

Confessions of an Erstwhile Land Rights Advocate

Fr Frank Brennan SJ AO*

Vice Chancellor and Mrs Saunders, Professor Ted Wright, Professor Linda Connor, Mr Kevin Williams, Ladies and Gentlemen.

Thank you for your welcome and the invitation to deliver the fourteenth Sir Ninian Stephen Lecture. I acknowledge the Awabakal people on whose lands we meet and I honour the Awabakal ancestors and their descendants.

We give thanks this night for the safe return to ground of miners Todd Russell and Brant Webb at Beaconsfield, and we join with the family of Larry Knight in mourning his passing.

Tonight I return to the Australian land rights debate, a topic which has not occupied much of my attention for the last eight years. There have been some developments in the contemporary debate about the relevance and correctness of land rights on which I wish to comment, while honouring the profound contribution of Sir Ninian Stephen to the life of the nation. Like St Augustine in his *Confessions*, I do not offer a public confession of my sins but rather my personal

perspective on the major events of my life experience with Aboriginal land rights.

Aurukun, on the west coast of Cape York in Northern Queensland, was dry in May 1982 – no rain and no grog allowed. A drunken but happy Aboriginal man staggered towards me, introducing himself: ‘I Johnny Koowarta.’ He apologised for being drunk and explained that he had just returned from Weipa, a mining town to the north where the Albatross Hotel served alcohol to all comers. In his broken English, Mr Koowarta explained, ‘I bin breakin’ the seal of the Queensland government. Me first man break that seal.’ I realised this was the person who the previous week had won an historic victory in the High Court of Australia against the Queensland government. John was one of the traditional owners of land at Archer River Bend in Cape York. The Commonwealth’s Aboriginal Land Fund Commission had allocated funds for the purchase of the pastoral lease because Cabinet thought Aborigines already had enough land. In September 1972 Cabinet had decided ‘the Queensland government does not view favourably proposals to acquire large areas of additional freehold or leasehold land for development by Aborigines or Aboriginal groups in isolation.’ This racially discriminatory policy was struck down by the High Court. Mr Koowarta had heard the result of his case on the radio news. He knew nothing of the detail.

The next day John came back sober. We sat under a tree and spent all morning working through every line of the complex High Court Judgment *Koowarta v Bjelke Petersen*.¹ John was

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¹ (1982) 153 CLR 168 (*Koowarta*).

very proud. He autographed my copy of the judgment. In 1990, I heard John speak at a conference on 'Two Laws and Two Cultures' at the University of Queensland. To the surprise of land rights activists he proclaimed his simple, evangelical Christian message: 'We are all one.' On 19 February 1991, John and I were back on the lecture circuit in Brisbane and I had the great pleasure of introducing him to Sir Ninian Stephen, the one we honour this evening. Sir Ninian had been one of the judges who heard John's case. He had concluded his judgment in John's favour, saying the withholding of approval by the Queensland Minister for Lands 'once explained by reference to the settled policy of his government, amounted to a refusal to ... permit persons, then possibly unknown to him but who in fact included Mr Koowarta, to occupy land by reason of their race.'² The retired Governor-General, with his legendary pipe in hand and that most mellifluous of voices, asked, 'Do I understand that you still do not have title to your land?' John replied, 'That's right, sir.' Sir Ninian expressed his dismay and John beamed with pride that he was known by the highest in the land as the one who had broken the seal of the Queensland government. Sir Ninian was a keynote speaker at the next session of the conference and told the audience of his joyful meeting with Koowarta. He said, 'It is not everyday that an erstwhile High Court judge meets a famous party whose case he had previously decided.'

When the Goss government was elected in Queensland, the new minister for Aboriginal Affairs, Ms Anne Warner, assured John that he would receive title to his land. His solicitor told me the sad news of John's passing in August 1991. His legal file was closed. He never did get his land. His name, and that of Ninian Stephen, will always be associated with the outlawing of racial discrimination in Australia.

After ten years distinguished service on the High Court of Australia, Sir Ninian was then our Governor-General for seven years. During his term as Governor-General, there was much controversy about the operation of the *Aboriginal*

² *Koowarta* (1982) 153 CLR 168, 222.

