ABORIGINAL LAND RIGHTS—THE LONG SHADOW OF THE EIGHTEENTH CENTURY

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Delivered at a Meeting of the Medico-Legal Society held on 15th August, 1981 at 8.30 p.m. at the Royal Australasian College of Surgeons, Spring Street, Melbourne. The Chairman of the Meeting was the President, Dr. J. W. Upjohn.

In 1980, the Australian Broadcasting Commission's Boyer Lectures were given by Professor Bernard Smith, the distinguished art historian, who was in that year President of the Australian Academy of the Humanities.

The Lectures were entitled *The Spectre of Truganini*, and to their published version Professor Smith added a brief introduction which opens with this compelling and ironical observation:

> These lectures, unlike several important legal judgments of the 1970s which have found that Australia was acquired by peaceful occupation and settlement, are based upon the historical premise that the country was acquired by the forcible dispossession of the indigenous inhabitants of Australia from their ancestral lands, a process that might be more fittingly described as invasion and conquest.

The purpose of my lecture this evening is to examine, so far as I can, just what it is that lies behind the incongruity between legal characterisation and historical reality, to which Professor Smith amongst many others draws attention.

For incongruity there undoubtedly is. And this incongruity is currently being drawn to our attention more forcefully and more urgently than ever before in the nearly two centuries since British settlement in this country began, for, rightly or wrongly, the *legal* characterisation of British settlement underlies the whole aboriginal land rights controversy—underlies it, and, to some extent, may be thought to have created it.

Professor Smith does not overstate the position in any significant way.

On the one hand, it is perfectly true, as he says, that in "several important legal judgements of the 1970s" the Courts found "that Australia was acquired by peaceful occupation and settlement". He is referring, undoubtedly, to the decision in 1971 by Mr. Justice Blackburn in what is popularly called *The Gove Land Rights Case (Milirrpum* v *Nabalco Pty. Ltd.*[1] and to the High Court of Australia decision

of 1979 in the case of *Coe* v *The Commonwealth*.[2] I shall come back to these cases later. It is sufficient to say now that they did find, as Professor Smith asserts, that "Australia was acquired by peaceful occupation and settlement". It is also desirable that I should at this early stage make two short comments on that finding: first, it was not new—the Courts were affirming a point which they regarded as long-settled and, secondly, the point was seen as a point of law, a point as to the legal nature and character of the British settlement—the Courts were not purporting to find the historical facts. Yet the contrast between the conclusions of the Courts and the historical reality is, indeed, very marked, and entirely warrants Professor Smith's irony.

The British colonisation of Australia was not achieved "by peaceful occupation and settlement". It was achieved in the face of fierce, bitter and unremitting resistance from the aboriginal inhabitants, who fought, and largely lost, a long guerilla war against those whom they conceived as invaders.

It is fair to say, I think, that for a very long time white Australians have been reluctant to acknowledge the grim and distasteful historical reality of the guerilla war, but the evidence for it is overwhelming, and is acknowledged by all modern scholars, so far as I am aware.

Let us go back to the very beginnings. Perhaps I may say here, in parenthesis, that most of this lecture is about "beginnings" rather than about *current* problems and attempts to solve them, which is why my paper is entitled as it is.

The English precursors of settlement were, of course, Dampier and Cook. Dampier touched on the west coast exactly one hundred years before the colonisation at Sydney Cove—in January 1688. The aborigines resisted him. "They did at first endeavour with their weapons to frighten us", he wrote in his published narrative, "who lying ashore deterred them from one of their fishing-places". The context of this first recorded act of resistance should not go unnoted—the aborigines were defending their resources. In 1699, Dampier returned to the western coast in the *Roebuck*. Although he published nothing about it, the logbook of that voyage, which is in the Public Record Office, records a scuffle with the natives in which a seaman was speared, a native wounded with a cutlass, and a shot was fired.[3] The first blood has been spilled.

Cook's first contact with the aborigines is much better known, being told vividly and at some length in his Journal. Once again, as with Dampier, what he records is resistance. Indeed, he records a skirmish even more extensive than that experienced by Dampier in 1699. Here is the entry for Sunday, 29th April 1770, in edited form:

> Saw as we came in on both points of the bay several of the natives and a few huts, Men, women and children on the south Shore abreast of the Ship, to which place I went in the boats in hopes of speaking with them . . .; as we approached shore they all made off except two Men who seemed resolved to oppose our landing . . . as soon as we put the boat in they again came to oppose us upon which I fired a Musket between the two . . . and one of them took up a stone and threw at us which caused my fireing a second Musquet load with small shott, and altho some of the shott struck the man yet it had no other effect than to make him lay hold of a Shield or target to defend himself.
>
> Immidiatly after this we landed which we had no sooner done than they throw'd two darts at us, this obliged me to fire a third shott soon after which they both made off . . .

