Aboriginal Land Rights: Further Reflections

by

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If there is one moral to be learned from the movie industry, it is that sequels are generally a mistake. Most sequels that I can bring to mind have been sadly disappointing, and one shudders to think of what we might be confronted with in 'Gone with the Wind, Part II', which as I understand it is already in production.

So I may have committed a major blunder in agreeing to produce a sequel to the address which I delivered to this Society 13 years ago, in August 1981, entitled 'Aboriginal Land Rights: The Long Shadow of the Eighteenth Century'.[1]

Yet the basis for the invitation was reasonable enough: in the interval the High Court has decided the *Mabo* case — probably, at the moment, the most widely referred to of all the hundreds of decisions the Court has made in its 91-year history. To be precise, I delivered my lecture to the Society on 15 August 1981; Eddie Mabo and four other Torres Strait Islanders began their action in the courts 8 months later — on 20 May 1982; and the High Court delivered its final judgment after ten years, on 3 June 1992.[2]

How reasonable, therefore, how entirely appropriate, that I should be offered the opportunity to re-visit my original address in the light of *Mabo* and all that goes with it! How could I do other than accept so very kind an invitation from such a distinguished Society?

Yet there is always the awful possibility that this will prove to be my 'Gone with the Wind, Part II'. I can only hope and pray that it will not be quite as bad as that. At least (unlike Hollywood) I am operating with most of the original cast.

Let me say at the outset that tonight's address is not going to be a close examination of the *Mabo* judgments (although of course I shall be referring to them), still less a review of the quite enormous body of writing to which these judgments have already given rise, and most of which I have not ever seen, let alone made the object of study. Nor do I intend to discuss Commonwealth and State legislation in response to *Mabo*, partly because the most contentious Acts are presently under challenge before the High Court and are therefore strictly *sub judice*.[3] Rather, as the title of tonight's paper indicates, I should like to offer some 'further reflections' on the material I presented 13 years ago, and to indicate how far the events of those 13 years (including *Mabo*, of course), and my own independent reading, have led me to revise or refine my earlier

views. That, I believe, was the basis of the invitation to me from your Committee.

So what was my argument 13 years ago? I must obviously attempt to summarise it as briefly as I can, and then select from it those points on which I think more could or should be said. (As it happens, my 1981 paper was reprinted a month or so ago in the *Victorian Bar News*;[4] some of you may therefore have recently read it, but I must assume that most of you have not).

I began by noting the strange and unsettling paradox that, whereas the Australian courts (at that time) were clearly of the view that 'the Australian colonies became British possessions by settlement and not by conquest' (to quote Mr Justice Gibbs, as he then was),[5] the historians were convinced that there *had* been at least some sort of 'conquest', given incontestable evidence that the aborigines had resented and resisted European occupation from the very beginning, and had fought, and largely lost, what I described as 'a long guerilla war against those whom they conceived as invaders'.

I suggested that it was important to try to unravel this paradox, because much of the aboriginal land rights controversy stemmed from the apparently perverse legal insistence that Australia was merely 'settled', not 'conquered'. If Australia were merely 'settled' — that is, if the Australian colonies were to be classified as 'settled colonies' — then, under the legal rules prevailing at the end of the 18th Century, especially as expounded by the distinguished 18th Century jurist Sir William Blackstone, the colonists brought their own legal system with them, in this instance the English common law and relevant statute law; that became the *exclusive* legal system of the colony. And in the *Gove Land Rights Case* of 1971 (*Milirrpum v Nabalco Pty Ltd*)., the first Australian case to raise the aboriginal land rights point, Mr Justice Blackburn (of the Supreme Court of the Northern Territory) held that the common law at the relevant time did not recognise the form of legal interest in land for which the aboriginal plaintiffs in that case were contending, namely, 'communal native title'.[6]

So the classification of the Australian colonies as 'settled' had the most profound and far-reaching consequences, so far as aboriginal claims to land were concerned, because, by contrast, had the colonies been classified as obtained by 'conquest', existing aboriginal laws would have been recognised (unless and until overruled

or replaced by the conquering power), and hence some forms of aboriginal land title might have been conceded. That, at any rate, was the orthodox theory as to 'conquered' colonies, as endorsed by Blackstone.

Why, then, were the colonies classified as 'settled', and not 'conquered' (a decision for the executive, the Crown, incidentally, not for the courts)?

In my 1981 lecture, I suggested that the answer was again to be found in Blackstone, and the writings upon which he himself drew.

Blackstone said that 'settled' colonies could be established where 'the lands are claimed by right of *occupancy* above, by finding them deserted and uncultivated and peopling them from the mother country'.

To use the language of international law (although Blackstone himself did not do so), Blackstone was saying that where newly-discovered lands were 'terra nullius', then 'settled colonies' (in the legal sense) could be established there.

'Terra nullius' — lands belonging to no-one, lands which were 'unoccupied' in the relevant legal sense, lands over which no-one else had 'sovereignty'.

But how could Cook, Phillip and the authorities in London have possibly regarded eastern Australia (and, eventually, the whole continent) as 'unoccupied', as 'terra nullius', when, very plainly an indigenous people lived there?