Land Rights (Northern Territory) Act 1976 (Cth) and the Hawke government's commitment to overriding the states and territories when Aboriginal rights and environmental concerns were at stake. One flashpoint was the decision of the Hawke Government to grant title to the traditional owners of Uluru (Ayers Rock). Sir Ninian and Lady Stephen did much to transform a political stoush into a very dignified ceremony in the life of the nation. They attended Uluru on 26 October 1985 and Sir Ninian handed over the title deeds. His speech on that occasion was the epitome of Stephen grace and bearing:

Today we stand not merely in the centre of our continent, at its very heart, but beside what has become one of our national symbols, what Aboriginal Australians know as Uluru and what the rest of us think of as Ayers Rock; and in the far distance lies Katajtuta, the Olgas. National symbols to all Australians, these great rocks have been places of high significance to Aboriginals for many thousands of years. Their great mass, their stark contrast with the surrounding plain, and something far less tangible, the sense of awe and of wonder which they create, gives this area a very special significance to all Australians.

To those of us who live far away, in the cities strung out along our continent's sweep of coastline in a great arc around 'the Rock', it beckons insistently – drawing us inland to discover and learn to understand the vastness of our land.

For many Aboriginal people, this place has still deeper meaning and deep spiritual significance, a significance whose roots go back to time immemorial. And now, today, the Uluru–Katajtuta Aboriginal Land Trust becomes the custodian of this heartland of Australia. The Trust, by the deed which is to be handed over today, acquires inalienable freehold title under Australian law to this place which is so special to its members. And at the same time, recognising, too, the special significance of Uluru to all Australians, and the appropriateness of it remaining as an Australian National Park, the Trust will today lease it back to the Australian National Parks and Wildlife Service as a National Park.

The Aboriginal Land Trust will henceforth be the legal owners of this place and Aboriginals will have a real say in

the management of this national park through membership of the Uluru–Katajuta board. Uluru has seen countless generations come and go, and, as a National Park, will long after all of us here today are gone and quite forgotten, remain for future generations of Australians a place of wonder and of strange beauty. I now place in the hands of the Uluru–Katajuta Aboriginal Land Trust the title deeds.

Thereafter, Ninian and Valerie Stephen made frequent visits to remote Aboriginal and Islander communities, often staying in quarters which had not previously hosted vice-regal guests.

I note that this lecture is being delivered on 9 May, the 105th anniversary of the first sitting of our National Parliament in Melbourne, and the 79th anniversary of the opening of the first Parliament House in Canberra in 1927. At that opening, Prime Minister Stanley Bruce declared, '[m]ay those who enter this open door govern with justice, reason and equal favour to all. May they do so in humility and without self interest. May they think and act nationally.' The present Parliament House was then opened on 9 May 1988 – one of the gala events of the bicentenary. Though Sir Ninian was Governor– General at that time, he did not have any formal role to play at the opening as Her Majesty Queen Elizabeth was in attendance. I was there in the crowd with Aboriginal friends including Galarrwuy Yunupingu and Andrea Collins who had dined with Her Majesty at Government House the previous evening. After the formal ceremony inside Parliament House, the Queen emerged into the brilliant sunshine where she was accompanied by Michael Nelson Tjakamarra who escorted her to the 200 square metre granite mosaic in the forecourt of the new building. The mosaic, named Tjurkurpa, depicts the Dreamtime meeting of Australian animals. Seeing the Parliament as the meeting place for different cultures in this land, Mr Tjakamarra said, 'I designed it for a good purpose. For both black and white.' A Papunya artist, he provided the design for the meeting place mosaic crafted from thousands of pieces of granite by Franco Colussi, William McIntosh and Aldo Rossi. The combined effort of these Aboriginal and Australian migrant artisans was the backdrop for a meeting

of cultures from opposite sides of the world. Zena Weekes, a three year old Eora girl slipped through the security cordon and presented Her Majesty with a posy of flowers wrapped in black, red and gold. Protesters called, 'What do we want? Land Rights. When do we want it? Now.' The black Rolls Royce and the white limousines whisked the dignitaries away to lunch. The late Kevin Gilbert, a Wiradjuri man and an honorary adopted member of the local Ngunawal tribe, claimed Tjakamarra had no right to speak outside his own country where he did not belong and that Tjurkurpa was under a holy curse that made it a creative and mystical force for justice and retribution.