As Manning Clark has written, "in this way the European began his tragic association with the aborigines on the east coast".[4]

It should be emphasised that there is no reason to attribute aggressive intentions to either Dampier or Cook, or, for that matter, to Arthur Phillip and the other founders of the settlement at Sydney Cove in 1788; quite to the contrary in fact. But their obvious and sincere desire for peaceful relations with the aborigines must not be allowed to obscure the unhappy and perhaps still unpalatable reality that the aborigines, for their part, opposed the coming of the Europeans and fought them with all the skills and weapons at their command.

Let us look at the events of the first year at Sydney Cove, for it was the experience of this initial period of settlement which would of necessity determine the attitude of the law to the act of colonisation.[5]

Governor Phillip had been expressly instructed to conciliate and protect the natives, an order which coincided with his own disposition and philosophy. His problem was that he could achieve very little direct and personal contact with them at all. His attempts to fraternize were rebuffed. His friendly overtures were declined. When official parties approached them, by and large the aborigines melted silently into the bush. Certainly there were some encounters, but all too often they were violent; convicts were generally involved, and on both sides there were robberies, beatings, bloodshed and killings. Phillip and his colleagues almost always blamed the convicts for these incidents, but, however provoked, they demonstrated all too dramatically that the policy of conciliation was failing. The natives were resisting the settlement, actively and passively.

And Phillip knew the reason why. In a despatch to Lord Sydney of September 1788, he warned that the natives might attempt to burn the crops, "for they certainly are not pleased with our remaining

amongst them, as they see we deprive them of fish, which is almost their only support".[6] A month later he wrote: "The natives still refuse to come amongst us . . . they see no advantage than can arise from us that may make amends for the loss of that part of the harbour in which we occasionally employ the boats in fishing".[7]

In other words, Phillip saw that the natives were resisting because the white men were appropriating their resources.

Phillip felt that if he could only persuade an aboriginal family to live with them, some progress towards mutual understanding might begin, but all his coaxing to that end failed. Finally and very reluctantly, in late December 1788, he took a native by force for the purpose. The experiment was not a success. Although Phillip was to claim that the aboriginal (whose name was Arabanoo) became "perfectly reconciled to his situation" and encouraged the governor to feel more optimistic about these strange, difficult and incomprehensible people, the unfortunate man died of smallpox less than 5 months after his capture.[8]

Other First Fleet diarists were as aware as Phillip that the aborigines were hostile, that what they were encountering was resistance, expressed both in open violence and passive non-cooperation and that the white men were regarded as invaders and expropriators.

Thus Watkin Tench, writing about the conditions of the colony at the end of 1788, said bluntly that "unabated animosity continued to prevail between the natives and us" and described it as a "state of petty warfare".[9]

But none of these other chroniclers seemed to see as clearly as did Phillip that what lay at the heart of the trouble was not the occasional foolish stealing of native possessions by convicts who had set up quite a trade in "souvenirs", or even the molestation of women, but the wholesale European take-over of aboriginal resources. David Collins, writing years after the event, could still express surprise that the natives should have stayed out of sight in the first weeks of settlement, when it would have been obvious that "their visitors were occupied in works that indicated an intention of remaining in their country".[10] Phillip, as we have seen, was not so naive, although even he could not appreciate, as we now do, the nature and scale of the European intrusion in aboriginal eyes and the shock it produced to the aboriginal economy, culture and psyche along the shores of Port Jackson.

It is neither possible nor necessary for me in this paper to take the details of the story any further. For reasons which I shall be explaining, I am concerned with things as they were at the beginning of British settlement in this country, and I am suggesting that the early experiences at Sydney Cove provided direct, unambiguous and

powerful confirmation of the impressions gained earlier by Dampier and by Cook. The natives of New Holland would not welcome the Europeans. They would not cooperate in the establishment of settlements. They would resist encroachment upon their domains. They would fight.

In so far as it is relevant to look at the later history of the expanding British settlements, those conclusions are, in general terms, reinforced. As long ago as 1889, the New South Wales historian G. B. Barton, hardly a radical figure, summed it all up: "It was a war of races".[11]

So Professor Bernard Smith is amply justified in his claim that this country "was acquired by the forcible dispossession of the indigenous inhabitants . . . from their ancestral lands", and that the process looks much more like "invasion and conquest" than the "peaceful occupation and settlement" of the lawyers' assertion.

Why is there this extraordinary disparity between the findings of law and the findings of history? What can the lawyers possibly mean when they say that Australia was acquired by "peaceful occupation and settlement"? Are they talking the same language as the historians, and, if not, why not? Are they asking the same questions as the historians, and, if not, why not? What is the interplay in this matter between legal reasoning and what we perhaps too glibly call "the facts"?

To answer these questions, we must look at English law as it was in the last decades of the 18th century. In that age of exploration and expansion, it was important to know by what legal means a nation could acquire territory and establish colonies, especially in what (to European eyes) were newly-discovered lands, and what were the nature and characteristics of the colonies so established. The great international lawyers had been giving consideration to the matter since the previous century, but for Englishmen of the time of Cook and Phillip the clearest, most modern, most satisfactory and most definitive statement of the position had been that provided by William Blackstone in his famous *Commentaries* of 1765, a work of great authority and one of the run-away legal best-sellers of all time.