The reason, I suggested, was that the concept of 'occupancy' had in this context — namely the law (both international and municipal) relating to the acquisition of territory — a special meaning. It was a legal term of art. Whether lands were 'occupied' or not, did not turn on whether they were 'inhabited', in the ordinary sense of that word. Certainly they did need to have inhabitants, but something more was required. What was that 'something more'? In 1981, having examined various possibilities, I suggested that 'occupancy', as used in this area of the law at the end of the 18th Century, was defined in terms of whether the territory in question was *under cultivation* — that is, in terms of whether the inhabitants engaged in agriculture. I called this 'the cultivation test'. Blackstone himself had used that criterion, and I traced some of its long pedigree in legal, philosophical and theological writings, all the way back to the Book of Genesis.

Judged by this criterion, eastern Australia *was* 'unoccupied', in that special legal sense; for all the early observers, including Cook (at some length), and many later observers for that matter, took note of the fact that the aboriginal peoples did not 'cultivate' the land in any sense known to Europeans. They were not agriculturalists; they appeared to be exclusively hunter-gatherers.

So this, I suggested, was why the British plantations in Australia could be (as they were) regarded as 'settled colonies' in 'terra nullius', with all the legal consequences which were thought to flow from that classification, including the failure to recognise any form of 'native title' to land under their own (native) rules and customs.

That, in very broad outline, was my 1981 thesis. I did make a number of other substantial points, and some I may advert to when I discuss the *Mabo* judgments, but I do not want to repeat them now. The outline of my principal argument is what is important. I concluded in 1981 by saying something about what we would now call 'the process of reconcilitation', and I shall do the same again tonight in due course.

The great question, however, to which I must now turn, is how far my 1981 thesis stands up in the light of *Mabo*.

There can be no easy answer to that question. This is partly because of the route by which the issue (or set of issues) reached the High Court, and partly because of the way in which its seven justices divided in their handling of the issues.

For the benefit of the non-laywers present especially, I need to say a little on these two preliminary points.

First, the route by which the issues reached the High Court. With this, in fact, I think most of you will be broadly familiar. The plaintiffs were Torres Strait Islanders, and they sought from the Court a declaration that they had native title to their traditional lands on the Murray Islands. These islands had never, in any relevant sense, been settled by Europeans, and their formal annexation to the Colony of Queensland did not occur until as late as 1879. So from the very beginning this case was in some respects off-centre. The islands in question had not formed part of the eastern Australia claimed by the British at the end of the 18th Century and the indigenous people, the Torres Strait Islanders, were ethnically and culturally distinct from the aborigines of the Australian continent in quite significant ways. In particular, of

Melanesian origin, they were a settled people (not nomadic), cultivating gardens, and with a clear system of social organisation.

Thus *Mabo* was not on 'aboriginal land claim' in the familiar mainland sense. At the very least, this has complicated an understanding of the decision. Some have gone further, and argued that it led the High Court to go seriously astray.[7]

That, then, is the manner in which these issues finally reached the High Court — a rather unfortunate manner, not by any means the ideal case to test the various issues from a mainland — Australia point of view, but that is how it was.

Now as to how the seven justices of the High Court divided on these issues.

There were four major and lengthy judgments. That of Mr. Justice Brennan may be considered the principal majority judgment, in that the Chief Justice (Sir Anthony Mason) and Mr Justice McHugh were content to concur with him, in a brief joint opening statement — a not-unimportant opening statement, however, because, insofar as it summarised the outcome of the case, it had been endorsed by all members of the Court. There were two other majority judgments: a joint judgment by Justices Deane and Gaudron, and a separate judgment by Mr Justice Toohey. Thus, to extract and understand the majority position, one must read and analyse three separate, closely-argued essays in judicial reasoning, running to a total of 117 pages (in the report of the case I am using).[8]

The dissenting judge was Mr Justice Dawson, who wrote an opinion of 45 pages. But in describing him as 'the dissenting judge', I must add an immediate qualification — although that is the way he is usually described. He was the dissentient in the sense that he was the only member of the Court to hold that no land was now held by native title on the Murray Islands, and that the action, therefore, failed. But over the *range* of issues before the Court, its members divided in different ways. Let me give you a few examples. (I do this merely in order to highlight the difficulty of interpreting *Mabo*, not necessarily because I shall be returning to these issues). Thus, *all* the judges, including Mr Justice Dawson, differed from the other members of the Court in holding, on the historical evidence, that in this instance it had not survived. Again *all* the judges, including *all* the majority judges, held that such title could be 'extinguished' by either legislative or executive

action showing a clear and plain intention so to extinguish. On this point, Mr Justice Dawson alone found such clear and plain intention, but on the question of whether any compensation was payable on such extinguishment, the Court was divided 4 to 3. Three of the majority judges (Mason, McHugh and Brennan), together with Mr Justice Dawson, found against any requirement of compensation; the dissentients on this point were Justices Deane, Gaudron and Toohey.

Mabo, therefore, was no seamless web!