A week after the opening, the federal Coalition's spokesman on Aboriginal Affairs issued this statement:

Because of the negative community response to radical Aboriginal protests, the Coalition has decided not to proceed with initiating a parliamentary resolution on Aboriginal matters. We do not believe that it would be positively received in the community and hence would fail to promote reconciliation as we had hoped. [Recent protests] had led the general Australian community to see the Aboriginal people as not being interested in good relations with non-Aboriginals.³

Two months previously, the High Court of Australia heard the first application in the Mabo proceedings. The High Court of Australia had, for the first time, to address the question whether Aborigines and Torres Strait Islanders could have had rights to land which survived the assertion of British sovereignty. All seven judges were agreed that they could not question the assertion of sovereignty by the British Crown. They also agreed that Aborigines and Torres Strait Islanders could have had rights to land prior to the assertion of sovereignty. Six of the judges thought that any such rights could survive the assertion of sovereignty by the Crown. It did not matter how you classified the Crown's mode of acquisition of the

³ Chris Miles, AA/88/24 (Press Release, 19 May 1988).

new territories. Whether the Crown asserted sovereignty by settlement, conquest or cession, native title rights could survive until the Crown extinguished them, either by granting the land to a third party or by dedicating the land to some public use, inconsistent with continued use and occupation by the traditional owners. After 1975, any surviving native title rights would be protected by operation of the Commonwealth's *Racial Discrimination Act* which ensured that native title holders would be treated in a non-discriminatory way, suffering any government interference with their property rights only on the same terms and conditions that would affect any other property holder. By a bare majority of four to three, the court decided that these rights could have been extinguished by the Crown prior to 1975 without the need for payment of compensation.

For some years thereafter, commentators Hugh Morgan and Ray Evans agitated about what they perceived as the Catholic thinking behind the High Court's *Mabo* decision.⁴ The suggestion was that the majority of judges who had been educated at Catholic schools must have allowed their Catholic perspective or values to influence their decision because it was inconceivable to these good Protestant gentlemen how else the court could have reached such a decision. They were particularly concerned that the lead judgments were written by Brennan J 'regarded as a conservative Catholic' and by Deane J, 'a Catholic of some standing'.⁵ Their anxiety was heightened by my relationship to Brennan J. Hugh Morgan offered public advice that I should have been particularly conscious of my father's standing, 'and sensitive to the implications of remarks which could quite incorrectly, give rise to suggestions of influence'.⁶ At the commencement of

⁴ See Ray Evans, 'Gnosticism and the High Court' (1999) 43(6) *Quadrant* 20. See also my response: Frank Brennan, 'Letters: Justice Brennan and *Mabo*' (1999) 43(9) *Quadrant* 5.

⁵ Evans, above n 4, 24–5.

⁶ Hugh Morgan, 'The Dangers of Aboriginal Sovereignty', *News Weekly*, 29 August 1992, 11, 12.

the *Mabo* proceedings back in March 1988, my father made a statement from the bench:

I have informed counsel appearing in this case that my son Fr Frank Brennan SJ is an adviser to the Australian Catholic bishops on matters relating to the land rights of Aboriginal and Islander peoples and that he is actively engaged in a ministry to these peoples. As this matter raises for consideration the question whether Islander people enjoy traditional rights with respect to land, not being rights arising under a statute, it is appropriate that the information I have given counsel should appear on the public record.⁷

Counsel offered no comment and neither did the likes of Evans and Morgan until four years later when the litigation was well complete. I regarded my father's statement as an excess of judicial scrupulosity. Morgan was convinced that 'in *Mabo*, and all that followed from it, we are engaged in a struggle for the political and territorial future of Australia'.⁸ Evans discerned a 'gnostic heresy which seized the collective minds of the High Court'.⁹ By 1999, Evans was publicly lamenting that 'Justice Brennan not only sat on the case but wrote the lead judgment, despite the fact that, in Australia, his son was, and has been for a decade, one of the most active and influential advocates for the revolutionary policies which were embodied in the *Mabo* judgment'.¹⁰

Then James Franklin in *Corrupting the Youth*, his history of philosophy in Australia, asserted that 'the most dramatic outcome of Catholic philosophy in recent times has been the High Court's *Mabo* decision on Aboriginal land rights'.¹¹ Keith Windschuttle took up the call with the observation that '[t]he majority of those who supported *Mabo* were Catholics':

⁷ Transcript of Proceedings, *Mabo v Queensland* (High Court of Australia, Brennan J, 15 March 1988).

⁸ Letter from Hugh Morgan to Frank Brennan, 19 September 1994.

⁹ Evans, above n 4, 26.

¹⁰ *Ibid* 24.

¹¹ James Franklin, *Corrupting the Youth: A History of Philosophy in Australia* (2003) 388.