Relying, then, principally upon Blackstone, English lawyers drew a distinction between two kinds of colonies.

On the one hand, there were "conquered" or "ceded" colonies, being colonies established in territories which were already inhabited and had passed into the possession of the British Crown by either of the processes of conquest or cession. On the other hand, there were "settled" colonies, where plantations of colonists were set down in uninhabited areas—in territory designated as "terra nullius".

This is how Blackstone himself stated the distinction in the passage most often quoted:

> Plantations or colonies, in distant countries, are either such where the lands are claimed by right of occupancy only, by finding them desert and uncultivated and peopling them from the mother country; or where, when already cultivated, they have been either gained by conquest, or ceded to us by treaties. And both these rights are founded upon the law of nature, or at least upon that of nations.[12]

It was also clear law that the categorisation of a colony as either "conquered" or "ceded" (on the one hand), or "settled" (on the other), was a matter for the Crown, in the exercise of its prerogative in relation to the conduct of foreign affairs, and not a matter for the courts.[13]

For the legal regime of a colony, very important consequences followed from the choice of the appropriate category and this is where the link is said to begin with the aboriginal land rights controversy. If the colony were regarded as of the "settled" variety, then the legal assumption was that the territory, being "terra nullius", was without law, and the colonists brought the whole of the English law with them, so far as it was applicable. But if the colony had been "ceded" or "conquered", then respect was paid to the existing laws of the original inhabitants. These laws continued in force until changed or abrogated by the Crown.

Thus, had New South Wales been regarded as a "conquered" colony (clearly on the facts no question of "cession" arose), some account would have been taken of aboriginal law and some recognition given to aboriginal land claims of a proprietary or possessory nature. That, at least, would have been the theory of the thing.

The evidence makes it plain, however, that, from the beginning, the Crown treated the colony established in New South Wales (which at that stage comprised the whole of eastern Australia), and, in due course, all the other Australian colonies, as "settled" rather than "conquered". Definitive judicial recognition of this categorisation was given in 1889 in the Privy Council decision of *Cooper* v. *Stuart*,[14] but it had been beyond serious dispute long before that. In 1979, the High Court of Australia, in *Coe* v. *The Commonwealth*, refused (in effect) to entertain any reconsideration of the issue, and, given that the issue never was one for judicial determination, at any rate in a municipal court (see Jacobs J.), I have no doubt that they were right.

Curiously enough, it is hard to pinpoint in time or to document any actual decision by the Crown to categorize New South Wales as a

settled colony—or, to take the process of decision conceptually one stage further back, to classify the territory as "terra nullius". So far as I am aware, no one has ever come across, say, an opinion of the English law officers on the point, either before the despatch of the First Fleet when, presumably, they would have relied upon Cook's reports of the territory or after the establishment of the settlement when despatches from Phillip and others would also have been available.

Cook's own formal act of "taking possession" of the eastern coast in the name of King George III, on 27th August 1770, certainly implied that he, Cook, regarded the territory as "terra nullius". Under his additional secret and sealed Instructions, which he was to open only after he had observed the transit of Venus in Tahiti, he was ordered to discover whether or not there was a great southern continent, and, if there was, to explore it.

> You are also [ran the Instructions] with the Consent of the Natives to take possession of Convenient situations in the Country in the Name of the King of Great Britain; or, if you find the Country uninhabited take Possession for His Majesty by setting up Proper Marks and Inscriptions, as first discoverers and possessors.

Cook "took possession" in the second form contemplated in his Instructions, as if the country was uninhabited, as if it was "terra nullius".

But of course Cook created no colony in New South Wales, and by international law, even in the 18th century, territory could be acquired only if a formal taking of possession were followed up by actual and effective occupation. So Cook's action could not finally settle the question, at least as a matter of strict law.

Nevertheless, in practice it appears to have done so. Governor Phillip's Commissions and Instructions, the Statute authorizing the establishment of a criminal court and other official documents all proceed upon the assumption (sometimes openly expressed) that New South Wales is already a territory of the Crown. By implication, then, the validity of Cook's action is confirmed, and thus, by implication, his assessment of the territory as "terra nullius". It is significant that the formal ceremonies which Phillip conducts upon the arrival of the First Fleet do not include any further "taking of possession". They are ceremonies of a consequential nature, appropriate to mark the beginning of the actual occupation of new territory. Once again, then, the legal appropriateness and effectiveness of Cook's action is, by implication, acknowledged and confirmed.