To return, then, to the great question, having explained how these issues came before the Court and something, at least, of the complexity of the Court's response — the great question, at least, from my point of view tonight: how far does my 1981 thesis stand up in the light of the *Mabo* judgments?

Well, I can take some comfort from the fact that the status of the Australian colonies as 'settled colonies' in the Blackstonian sense was affirmed by the whole Court. They were not, legally speaking, 'conquered' colonies (and, of course, the question of 'cession' simply did not arise). All members of the court agreed that the mode of acquisition of new territories at the relevant time was a matter for the Crown in the exercise of its prerogative powers; and that, on the evidence, all the Australian colonies had been acquired as 'settled' colonies. With such acquisition, Great Britain had acquired 'sovereignty' over those territories. Not only had this been the conclusion reached in all previous cases in relation to the Australian position, few in number though they were, so that the finding was in accord with precedent, but as the acquisition was an 'act of State', to use the technical legal term, it could not be questioned in any municipal court. The point had been put very neatly in an earlier High Court case, *Coe* v. *the Commonwealth* (1979), by Mr. Justice Gibbs (as he then was), with whom Mr. Justice Aickin concurred: 'It is fundamental to our legal system that the Australian colonies became British possessions by settlement and not by conquest'.[10]

So far, so good, you might be tempted to say. But these findings, although unanimous, were essentially formal: the Court considered that it was not at liberty to hold otherwise. It did *not* follow that members of the Court were happy with the mode of the acquisition, or with the classification of the colonies as 'settled'. Indeed, the majority of the Court made it perfectly clear that they

were far from happy on these points, and, while they accepted that they could not alter the established legal position, they did their formidable best to undermine its rationale.

So what, for our purposes tonight, I might be allowed to call 'my' *terra nullius* argument was dealt a devastating blow. All that 18th Century theorising which I outlined earlier was, it seems, rejected, as no longer of any legal consequence. At any event, that has certainly been the general perception of *Mabo* — namely, that the majority judgments totally rejected the idea that Australia had ever been *terra nullius*. (Incidentally, and by way of a necessary footnote, let me stress that I do not claim that the *Murray Islands themselves* could have been regarded as *terra nullius*, by *any* test, when annexed by Queensland in 1879. But, as I say, the majority of the High Court appeared to hold that *the whole of Australia* had never been *terra nullius* — a much more sweeping proposition.) In addition to the countless newspaper headlines which have advanced this view, let me quote just two scholarly comments to the same effect: from the Introduction to the book of essays *Mabo: A Judicial Revolution*[11] — 'in *Mabo* v *Queensland* (1992) 66 A.L.J.R. 408 the *terra nullius* idea was discarded';[12] from the essay by Fr. Frank Brennan, SJ. in the same volume — 'the High Court upheld the Islanders' claim, ruling by six to one that the lands of this continent were not *terra nullius* or 'practically unoccupied' in 1788'.[13] And the coping-stone, it might seem, was put upon this position by the Commonwealth Parliament itself, when it stated in the Preamble to the Native Title Act 1993:' The High Court has ... rejected the doctrine that Australia was *terra nullius* (land belonging to no-one) at the time of European settlement ...' (A preamble may not, strictly, be part of an Act of Parliament, but it is nonetheless legally significant.) I do not want to pretend that these perceptions of the majority position in *Mabo* are unwarranted. That would be at best naive, at worst down-right dishonest. Such perceptions are very plainly warranted, and I could quote or refer you to long passages in the majority judgments to demonstrate that.[14] Thus, Fr. Brennan's comment draws on the exact words of Deane and Gaudron JJ.[15]

But, with my back to the wall, as it were, I would like to suggest to you that the position sbout *terra nullius* and the 'settled colony' categorisation is not as clear as the Court, the Parliament and some of the commentators seem to think, and that some aspects of

the Court's assessment of the situation are open to question. That is not to say that I think that there is the slightest possibility that the majority's views on all these issues are likely to be over-ruled in any foreseeable future, especially now that they have a form of Parliamentary endorsement.[16] As I shall show shortly, from the point of view of the legal outcome of the case, their views on these issues, paradoxically, don't really matter. There are some points, however, on which I should like to set the record straight, at least as I see it.

In the first place, it has been argued by some that the *terra nullius* concept was rightly rejected, not because it was necessarily wrong (either in itself or in its application), but because it was legally irrelevant.

Let me put to one side Mr. Justice Dawson's contention to this effect, because it was of a special and particular nature and did not go to the general issue. He looked closely at the manner by which the Murray Islands had been annexed by Queensland, noting that on annexation the law of Queensland had been expressly declared to be in force. There was no need, therefore, he said, 'to classify the Murray Islands as conquered, ceded or settled . . . [or] to resort to notions of terra nullius . . .'.[17] For Mr Justice Dawson, then, on the approach which he took to the issues before the Court, an examination of *terra nullius* and the Blackstonian classification was simply not called for. In this sense, *terra nullius* was legally irrelevant. And, given Mr Justice Dawson's chosen mode of analysis, I would respectfully agree.

