe, the Privy Council canvassed the possibility that various private individual’s acts may have vested ‘full possession’ and ownership of land in the British Honduras, enforceable against the Crown.33

B Outstanding Difficulties

However, even if submissions to this effect are made upon appeal, success remains unlikely, as various conceptual difficulties and overwhelming state practice hinder the applicant’s claim.

1 Private Actions

Predominantly, despite the previous section’s conceptual arguments, international law does not permit the actions of individuals to amount to a legally effective ‘occupation’.

Fundamentally, private individual actions are unlikely to sufficiently demonstrate the necessary widespread and unambiguous acquisition of control over the territory in issue. Although the actions alleged to

29 Ederington, above n 27, 268-9, 276-7.
30 For judicial support for this position, see eg, South West Africa (Ethiopia v South Africa) (Second Phase) [1966] ICJ Rep 6, 294-9 (Judge Tanaka).
31 21 US (8 Wheat) 543, 595 (1823).
32 133 F 2d 743, 746-7 (9th Cir, 1943).
33 (1880) 6 App Cas 143, 152-6.
demonstrate occupation remain unparticularised in *Ure*,[34] the *Minquiers and Ecrehos Case* sets a high threshold for demonstrating the intention required to constitute a ‘manifestation of authority’, rejecting the erection of houses and maintenance of hydro-electric stations as sufficient to constitute effective occupation.[35]

More insurmountable, however, is international law’s determination that private actions are incapable of manifesting the requisite *animus occupandi, effectivités* or actions *à titre de souverain* necessary to assume exclusive rights over territory.[36] It is well-established that effective occupation of *terra nullius* requires manifesting an intention to effectively administer the territory *as sovereign*. In this respect, the activities of private individuals, unconnected with the authority of any state, may not demonstrate such an intention, as their private nature renders them, *ipso facto*, incapable of manifesting the state ‘authority’, ‘jurisdiction’[36] or ‘sovereignty’,[40] required for ‘occupation’. This is repeatedly reaffirmed in decisions including the *Malaysia/Singapore Sovereignty Case*,[41] the *Land, Island and Maritime Frontier Dispute Case*,[42] and the *Guiana Boundary Case*.[43]

This wealth of jurisprudence regarding the unique nature of ‘official’ occupation substantially impedes existence of the rule alleged by the applicants in *Ure*. These thresholds are required as a result of the principle of ‘effectiveness’ which, as Malcolm Shaw identifies, underpins the legal institution of ‘title’ to territory.[44] In this respect, the nature of authority exercised by a territorial sovereign exists in a domain entirely separate to that inhabited by private individuals, manifesting modern equivalents to the Roman law doctrine of *imperium*, embodying the state’s unique power.[45] This distinction must be maintained as private individuals are unable to effectively discharge the imperative on

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[34] *Ure* [2015] FCA 241 [3].
[36] *Kaskili/Sedudu Island (Botswana/Namibia) (Judgment)* [1999] ICJ Rep 1045, 1104-5; *Arbitral Award on the Subject of the Difference Relative to the Sovereignty over Chiperton Island (France/Mexico) (Award)* (1932) 26(2) AJIL 390, 393-4.
[40] *Island of Palmas (Netherlands/United States of America) (Award)* (1928) 2 RIAA 829, 829 (‘Island of Palmas’).
[41] [2008] ICJ Rep 12, 51, 57.
[43] *Guiana Boundary (Brazil/Great Britain) (Award)* (1904) 11 RIAA 11, 21.
territorial sovereigns to protect one another’s rights within their territory – a natural concomitant of territorial control.\textsuperscript{46} Such reasons presumably underpin Judge Huber’s unequivocal declaration in \textit{Island of Palmas} that ‘territorial sovereignty belongs always to one, or in exceptional circumstances to several States, to the exclusion of all others’.\textsuperscript{47}

\section*{2 Legal Personality}

Compounding these problems, the applicants in \textit{Ure} must overcome the contention that private individuals lack international personality, rendering them incapable of holding and enforcing rights analogous to ‘title’ under international law.