Despite all this, it might, I suppose, have been open to Phillip, on the basis of his experience in the colony, to have advised the Crown

that the classification of the territory as "terra nullius" should be reconsidered. No grants of land to private individuals appear to have been made before March 1791,[15] and up to that point a re-assessment of the legal character of the colony would, I think, have been possible, if it had been thought necessary or desirable; after land grants had begun, it would have been much more difficult, to say the least. But there is not the slightest evidence to suggest that Phillip wished to question the basic assumptions, or that he was under pressure from anybody, either at home or in the colony, to do so. New South Wales was a "settled" colony in the Blackstonian sense, and that was that.

We are, therefore, and at long last you might say, brought hard up against the central mystery of this whole story.

Why did the application of the Blackstonian distinction to New South Wales cause it to be categorized as a "settled" rather than a "conquered" colony? Why was the eastern coast of Australia regarded as "terra nullius"? Why did officialdom make these seemingly absurd decisions, when the plain facts were that this territory was not uninhabited, and that the incursions of the Europeans were resented and resisted from the earliest days?

Various theories have been suggested, or can be suggested, by way of explanation for this apparent mystery. Only two of them, I believe, warrant our serious attention tonight.[16]

The first possible explanation runs along these lines. Native peoples living in a simple, tribally-organised society do not count as "occupants" for the purposes of the law relating to the acquisition of territory. Because their community is not structured in a recognizably European fashion, because it has no civilized polity, it may be disregarded. For legal purposes, their territory is "terra nullius".

I think one can say fairly confidently that this argument may have played some part in the classification of New South Wales as "terra nullius". Undoubtedly the social structures of the aborigines were not "civilized" in the European sense. But one cannot be certain about it. The proposition does not seem to have been generally accepted until well into the 19th Century; it had certainly not been favoured by the great international lawyers of the 16th and 17th centuries. There is no argument along these lines in Blackstone, its standing in international law at the time would have been doubtful, I know of no contemporary reference to it specifically in relation to New South Wales, and actual British practice had not always reflected it—notably, British practice in the Americas and in India. Nor was British practice to reflect it in the later case of New Zealand. Nevertheless, it seems that there was some authority for such an argument in English common law at the end of the 18th Century, or so (at least) says Sir William

Holdsworth,[17] and given that Australian aboriginal society was seen as quite astonishingly primitive, the point may have been taken.

There is, however, a second line of argument, a second possible explanation, for which the evidence is much stronger.

It turns, again, on the definition of what constitutes "occupancy" of territory for the purposes of the law of acquisition and the Blackstonian distinction.

"Occupancy" is not defined by reference to whether the lands are inhabited; it is defined by reference to whether the lands are cultivated. "Cultivation" is the significant criterion. It is this criterion which Blackstone himself used in the passage already quoted. There he made the distinction between the two kinds of colonies turn on whether the lands concerned were, on the one hand, "desert and uncultivated", or, on the other hand, "already cultivated". He did not, in that passage, make any reference to "inhabitation" at all.

In the *Gove Land Rights Case*, Blackburn J. said that the phrase "desert and uncultivated" was "Blackstone's own",[18] and certainly I can find no trace of it in earlier decided cases. But the "cultivation test", if I can call it that, had, nevertheless, a very long and distinguished ancestry in legal, philosophical and, indeed, theological writings.

It can be (and was) traced right back to the scriptural injunctions of the Book of Genesis. Was it not God Himself who commanded man to cultivate the earth? Adam was not set down in the Garden of Eden to loll about there in graceful Michelangelesque attitudes. No—Genesis tells us that "the Lord God took the man and put him in the Garden of Eden to till it and keep it" (2.15). Adam and Eve were instructed to "fill the earth and subdue it" (1.28). "Adam was a gardener", "Adam delved and Eve span"—our literature is full of references to the origin of cultivation, of husbandry, in the very Word of God, and the impact of this on modes of thought over the centuries had been profound.

Thus Sir Thomas More, to take a famous example, stresses the moral duty of good husbandry in his book, *Utopia,* written early in the 16th Century.

> For they count this the most just cause of war [he says, of his Utopians] when any people holdeth a piece of ground void and vacant to no good nor profitable use, keeping other from the use and possession of it, which notwithstanding by the law of nature ought thereof to be nourished and relieved.[19]

That passage positively bristles with ethical judgments about land use. Husbandry is a moral imperative. Man ought to cultivate the

land, it is his duty to cultivate the land, and if he fails to do so he forfeits his right to call it his own. He must concede that right to whoever will undertake the responsibility of husbandry.

At the end of the 17th Century, this same idea is elaborated at considerable length by John Locke, in his *Two Treatises on Government.* Locke argues that property rights in land arise out of the cultivation of it—that by adding his labour to it, man acquires rights to it.

> As much land as a man tills, plants, improves, cultivates, and can use the product of, so much is his property.[20]

He does not require the consent of his fellow-men for that recognition of title, because what he has done is in direct obedience to the "command of God". Hence, argues Locke, where native peoples do not cultivate lands, those lands are available to the first comers who use them productively.