However the argument for legal irrelevance has taken another form. In his Foreword to the volume I have already mentioned, *Mabo: A Judicial Revolution*, Sir Harry Gibbs, a retired Chief Justice of the High Court, contends that 'the expression "terra nullius" seems to have been unknown to the common law', and that 'it was not the question asked at common law to determine whether a colony, admittedly under the sovereignty of Great Britain, was acquired by settlement'. 'Public understanding' of the relevant common law principles, he argues, 'is not assisted when those principles are described by a phrase which is misleading and perhaps emotive'.[18] Well, nothing Sir Harry Gibbs says should be treated lightly, but I do not believe that we can dismiss *terra nullius* as easily as that.

It is perfectly true that *terra nullius* is a concept — an ancient concept — of *international* law, of customary international law, but it has been accepted as an orthodoxy since at least the 18th Century that customary international law is *part of* the common law. Blackstone himself said so: '. . . the law of nations . . . is here [i.e. in England] adopted in its full extent by the common law, and is held to be part of the law of the land.'[19] This view is upheld by modern commentators, at least so far as *customary* international law is concerned.[20] Certainly there are difficult jurisprudential problems about the over-all relationship between municipal law and international law, but we need not go into those; the orthodox position remains as I have stated it. Even if we concede, then, that *terra nullius*, strictly speaking, has its origins in international law, and has principally to do with the acquisition of sovereignty, nevertheless it intersects, conceptually, with the common law of colonisation at the point of the Blackstonian classification, a point which Brennan J., for one, expressly recognises.[21] For my part, therefore, I cannot agree that it is improper or misleading to examine the concept of *terra nullius* in a case such as *Mabo*. It is *not* legally irrelevant, and I agree with the majority of the High Court in not seeing it as irrelevant.

The much more serious argument which I have to face, however, is that to the effect that the application of the *terra nullius* concept to Australia was legally *incorrect* — that those, such as myself, who thought that a case for its application could be made were quite simply, wrong — terribly wrong: wrong intellectually, wrong morally, wrong on every count; wrong, wrong, wrong. There are emotional passages in some of the judgments which justify this theatrical way of putting it.[22]

If this were true, it would be a most painful burden to live with, but I do not believe it is true.

I consider that much of the High Court's examination of the *terra nullius* doctrine and its application to Australia rests upon a mis-reading of an important case decided by the International Court of Justice in 1975: *The Advisory Opinion on Western Sahara*[23] — a case expressly relied upon by four of the majority judges (Brennan, Mason, McHugh and Toohey JJ),[24] and, hence, by a majority of the court.

The Western Sahara was colonised by Spain in 1884, the colony

being known as Spanish Sahara. As part of the world-wide process of decolonisation, Spain arranged to hold a referendum under UN auspices in Spanish Sahara on the question of self-determination. At that point, however, two other States, Morocco and Mauretania, made claims to the territory, so the UN General Assembly in 1974 requested an Advisory Opinion from the World Court. The Assembly posed two questions, only the first of which we need to note: 'Was Western Sahara ... at the time of colonisation by Spain a territory belonging to no one (*terra nullius*)?' The Court held unanimously that it was not.

Now, there is no doubt that the World Court exhibited some dislike for the *terra nullius* concept. This was not so marked in the principal joint judgment, but it was very marked indeed in the separate judgment written by Judge Ammoun, the Vice-President of the Court, in a passage twice quoted at length in *Mabo*.[25] Judge Ammoun concluded that 'the concept of terra nullius, employed at all periods, to the brink of the twentieth century, to justify conquest and colonisation, stands condemned.'

Why do I think the High Court got the *Western Sahara case* wrong, as I do? Well, in the first place, they were clearly very influenced by the remarks of Judge Ammoun, but Judge Ammoun was *not* speaking for the whole Court. His was a separate opinion. The joint opinion of the overwhelming majority of the judges, which is technically the Opinion of the Court, contains no passage comparable to that of Ammoun as quoted in *Mabo*, and certainly does not endorse Ammoun's sweeping and condemnatory conclusion. Authoritative text-writers such as Crawford[26] and Harris[27] have seen the court's Opinion as affirming the place of the concept of *terra nullius* in the history of international law, albeit with some qualifications.

The second error in interpretation (as I believe it to be) is even more grave. The High Court failed to note what the World Court actually *did* in the *Western Sahara Case*. Briefly, what the World Court did in that case was to apply what is known as 'the intertemporal rule'.

'Oh dear, another piece of dreadful legal jardon', I hear you say. But the rule is really very straight-forward and simple, and, I think, makes eminent common-sense. Let me quote the statement of the rule as it appears in a modern text-book of international law:

> 'the fact is that in many instances the rights of parties to a dispute derive from legally significant acts . . . very long ago. Sir Gerald Fitzmaurice [an earlier commentator on the inter-temporal rule] states the rule applicable in these cases: 'It can now be regarded as an established principle of international law that in such cases the situation in question must be appraised . . . in the light of the rules of international law as they existed at the time, and not as they exist today'.[28]

In a celebrated international arbitration of 1928 (the *Island of Palmas Case*), the rule was stated this way: 'a judicial fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time when a dispute in regard to it arises or falls to be settled'.[29]