As a result of the intertemporal law doctrine,\textsuperscript{48} any analysis must adopt the law in force as at the time of the alleged acquisition of sovereignty, which, in this case, predated any recognition that non-state actors may enjoy some degree of international personality.\textsuperscript{49} It is thus trite to observe that in the 1800-1900s, international law reflected Vattelian principles, taking little-to-no direct cognisance of individuals.\textsuperscript{50}

Thus, enabling private actions to create proprietary rights enforceable under international law spurs logical inconsistency, as the law does not recognise any individual as a ‘person’ capable of holding and enforcing those rights.\textsuperscript{51} Although it is accepted that an absence of enforcement machinery cannot deny the existence of rights which are otherwise firmly established;\textsuperscript{52} where the existence of a particular right is doubtful, it is submitted that such difficulties militate against recognition.

It is observed that, in a similar scenario, the absence of these twin considerations of legal personality and enforcement mechanisms led the High Court of Australia to vest ‘sovereign rights’ over territory exclusively in the Commonwealth.\textsuperscript{53} Furthermore, as private parties fall outside the protection granted by principles of non-interference and sovereign equality, any rights recognised would be inherently vulnerable.\textsuperscript{54} Any recognition of private territorial rights is thus

\begin{thebibliography}{99}
\bibitem{46} \textit{Island of Palmas} (1928) 2 RIAA 829, 839.
\bibitem{47} Ibid 838.
\bibitem{48} Ibid 845.
\bibitem{49} \textit{Reparations for Injuries Suffered in the Service of the United Nations (Advisory Opinion) [1949] ICJ Rep 174, 179}.
\bibitem{50} \textit{Kate Parlett, The Individual in the International Legal System: Continuity and Change in International Law} (Cambridge University Press, 2011) 11-16.
\bibitem{52} \textit{H L A Hart, The Concept of Law} (Clarendon, 3\textsuperscript{rd} ed, 2012) 82-3, 217-20.
\bibitem{53} \textit{Seas and Submerged Lands Case} (1975) 135 CLR 337, 364, 469-70, 505; \textit{Bonser v La Macchia} (1969) 122 CLR 177, 222.
\bibitem{54} \textit{Robert Jennings and Arthur Watts (eds), Oppenheim’s International Law} (Oxford University Press, 9\textsuperscript{th} ed, 2008) vol 1 – Peace, 678.
\end{thebibliography}
inconsistent with the Westphalian attempt to rationalise and harmonise the actors within the international system.55

Although the International Court of Justice,56 High Court of Australia57 and leading publicists58 each aver to the possibility of ‘entities’ without international personality owning territory, these rest upon the collective or representative status of the titleholder, and are, accordingly, not directly analogous to private individuals.

IV RESPECT FOR PRE-EXISTING RIGHTS

Although Yates J was not required to consider this in Ure, if the applicants successfully establish that international law permits proprietary rights to arise via private occupation of terra nullius, declaratory relief would require further demonstrating that international law demands respect for pre-existing property rights following changes in sovereignty. In this respect, the applicants rest upon a more stable foundation.

A Doctrine of Continuity

Legal treatment of pre-existing proprietary rights following changes in sovereignty historically depended upon whether territories was ceded or obtained by conquest (where rights subsisted until alteration, subject to treaties of cession), or settled (where rights were abolished as no rights-holders were considered to exist).59 A substantial body of early state practice from the French, English, Portuguese and Dutch Empires appears to support this ‘classical’ view of pre-existing rights which would defeat the applicant’s claim.60 Termed the ‘doctrine of recognition’, Lord Dunedin well-known dicta in Vajesingji Joravarsingji v Secretary of State for India most clearly captures this rule, suggesting

[any inhabitant of the territory can make good in the municipal Courts established by the new sovereign only such rights as that sovereign has, through his officers, recognised. Such rights as he had under the rule of predecessors avail him nothing.61

Despite its support, this principle has historically grappled with the alternative ‘doctrine of continuity’, which – at its highest – deems that

55 Shaw, Territory, above n 43, 62.
57 Administration of Territory of Papua and New Guinea v Guba (1973) 130 CLR 353, 397 (‘Guba’).
59 See the discussion of Brennan J in Mabo v Queensland [No 2] (1992) 175 CLR 1, 32-35 (‘Mabo’).
61 (1924) LR 51 Ind App 357, 360 (emphasis added).
any pre-existing rights not only subsist following changes of sovereignty, but are enforceable against any new sovereign.