These theological and philosophical ideas enter the law primarily through the work of the influential writer Vattel, whose book *The Law of Nations* was first published in French in 1758, with an English edition as early as 1760, just five years before Blackstone published his *Commentaries.*

Vattel argued that—

> The law of Nations will only recognize the ownership and sovereignty of a Nation over unoccupied lands when the Nation is in actual occupation of them, when it forms a settlement upon them, or makes some actual use of them . . . Every Nation is . . . bound by the natural law to cultivate the land which has fallen to its share . . . and when the Nations of Europe, which are too confined at home, come upon lands which the savages have no special need of and are making no present and continuous use of, they may lawfully take possession of them and establish colonies in them.[21]

It is, I believe, generally acknowledged that Blackstone derived the "cultivation test" element of his colonial distinctions directly from Vattel, and thus incorporated it into the common law.

A very significant endorsement of this reading of Blackstone—significant both for its date and for its authorship—occurs in Chalmers's *Political Annals of the Present United Colonies,* published in 1780. Chalmers was something of an authority in the area of colonial law. In a passage which Blackburn J. quoted in the *Gove Land Rights Case* (at 202), Chalmers said:

> No conquest was ever attempted over the aboriginal tribes of America: their country was only considered as waste, because it

> was uncultivated, and therefore open to the occupancy and use of other nations (Vol. I, p. 28).

That passage may be historically questionable, but as an affirmation of the common law distinction in Blackstonian terms, including the "cultivation test" element, it is highly important. When that common law distinction in its Blackstonian expression is applied to Australian conditions as the British first perceived them, the categorisation of the country as "terra nullius" and of the colonies as "settled" becomes, at length, understandable. For the aboriginal peoples did not cultivate the land in any sense known to Europeans. They were exclusively hunter-gatherers. They did not plough or dig or plant crops. To use the language of Vattel, they "rather roamed over" the land "than inhabited [it]".

All the early observers took particular note of this. From many possible examples, let me cite the comment of Captain Watkin Tench in his *Narrative* of 1788: "To cultivation of the ground", he said, "they are utter strangers". And he and others of the First Fleet were merely echoing and confirming what Cook had recorded in his *Journal* in 1770 (23rd August):

> The Natives know nothing of cultivation . . . They seem to have no fix'd habitation but move about from place to place like wild Beasts in search of food, and I believe depend wholy upon the success of the present day for their subsistance . . . In short these people live wholy by fishing and hunting, . . . for we never saw one Inch of Cultivated land in the whole Country . . . We are to consider [he concluded, in a sentence which echoes Locke] that we see this Country in the pure State of Nature, the Industry of Man has had nothing to do with any part of it . . .

I am confident, then, that it is the "cultivation test" element in the Blackstonian distinction that explains, at least at a formal level, that original and apparently perverse classification of New South Wales as "terra nullius" and the Australian colonies as "settled" rather than "conquered".

We now have a much more sophisticated understanding of the relationship between aborigines and the land, and the extent to which they did in fact "manage" the land, by use of fire, for example, but it has taken us the better part of two hundred years to arrive at this understanding, largely because we had to develop the sciences of anthropology and archaeology in their Australian applications in order to do so. Legal anthropology, in particular, did not really begin until the late 19th Century, and its principal development has been in this century. That understanding has come two hundred years too late, so

far as the categorization of Australian settlement is concerned. Or so I believe. I shall have something further to say on that point in a few moments, but before I do so I should add an important footnote (as it were) to my principal conclusion.

My contention has been that the "cultivation test" element in Blackstone's distinction provides the best explanation for the decision to regard the settlement at Sydney Cove as a "settled colony" in "terra nullius". I believe, however, that one can go further than that.

I strongly suspect that that same "cultivation test" would have prevented the recognition of aboriginal land titles of a proprietary nature even if the colony had been classified as "conquered", because the theory of the "cultivation test" (as we have seen) is that cultivation and use of land (in the European sense) is a necessary pre-requisite for any valid assertion of property rights.

Similarly, if there had been an early examination in the Australian courts or by the law officers of the Crown of the question of whether the common law of a "settled" colony recognized what we now call "communal native title", and if it had been agreed in principle that such title could be recognized, I believe that the "cultivation test" would have led nevertheless to any aboriginal claim being rejected.[22] In other words, the "cultivation test", as it was understood and applied in the law at the turn of the 18th Century, stood in the way of any recognition of aboriginal proprietary interests in land, however such claims might be raised.

It might be a proper if somewhat unexpected conclusion, therefore, that, from the point of view of aboriginal land rights, the categorization of the Australian colonies as either "conquered" or "settled" had very little, if anything, to do with the matter. Whichever way the categorization had gone, the result would have been the same.[23]

Epilogue

This paper has been concerned with beginnings. My aim has been to explain why the original legal response to aboriginal society took the form it did.

But neither you nor I would be satisfied if I stopped short at that point. It is inevitable that at least two further questions should occur to us and it would be unrealistic not to acknowledge them. The first question is: could the situation have been handled differently? What might have happened, if another kind of legal response had been made? The second question is: what should we do now?