And so, in the *Island of Palmas Case*, for example, the Arbitrator held that he must determine the effect of that island's discovery by Spain in the 16th Century 'by the rules of international law in force in the first half of the 16th Century . . .'[30]

The rule, I suggest, makes very good sense. Some such rule is absolutely necessary if there is to be stability in international affairs. Questions of sovereignty cannot be constantly re-opened. If the position were otherwise, than, to quote another distinguished international lawyer (Jessup), '(e)very state would constantly be under the necessity of examining its title to each portion of its territory in order to determine whether a change in the law had necessitated, as it were, a reacquisition'.[31]

So that is the 'inter-temporal tule', and the rationale for it. And this was the rule applied by the World Court in the *Western Sahara Case*.[32] The question was whether the territory in question was *terra nullius* according to the international practice of *1884*, the date of Spain's colonisation. The Court's Opinion is quite clear on the point. The relevant date was *1884*, not 1974 (when the dispute arose) or 1975 (when the Court wrote its Opinion) and the Court determined, by applying the standards of *1884*, that the territory in question was not *terra nullius*.

This significant aspect of the *Western Sahara Case* seems to have been completely over-looked by the majority of the High Court in *Mabo*. There is no acknowledgment of the 'inter-temporal rule' at all, even though, as plaintiffs' counsel recognised, an

earlier High Court seems to have applied it in a case of 1974.[33] In *Mabo*, the *terra nullius* concept is discussed in modern terms, with reference to present-day views about indigenous peoples and their societies; and, in these terms, it is, not surprisingly, rejected as applicable to aboriginal Australia. But that approach, in my view, was in error. Under the 'inter-temporal rule', which itself must probably be regarded as part of the common law, the question in *Mabo* was whether the Blackstonian concept, lying behind and intersecting with the Blackstonian classification of colonies as it does, was properly applied to eastern Australia *in 1788* — that is, was properly applied in accordance with international law and practice as it stood at the end of the 18th century, *not* at the end of the 20th century, or even of the mid-19th century, and upon the factual situation as it was *then* honestly perceived to be.

I would, of course, contend that it was properly so applied. That was the principal thesis of my 1981 paper, as I outlined it earlier, and nothing I have read since 1981 has led me to change my mind. On the contrary, the more I have studied the matter the more convinced I have become that my assessment of the late 18th Century situation is thoroughly defensible. Only a few months after I had delivered my 1981 paper, the respected historian Professor Alan Frost published an article which came to essentially the same conclusion — and, incidentally, gave me much comfort, coming as it did from a fully professional historian.[34] The same author, in his later biography of Governor Phillip, summed up his position in a single sentence: 'the colonisation [Phillip] pursued was, in *contemporary* terms, a legal and a moral act'.[35]

There is no time tonight to review all the additional evidence I have dug out since 1981, but I would draw attention to the influential views of the writers of the so-called 'Scottish Enlightenment'. I was not aware of the significance for our purposes of this movement when I spoke in 1981. The 'Scottish Enlightenment' occurred roughly in the third quarter of the 18th Century. Today, the best known member of this school is, I suppose, Adam Smith, who published *The Wealth of Nations* in 1776; but at the time there were others who were widely read and just as significant — men like Adam Ferguson,[36] Lord Monboddo[37] and Henry Home.[38] In their writings, which went into multiple editions, these men set out what purported to be a rational and scientific analysis of the various kinds of societies to be found in the world, ranking them in

ascending order from the primitive to the sophisticated. Their view was that it was only when a people turned to *agriculture* that anything that could reasonably be called a 'civil society' really began.[39]

Sir William Blackstone was a contemporary of these Scottish writers I have mentioned. The Scottish Enlightenment', therefore, may be added to those 18th Century sources which supported his adoption of a 'cultivation test' for the purpose of determining whether a colony established in inhabited territory was to be classified as 'settled' or 'conquered'.

But, as I say, I cannot place all my evidence before you tonight, both old and new. I can only repeat that I believe my 1981 thesis still stands up, when judged, as it should be, in late 18th Century terms.

I would conclude, therefore, that the High Court's view that it was obliged to accept the British classification of eastern Australia as a 'settled colony' when it made its (unreviewable) claim to 'sovereignty' was not something which called for any apology, legally speaking. Despite the distaste which the majority displayed towards the *terra nullius* concept, the 'inter-temporal rule', when properly understood and applied, fully justified the formal legal findings. There was no need for breast-beatings and confessions of shame and the acknowledgement of something very close to communal guilt.

Let us concede, however, that to all intents and purposes, and whether rightly or wrongly, necessarily or unneccessarily, the Court, by majority, *did* effectively reject the *terra nullius* classification as ever properly applicable to eastern Australia. So, at all events, the Commonwealth Parliament seems to have decided.[40] Such rejection could not lead in any automatic way to a finding in favour of native title. After all, the Court did accept that Australia must be regarded as a 'settled colony' which had inherited the common law. Mr. Justice Blackburn in the *Gove Land Rights Case* (1971) had held that the common law could not accommodate the concept of native title. A finding in favour of native title would only be possible if that aspect of Blackburn's decision could be over-ruled.