International judicial support for this doctrine is widespread, encapsulated by the Permanent Court of International Justice’s *German Settlers in Poland* and *Certain German Interests in Polish Upper Silesia* decisions. Support reached its zenith in Viscount Haldane’s unequivocal declaration in *Amodu Tijani v Secretary of Southern Nigeria* that ‘[a] mere change in sovereignty is not to be presumed as meant to disturb rights of private owners’. Such cases reflect historical determinations from the United Kingdom and United States’ Courts, traceable at least to 1693. Accordingly, Guggenheim suggests this historical consistency confirms that the doctrine represents customary international law.

The ‘doctrine of continuity’ appears to proceed from the same natural law basis as the applicant’s primary rule, focusing upon the existence of proprietary rights distinct from the internal laws of any state.

Resultantly, maintenance and preservation of those rules is regulated on the international plane, which has historically supported ‘continuity’ of rights. Accordingly, this ground’s success is interrelated to the attitude adopted toward arguments raised in the previous section.

B Reconciliation with Common and Colonial Law

Although these questions exceed the scope of the special case presented to Yates J, the applicant’s success in *Ure* is complicated by both English colonial law and the common law doctrine of estates.

Although Yates J’s decision contains insufficient detail regarding this issue, it may be contended that any ‘occupation’ was not truly ‘private’ in nature. Instead, stemming from anonymous Court of Chancery decision and Blackstone’s refrain that ‘that if an uninhabited country be discovered and planted by English subjects, all the English laws….are immediately there in force’ and colonial law considered English subjects to ‘carry’ English law with them. Accordingly, contingent upon Mr Ure’s claims.
nationality as at the alleged occupation, any acquisitions may thus be 
automatically attributable to the English Crown.\footnote{R v Symonds [1847] NZPCC 387, 391-2.}

These concerns stem from the common law’s assumption that the 
document of estates renders the Crown the ultimate proprietor of all land 
under its authority.\footnote{Williams v A-G (NSW) (1913) 16 CLR 404, 439; Seas and Submerged Lands Case (1975) 135 CLR 337, 490.} As the recognition of native title rights,\footnote{Mabo (1992) 175 CLR 1.} and the 
anomalous existence of allodial landholdings in the Pitcairn, Shetland and 
Orkney Islands demonstrate,\footnote{McNeil, above n 57, 155-6.} this principle has never operated 
absolutely. The common law thus remains capable of recognising 
proprietary rights existing outside the tenurial system.\footnote{Mabo (1992) 175 CLR 1, 60.} Although 
unsatisfactory, this may occur through characterising the applicant’s 
rights as usufructs,\footnote{Guba (1973) 130 CLR 353, 397.} destroying and reconstructing’ their rights within 
the tenurial system,\footnote{Samantha Hepburn, ‘Disinterested Truth: Legitimation of the Doctrine of Tenure Post- Mabo’ (2005) 29(1) Melbourne University Law Review 1, 32-33.} or through characterising their interests as ‘bare’ 
rights or ‘mere equities’ transferrable only to the Crown.\footnote{Holden v Smallbrooke (1666) 124 ER 1030, 1031; Mabo (1992) 175 CLR 1, 89.} 

\section*{V CONCLUSION}

Of itself, Yates J’s judgment in \textit{Ure} is most notable for its contribution to 
further clarifying the ‘act of state’ doctrine in Australian law. In 
particular, his Honour’s consideration of international law’s recognition 
of private territorial rights was limited by the problematic examples 
submitted. However, as outlined above, \textit{Ure} presents broader 
philosophical and legal questions concerning territorial acquisition, 
private property rights and transition of sovereignty. Furthermore, the 
application canvasses questions of broader importance, challenging the 
‘common lawyer’s one-dimensional view of property’.\footnote{Western Australia v Ward (2002) 213 CLR 1, 95.} At publication, 
the Full Federal Court is scheduled to hear argument in the \textit{Ure} appeal on 
16 November 2015.