Let me take that first question. It can be stated in a number of ways, but its essential concern is straightforward. Suppose the first

settlers at Sydney Cove had been prepared to give some sort of legal recognition to aboriginal interests of a proprietary nature in land and related resources such as fishing areas. How might this recognition have been expressed and with what results?

In the nature of things, one cannot give a sure answer to such a question, but I think we can make a fairly reasonable guess, because when the first settlers came to Port Phillip an attempt was made to bargain in legal form with the local tribes in relation to land. I refer, of course, to the so-called "treaties" which John Batman made with the chiefs of the Dutigallar tribe in June 1835, and which purported to transfer the ownership of some 600,000 acres of land from the tribe to Batman, an area which included the sites of both Melbourne and Geelong.

It is quite wrong, in fact, to call these dealings "treaties". They purport to be ordinary conveyances of land, drawn up strictly in accord with the forms of the time. They were drafted by an intelligent and able lawyer, Joseph Gellibrand, and Batman was quite open about the transaction. He formally reported it to the Lieutenant-Governor of Van Diemen's Land saying of his dealings with the chiefs:

> I fully explained to them that the object of my visit was to purchase from them a tract of their country . . .
>
> The Chiefs appeared most fully to comprehend my proposals and much delighted with the prospects of having me to live among them.[24]

There is no reason to disbelieve these assertions. Batman was a talented and honest man, who had already made a reputation in Van Diemen's Land for his compassionate and conciliatory attitude towards the aborigines. He and his colleagues seem to have been engaged in a genuine attempt (in the words of the *Australian Dictionary of Biography*) to initiate "a free colony on a basis consistent with the welfare of its Aboriginals".

As we all know, the attempt failed. Governor Bourke, by proclamation, declared Batman and his party to be trespassers and the land grants to be "void and of no effect against the rights of the Crown". There was, in this reaction, undoubtedly some concern for the position of the aborigines, but, as Glenelg, the Secretary of State, made clear, the real vice of Batman's transactions was that they ran counter to the established legal position. As he put it in a letter to Bourke:

> It is indeed enough to observe that such a concession [i.e. that the aborigines could convey land] would subvert the foundation on

which all Proprietary rights in New South Wales at present rest . . .[25]

Glenelg's comment was clearly correct, and official repudiation of Batman's transactions was thus inevitable.[26]

Yet, as regards the aboriginal tribes, the dealings were not grotesquely unfair, at least by the standards of the time. Take the grant for the 100,000 acres in the Geelong area—the present Bellarine Peninsula, more or less. The aboriginal population of that area was probably less than 500, perhaps even less than 300.[27] In return for transferring to him the ownership of the land—over which, incidentally, it is clear that Batman assumed the tribe would still roam—Batman transferred to them an immediate consignment of useful trade goods (blankets, knives, tomahawks, scissors, clothing, flour and the inevitable looking-glasses), and undertook further to pay a much larger and carefully quantified yearly tribute of the same nature for the indefinite future. He thought this was reasonable. Blainey reckons the tribute under both grants at £200 annually, in the money values of the time.[28]

Now, I suggest to you that the Batman transactions may be taken as a model of what might have happened at Sydney Cove, had Government been prepared, for whatever reasons, to recognize aboriginal land interests of a proprietary nature. I suggest that purchases along similar lines might have been made from the various Sydney tribes and then more widely as European settlement expanded—purchases negotiated either directly by the Crown or by private persons under some form of government regulation. By 1850 let us say, there would probably have been a large number of them.

But is it not clear, ladies and gentlemen, that if such transactions had occurred, they would now be generally regarded as unconscionable, as grossly one-sided, as unfair, as having been made by the aborigines in ignorance of what they were doing and perhaps under duress, as a kind of confidence trick? For is not that how Batman's transaction itself is generally regarded?

My answer, then, to the first question in this epilogue—might things have been very different?—is "no, not in the end result". Even if the proprietary interests of aborigines *had* been recognized at the beginnings of settlement, the chances are that we would still have an aboriginal land rights problem substantially similar to that which we have today, and perhaps even harder to solve.

That brings me to my second and final question: What should we do now?

I am sure there is no point at all in attempting to turn the clock back and re-define Australia as a "conquered" colony in the Blackstonian

sense. The plaintiff in *Coe* v. *The Commonwealth* put forward that proposal, but it was, I think quite rightly, rejected. It is far, far too late in the day to embark upon so radical a re-assessment, even if it would do any good, which I doubt. I would respectfully agree with Mr Justice Gibbs, with whom Mr Justice Aickin concurred, when he said:

> It is fundamental to our legal system that the Australian colonies became British possessions by settlement and not by conquest.