This was not a matter which I chose to advert to in my 1981 paper, but in fact I had always held the view (and taught it) that this was the most vulnerable part of Blackburn's impressive,

conscientious and monumental judgment (it runs to 147 printed pages in the Reports) and I *do* think it was an impressive and conscientious judgment. One of the contributors to the book *Mabo: A Judicial Revolution* chose to describe Blackburn's judgment as 'infamous'.[41] I regard that epithet as insulting and uncalled for, but Blackburn's finding that the common law could not accommodate native title was open to question (and was questioned) at the time.[42] Over the following years, researchers in the area uncovered a wealth of evidence, both judicial and non-judicial, which had been largely misunderstood, over-looked or forgotten, and which all pointed to the conclusion that the common law at all relevant times *could* recognise forms of native title[43] — a conclusion very strongly re-inforced by modern decisions in the Canadian courts, especially the Supreme Court decisions of *Calder* (1973)[44] and *Guerin* (1984).[45]

So the High Court's decision to this effect in *Mabo* really came as no surprise to many of us who had been following the matter. As a legal historian, I am quite comfortable with it. It does not shock me at all. It may be said that it is deeply regrettable that it took so long — until 1992 — for the point to be established authoritatively in its Australian context, given that (as Professor Henry Reynolds in particular has shown) some at least of the ingredients for the decision had been present in the historical record for a very long time, but I am not sure that, until comparatively recently, the climate was appropriate for such evidence to be properly assessed, especially given Australian practice in the area. In any case, much of the evidence has been rescued from obscurity only since the *Gove* case, and the influential Canadian decisions are all later than *Gove* — two being as recent as 1990 and 1991.[46] There has always been speculation as to whether Blackburn's decision on the point in *Gove* would have been reversed if it had been taken on appeal to the High Court at the time. Well, we shall never know, of course, but I am inclined to doubt it. Twenty years ago, the time, I think, was not yet ripe.

One odd consequence of *Mabo* is that the distinction between 'settled' and 'conquered' (or 'ceded') colonies has been virtually eliminated, at any rate in relation to native title to land. That is why I said earlier that, in the result, and paradoxically, the classification of Australia as 'settled' rather than 'conquered' may no longer really matter. This Blackstonian distinction was a basic

premise of my 1981 paper, and I have to concede that it has been severely shaken. Whether it has entirely disappeared, as some would argue, depends on whether the *Mabo* decision has implications for other areas of aboriginal law. That is a fascinating, difficult and provocative question into which I cannot possibly go tonight; but you should be aware that some are arguing that *Mabo* does, logically, carry such implications, and that aspects of aboriginal criminal law, for example, should now be recognised by the common law.[47]

* * *

I should like to conclude my paper tonight in much the same way as I concluded my 1981 paper, but more briefly than on that occasion.

I asked the question then, 'what should we do now?' I said that I could see no point in trying to re-write history, quoting the late Professor Stanner, a wise, compassionate and respected anthropologist in this field, who wrote: 'We can neither undo the past or compensate for it. The most we can do is to give the living their due'. I then looked, first, at the possibility of enacting 'land rights' legislation; and, finally, and with some enthusiasm, I examined and commended the work of the then Aboriginal Treaty Committee, founded in 1979 under the chairmanship of Dr. Coombs. I was a subscribing member of that movement.

On both these approaches to 'giving the living their due', I am now however, considerably disillusioned.

True, there was some land rights legislation in most if not all of the States and in the Northern Territory in the pre-*Mabo* period, and various parcels of land, some of very considerable size, became vested in aboriginal communities, but attempts at the national level to enact some sort of general land claims scheme were unsuccessful, as they were here in Victoria. In neither case, I believe, was there lack of goodwill on the part of the governments involved. The principal problem, which proved intractable in both cases, was to find a representative aboriginal group with which to negotiate, and which could come to some sort of agreement amongst themselves on what they really wanted. There is an extremely delicate point involved here, but it must in all honesty be made: the aborigines of Australia are not a united community by any

means, and they have widely differing perceptions of themselves, their inter-relationships, their place in Australian society overall, their aspirations and their needs. I simply make the point: I prefer not to elaborate upon it, but its implications in this context are obvious.

The *Mabo* decision itself called for a legislative response. The High Court had recognised native title, and had defined it up to a point; but the post-*Mabo* situation called for some legislative scheme or schemes if confusion and endless litigation were to avoided. Two major but very different schemes were enacted by Western Australia (the State most likely to be affected by *Mabo*) and by the Commonwealth, and both are currently under challenge before the High Court. It would not, therefore, be proper for me to offer detailed comment on them, even if I felt competent to do so.[48] However I would venture a pessimistic prediction: whatever scheme or schemes, at whatever level, may finally emerge to (in effect) implement *Mabo*, I cannot imagine that they will work to the general satisfaction. I foresee an endless series of very bitter and unhappy disputes. The evidentiary problems alone are massive.[49] If any support were required for this conclusion, I need only refer you to the article in today's *Age* on the Yorta Yorta land claim, the first Victorian case to be accepted for adjudication by the Native Title Tribunal. Still in its very early stages, it has already led to deep divisions and mistrust.[50]

Finally, I turn to the proposals for some sort of 'treaty'.

Of course, at this stage in our history, no agreement could be a 'treaty' in any legally accepted sense of that term, and in fact many who supported Dr. Coombs' initiative of 1979 preferred to use the aboriginal word 'Makarrata', a non-legal term meaning 'a settlement following a long dispute'. But even the word 'Makarrata' seems now to have disappeared from the vocabulary of the debate, and, despite continuing occasional references to a 'treaty', it has become more usual to talk in rather vague terms about bringing about 'an act of reconciliation', preferably by or at the time of the centenary of federation. The final paragraph of the Preamble of the Commonwealth's Native Title Act describes that statute as 'intended to further advance the process of reconciliation among all Australians'.

Well, it is no doubt an admirable enough objective — nobody could actually quarrel with the idea of 'reconciliation', but what

form would an 'act of reconciliation' take? Who would be the parties to it? Is the idea, to be blunt, at all realistic?

Once again, I tend to be pessimistic. Dr. Coombs' Committee faced the hard truth that it was getting nowhere, and wound itself up.[51] The problems which thwarted earlier attempts to secure general land rights legislation, and which will assuredly haunt the implementation of any post-*Mabo* legislation to survive the High Court, make the likelihood of achieving some honest and properly-negotiated 'act of reconciliation' (or 'treaty' or whatever you like to call it) highly unlikely, at least in the short or medium term. In the *long* term, however, it may be a different matter. It has been observed that the very decision in *Mabo* is likely, over time, to create a greater sense of unity amongst aborigines — that it is (to quote one commentator)' 'one brick in the wall' in rebuilding aboriginal self esteem and cultural integrity', and 'in establishing a legal bridge-head it presages a quantum leap in the potential for innovative political and legal polemics'.[52]

So the conditions for some kind of worthy and workable 'act of reconciliation' may well eventually emerge in post-*Mabo* Australia. I suggest, however, that we should do well to allow the situation to evolve at its own pace, and I close this over-long address, appropriately, I think, with the words of a prominent aborigine — Mr. Mick Dodson, very active in the aboriginal land rights movements, the Aboriginal and Torres Strait Islander Social Justice Commissioner, and co-chairperson of the Working Group on Indigenous Populations (a committee of the U.N. Commission on Human Rights). As recently as 6 October, Mr. Dodson was reported as saying this: 'Genuine reconciliation . . . will only occur through shifts in the attitudes and actions of individuals and communities. It cannot be achieved by government action alone'.[53] Those, it seems to me, are wise words — and encouraging words. Perhaps I am, almost in spite of myself, just a little bit optimistic. Perhaps, after all, hope has not altogether 'gone with the wind'.

REFERENCES

1. XIV *Proceedings of the Medico-Legal Society of Victoria* 93.
2. *Mabo and Others v State of Queensland* (1992) 175 CLR 1; 66 ALJR 408; 107 ALR 1.
3. On 16 March 1995, the High Court unanimously upheld the Commonwealth's Native Title Act 1993 and found invalid Western Australia's Land (Titles and

Traditional Usage) Act 1993: *Western Australia* v *The Commonwealth*; *The Wororra Peoples and Another* v *Western Australia*; *Teddy Biljabu and Others* v *Western Australia* (1995) 128 ALR 1.

4. (1994) 89 *Victorian Bar News* 34.
5. In *Coe* v *The Commonwealth* (1979) 24 ALR 118 at 129; 53 ALJR 403 at 408. The proposition, he said, was 'fundamental to our legal system'.
6. (1971) 17 FLR 141. With this exception, I have not repeated for the purposes of the present resume the citations of authority which I attached to my 1981 lecture.
7. Notably S.E-K Hulme, QC: see his 'Aspects of the High Court's Handling of Mabo', (1993) 87 *Victorian Bar News* 29; being an address to a conference of The Samuel Griffith Society, Melbourne, 31 July–1 August 1993.
8. (1993) 107 ALR 1. All later citations are to this report of the case.
9. Dawson J.'s position was rather more subtle than this (see 98–99), but I believe the generalisation can stand.
10. See footnote 5. Curiously, *Coe* is not discussed in *Mabo*. It is mentioned once only, and then in a footnot: Brennan J. at 20.
11. UQP; 1993. These pulication details are not repeated in subsequent citations.
12. *Op. cit.* xv.
13. *Op. cit.* 25.
14. For example, Brennan J. at 27–29, 41–42; Deane and Gaudron JJ. at 78–83; Toohey J. at 141–142.
15. At 82–83.
16. Indeed, the High Court itself was to reiterate this position in the 1995 decisions cited in footnote 3.
17. At 106.
18. At xiv.
19. *Commentaries on the Laws of England*, Book 4, Ch V, 67.
20. For example, Brownlie, I. *Principles of Public International Law*, Clarendon Press, Oxford, 3rd ed., 1979, 45–49, citing 'a long line of authority'. An earlier High Court decision to this effect is *Chow Hung Ching* v *The King* (1948) 77 CLR 449.
21. At 20–21.
22. For example, Brennan J. at 29, and especially Deane and Gaudron JJ. at 82.
23. [1975] ICJR 12.
24. Brennan J. (with whom Mason CJ. and McHugh J. concurred) at 27–28; Toohey J. at 141–142.
25. *Ibid.*
26. Crawford, J. *The Creation of States in International Law*, Clarendon Press, Oxford, 1979, 179–181.
27. Harris, D.J. *Cases and Materials on International Law*, Sweet and Maxwell, London, 3rd ed., 1983, 165–167 (reading extract in context).
28. Brownlie, *op. cit.*, 131–133.
29. As quoted in Harris, *op. cit.*, 153.
30. *Ibid.*
31. As quoted in Harris, *op. cit.*, 158.
32. Harris, *op. cit.*, 165–167, extracts the *Western Sahara Case* as an example of the application of the 'inter-temporal rule'. See also case-note by Oelofsen, P.D. in (1975) 1 *South African Year Book of International Law* 155, especially at 157–158: '. . . it was therefore clear that the words 'Was Western Sahara . . . a