That is how things are, and that is how they must remain. It is useless to suppose otherwise. A solution to the aboriginal land rights problem cannot be found by re-writing history. To quote Professor Stanner, a noted anthropologist in this field and a member of the Aboriginal Treaty Committee:

> We can neither undo the past nor compensate for it. The most we can do is to give the living their due.[29]

The most practical way to give the living their due, I expect, is to enact legislative schemes which provide for the vesting of lands in identifiable aboriginal groups. As we all know, a major Report on how this might best be done was presented by Mr Justice Woodward to the Commonwealth Government in 1974, and such a course of action is now being followed by the Commonwealth and various of the States. Mr Justice Blackburn, who had been the judge in the *Gove Land Rights Case*, examined some of the problems associated with such a policy in an address to this Society in October 1974, an address to which I am indebted for more than one point in my paper tonight.[30] But I do not intend to discuss the Woodward Report, the policy in general, particular legislation or the difficulties which have arisen in relation to this policy in some of the States and Territories. That is a major subject in its own right, and I have little competence in it. It is enough for me, in the context of this paper, to make the obvious point that action of this kind is at least part of the answer to the second of my two questions by way of epilogue: what should we do now?

It is part of the answer, but not, I suspect, the whole of the answer. It is too ad hoc, too transactional, too much like "band-aid" law or "band-aid" welfare. As long ago as 1968, in the Boyer Lectures of that year, Professor Stanner saw that something more substantial might be required.

> I believe [he said] that the path of statesmanship is to work while there is still time towards a grand composition of all the troubles that lie between us and the people of aboriginal descent.[31]

In 1979, a group of people under the chairmanship of Dr H. C. Coombs formed themselves into an Aboriginal Treaty Committee,

and set out to achieve that "grand composition". The Committee is promoting its case carefully and responsibly, and its ideas are being accorded respectful attention, as witness, for example, the lengthy editorial notice of the book written for the Committee by Stewart Harris, entitled *It's Coming Yet*, in the *Australian Law Journal* for May 1980, a notice which looks on both the book and the cause seriously and favourably.

To use the term "treaty" for the proposed "grand composition" is, I think, unfortunate, as no "treaty" in any legally accepted sense of that term is remotely possible at this stage. What is envisaged is a formal negotiated agreement at a national level, on a range of issues relating to peoples of aboriginal descent. Such an agreement, as the writer in the *Australian Law Journal* puts it, would "need to be underpinned by legislation of the Federal Parliament, and for abundant caution, by uniform statutes of the State Parliaments".[32] More recently, an aboriginal word, "Makarrata", has begun to be used in preference to the word "treaty". The word "Makarrata"—a word of the Yolmu people of Elcho Island, north-east of Darwin—means "a settlement following a long dispute",[33] and it seems therefore an appropriate word to use, especially as the aim of the Committee is a political settlement rather than a legal settlement in any technical sense.

Let me quote from an article which Dr Coombs wrote about the proposal in *The National Times* in June 1980:

> We can now if we wish set in train action "to give the living their due" . . . We see such a treaty as recording aboriginal acknowledgement of the right of other Australians to share in this land, of the validity of property rights, legally and justly granted to, or acquired by, white Australians and the acceptance of the sovereignty of the Australian Parliament. We see it also however as recording White Australians' acknowledgement of the right of Aborigines:
>
> 1. To maintain and enjoy their distinctive identity, their traditional law, languages and culture.
>
> 2. To have acknowledged their title to land to which they can show valid claim in Aboriginal law and custom where this can be done without injustice to others who have acquired title to it.
>
> 3. To be helped to acquire other lands necessary for their social and economic purposes.[34]

There obviously must be the most careful examination of this far-reaching and quite novel proposal. Broad issues of policy and procedure must be identified and analysed, as must a mass of detail, even before serious negotiations can begin.

The relationship of such a settlement to the ILO Convention of 1957 on the "Protection and Integration of Indigenous and other

Tribal and Semi-Tribal Populations in Independent Countries" would also need to be considered. This Convention could well have a significant legal bearing on the matter. In November 1979, the Federal Government confirmed that it stood ready to ratify this Convention, but was awaiting the agreement to it of Queensland. As far as I know, that is still the position.[35]

Some literature about the Makarrata is now appearing.

In addition to Stewart Harris's *It's Coming Yet*, which I have already mentioned, there is an excellent *Current Affairs Bulletin* on the question, by Mr Bryan Keon-Cohen, published in February 1981.[33] I would commend both these publications to you.

I cannot go into this fascinating suggestion for a Makarrata in any further depth in this paper. I should report, however, that the idea has seized the imagination of many and has now taken firm root. I am convinced it is not just a stunt, as I originally feared. In March of this year, both the Federal Government and State Governments formally announced their willingness to negotiate for a Makarrata—an announcement, as I need hardly observe, of major moment in the history of this country.

The hope is that a Makarrata might be arrived at in 1988, the year of the bicentenary of European settlement. The symbolism would be obvious and appropriate. And it is with that thought that I conclude. The long shadow of the Eighteenth Century lies athwart the matter of aboriginal land rights in this country, and nothing can ever quite remove it. But at the end of the Twentieth Century, an opportunity arises to let in just a little light.