territory belonging to no one (*terra nullius*)? 'should be interpreted by reference to the law in force at the time of colonisation' (157).

33. From the plaintiffs' written submission, as quoted by Castan, R. and Keon-Cohen, B. (of their counsel) in 'Mabo and the High Court: A Reply to S.E.K. Hulme, QC', (1993) 87 *Victorian Bar News* 47 at 50: 'the High Court in *Daera Guba* (1974) 130 CLR 365 held that the correct law to now apply in respect of early land transactions in a territory which later becomes a British colony, is the local custom and usage applicable to such land *and the time of such transactions*' (emphasis added). While the 'inter-temporal rule' is not referred to by name in *Daera Guba*, it was effectively applied; see especially Gibbs J. at 437–438.
Daera Guba is referred to a number of times in *Mabo*, but not on this point; Brennan J. at 35; Deane and Gaudron JJ. at 66fn., 69–70, 72fn; Toohey J. at 151 fn.
34. 'New South Wales as *terra nullius*: the British denial of Aboriginal land rights', (1981) 19 *Historical Studies* 513.
35. *Arthur Phillip, 1738–1814: His Voyaging*, OUP, 1987, 261 (and see his footnote 20). Emphasis added.
36. Ferguson, Adam *An Essay on the History of Civil Society*, Edinburgh, 1767.
37. Burnet, James (Lord Monboddo) *Of the Origin and Progress of Language*, Edinburgh, 1773.
38. Home, Henry (Lord Kames) *Sketches of the History of Man*, Edinbrugh, 1774.
39. For an examination by a modern Australian historian of the 18th Century concept of the 'progression' of civil societies, see Sixon, R. *The Course of Empire* OUP, 1986.
40. And see footnote 16.
41. Noel Pearson at 75.
42. For example, Hookey 'The Gove Land Rights Case . . .', (1972) 5 *Federal Law Review* 150; Hookey 'Chief Justice Marshall and the English Oak: Comment', (1974) 6 *Federal Law Review* 174.
43. See especially Reynolds, H. *The Law of the Land*, Penguin Books Australia, 1987.
44. *Calder* v *Attorney-General of British Columbia* (1974) 34 DLR (3d) 145.
45. *Guerin* v *R* (1984) 13 DLR (4th) 321.
46. *R* v *Sparrow* (1990) 70 DLR (4th) 385. *Delgamuukw* v *British Columbia* (1991) 79 DLR (4th) 185; order varied on appeal: (1993) 104 DLR (4th) 470 (the judgments on appeal run to 300 pages).
47. See, for example, Mulqueeny, K.E. 'Folk-Law or Folklore . . .' in *Mabo: A Judicial Revolution* 165. In December 1994, however, the High Court rejected the contention that customary Aboriginal criminal law continued to exist within the common law: *Walker* v *New South Wales* (1994) 69 ALJR 111; 126 ALR 321 (Mason CJ.).
48. But see now footnote 3 above.
49. For an examination of some of these problems, see Keon-Cohen, B. 'Some Problems of Proof: the Admissibility of Traditional Evidence' in *Mabo: A Judicial Revolution* 185.
50. 'Deep social ruts appear in land claim', *The Age*, 15 October 1994. Four days later (19 October 1994), *The Age* ran a further story: 'Negotiations for Yorta Yorta land claim struggling'. On 30 May 1995, *The Age* reported the failure of mediation talks between parties to the claim and the referral of the matter to

the Federal Court; more than 400 groups were registered as parties to the claim, and 'a lengthly, complicated and costly courtroom battle' was expected ('Yorta Yorta talks fail, now for Federal Court'). As of the end of May, 1995, no claim under the Native Title Act had succeeded anywhere in Australia.

51. For Dr. Coombs present, more open-ended position, see his *Aboriginal Autonomy: Issues and Strategies*, CUP, 1994.
52. Mulqueeny, K.E. in *Mabo: A Judicial Revolution* at 168.
53. *The Age*, 6 October 1994 ('Buyer to return Aboriginal artefacts').