FOOTNOTES

[1] (1971) 17 F.L.R. 141

[2] (1979) 24 ALR 118; 53 ALJR 403.

[3] G. Rawson "Our Earliest Document", Melbourne *Age*, 4 Nov. 1950. I do not know if this information has since been published elsewhere; the incident is not mentioned by Manning Clark in Vol. 1. of his *History*.

[4] *A History of Australia*, I, 49.

[5] This is not just an historical point. Under the "inter tempora" rule of international law, the legal characterisation of any act is to be decided in accordance with the law at the date of the act, not with the law at the date of any later dispute concerning that act.

[6] Despatch No. 7; 28/9/1788. 1 *HRA* 77.

[7] Despatch No. 10; 30/10/1788. 1 *HRA* 96.

[8] Phillip to Sydney, 12/2/1790; 1 *HRA* 145. Accounts of this episode are given by other First Fleet writers—e.g. Tench, Collins.

[9] *A Complete Account of the Settlement at Port Jackson* . . . (1793), p. 7.

[10] *The English Colony in New South Wales*, Whitcomb and Tombs Ltd edition (no date), p. 18.

[11] *History of New South Wales from the Records*, I, 133.
[12] *Commentaries*, I, 166–7.
[13] Castles, A. C. *An Introduction to Australian Legal History*, pp. 2–3.
[14] (1889) 14 App. Cas. 286.
[15] A. Britton *History of New South Wales from the Records*, *II*, 117.
[16] Two further robust explanations occasionally offered should, perhaps, be referred to by way of footnote, although they were not examined in the lecture as delivered:

(a) "A colonising power will simply disregard the rules if this suits its purposes".

I have no doubt that there is truth in this as a general proposition, but the official documentation in relation to the settlement at Sydney Cove suggests that the Government was in fact trying hard to follow the rules. In any case, Britain's "purposes" in forming the settlement are still a matter of much controversy.

(b) "The aborigines were at first regarded as mere animals, and not really human"

It is certainly true that the aborigines were seen as extremely primitive, and their way of life as close to that of "brutes" and "beasts". But the observers who really count (Cook, Phillip, Collins, Tench etc.) were also at pains to stress their essential humanity. Note, too, that, under the common law, blacks and whites were equally entitled to the protection of person and property: Blackstone, I, 424, citing *Smith* v. *Brown* (1706) Salkeld 666.

A more serious, but minor, argument deserving of mention is that the authorities may have preferred to categorize a colony as "settled" rather than "conquered" unless the facts were overwhelmingly against it, in order to assure the colonists the benefits of the 17th Century English constitutional settlement (a "conquered" colony was ruled under the prerogative, at least initially). But one may take leave to doubt whether this consideration would have weighed very heavily in the planning for a penal establishment, or even for a naval depot (if that theory be preferred). Again, the controversy about the true motives for the enterprise lessens the force of the argument.

[17] Holdsworth *History of English Law, XL,* 232–248.
[18] 17 F.L.R. 141, 201.
[19] Camelot Series edition; p. 131. I am indebted to Professor Yarwood for this reference: Melb. *Age*, 10 Feb. 1981.
[20] Dent edition, p. 134.
[21] As quoted in Bennett and Castles *A Source Book of Australian Legal History*, 250–252.
[22] In the *Gove Land Rights Case*, Blackburn J. held that the common law at the end of the 18th Century did not recognize "communal native title".
[23] By a quite different line of argument, Hookey reached the same conclusion (namely, that the categorization was not very important) in his article on the *Gove Land Rights Case* in (1972) 5 Federal Law Review 85.
[24] Clark *Select Documents*, I, 92.
[25] *Ibid.* 93.
[26] I respectfully adopt the view of Blackburn J. in the *Gove Land Rights Case* (at p. 257) that the Government was not merely relying upon the well-known rule that only the Crown can deal directly or authorize land transactions with native peoples, but was making the larger point that the law of New South Wales did not recognize any native proprietary rights at all.
[27] See Blainey's estimates in *Triumph of the Nomads*, p. 108, which are supported by various estimates in La Trobe's *Letters from Victorian Pioneers*.
[28] *A Land Half Won*, p. 87.

[29] Stewart Harris *It's Coming Yet*, p. viii.
[30] XII Proceedings of the Medico-Legal Society of Victoria, p. 352.
[31] *After the Dreaming*, p. 252.
[32] 54 ALJ 248.
[33] Keon-Cohen, B. "The Makaratta", 57 *Current Affairs Bulletin* (Feb. 1981), No. 9, p. 8.
[34] *National Times* 8-14/6/1980.
[35] For this reference, and for certain other ideas, I am indebted to a paper by Mr Gervaise Coles entitled "The International Significance of an Aboriginal Treaty" delivered at a seminar in the Australian National University on 17 July 1980. The paper was kindly made available to me by Dr H. C. Coombs.