One of the critical issues in the debate over native title is the attitude the pre-contact Aborigines had to the land. Most discussion assumes they had clearly defined territories, which were exclusively theirs. This concept was one of the principal assumptions on which the Mabo decision was made. Justice Sir Gerard Brennan has made clear that his own judgment had been informed by his son, Father Frank Brennan, the Jesuit barrister and advisor to the Catholic bishops on Aboriginal affairs.¹²

Brennan J had made no such thing clear. Windschuttle's claim was false, uninformed speculation. Brennan and Toohey JJ had extensive experience of Aboriginal land rights before they became High Court judges. Toohey was the first Aboriginal Land Commissioner in the Northern Territory when the Commonwealth Parliament passed the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) implementing the key recommendations of the Woodward Royal Commission. As a barrister, Brennan had been briefed by the Commonwealth as the senior counsel for the Northern Land Council in the Woodward Commission.¹³ Sir Edward Woodward had 'particularly asked' that Brennan 'be briefed for the Northern Land Council'.¹⁴ Woodward acknowledged that Brennan

¹² Keith Windschuttle, 'Mabo and the Fabrication of Aboriginal History' (2003) 15 *Upholding the Australian Constitution: Proceedings of the Samuel Griffith Society* 283, 284, 294–5.

¹³ At Sir Gerard Brennan's swearing in as a High Court Judge in February 1981, then Attorney General, Peter Durack QC, informed the court, '[t]here are two events during your time at the Bar which I think deserve special mention. The first was the case in which you appeared for the small landholders in Fiji and the result of the case was a victory for the Fijians which was of great significance. The second concerned the work you did for the Northern Land Council and the Aboriginal Land Rights Royal Commission conducted by Mr Justice Woodward. That report by Mr Justice Woodward formed the basis of legislation adopted by successive Federal Governments for Aboriginal land rights. Many of Mr Justice Woodward's recommendations followed submissions you made on behalf of the Northern Land Council and, of course, it was an investigation which had tremendous significance for Australia's Aboriginal people.'

¹⁴ Sir Edward Woodward, *One Brief Interval* (2005) 135.

drafted key sections of the land rights bill then presented to government. In his autobiography, Woodward said that Brennan 'did an outstanding job' and 'had some influence on my approach to the report'. Attesting to Brennan's advocacy of the Aboriginal claims, Woodward wrote:

I have always taken the view, in conducting or advising any Royal Commission or Board of Inquiry, that recommendations should be reasonably capable of implementation after taking into account financial and political realities. I did not depart from that principle in this case, but I bore in mind Brennan's submission to me that 'this is a report which will for all time mark the high-water mark of Aboriginal aspirations. Whatever Your Honour does not recommend in favour of Aborigines, at this stage, will never be granted'.¹⁵

It was in response to this advocacy that Woodward finally recommended that traditional owners exercise a veto over mining developments on their lands. In his final report, Woodward said, '[o]f all the questions I have had to consider, that of mineral rights has probably caused me the most difficulty and concern.'¹⁶ Causing great angst to the mining industry (especially Hugh Morgan), Woodward, though denying Aboriginal ownership of minerals, was sufficiently influenced by Brennan's advocacy that he concluded, 'I believe that to deny Aborigines the right to prevent mining on their land is to deny the reality of their land rights.'¹⁷

No doubt Brennan's advocacy experiences in the 1970s did directly inform his judicial mind in later years. Like Mason and Deane JJ, he then spent more than ten years on the High Court before the determination of *Mabo*, hearing numerous land rights appeals from the Northern Territory. Professor Tony Coady has observed in his review of Franklin's *Corrupting the Youth* that 'Franklin's idea that Catholic philosophy via

¹⁵ Ibid 141.

¹⁶ Sir Edward Woodward, *Aboriginal Land Rights Commission: Second Report, April 1974* (1974) 103.

¹⁷ Ibid 108.

natural law theory had a big influence on the Mabo decision' is 'unconvincing', 'since resorting to morality to justify legal decisions has other foundations other than natural law, as is clear in the work of the Oxford philosopher Ronald Dworkin and in much of the human rights movement.'¹⁸ No one could seriously postulate that it is only a Catholic mindset that could result in the High Court finding for Aborigines in their common law claims to land. Most other superior courts in other equivalent countries have done the same regardless of the religious affiliations of the judges. When it came to the question of compensation for past dispossession, there was a division among the judges and no agreement among the Catholics: Mason CJ, Brennan, Dawson and McHugh JJ holding that no compensation was payable and Deane, Gaudron and Toohey JJ holding that it was payable.

The Brennan judgment was the most conservatively and judicially crafted of the majority judgments. Unlike others, he did not quote historians such as Henry Reynolds. He actually confined himself to the historical record regarding the Torres Strait Islands. Presumably that is why the Brennan judgment commanded the assent of Mason CJ and McHugh J, two judges very unlikely to subscribe assent to a judgment 'informed by' a priest who was a son of the judge.

One does not need a particular religious sensibility to espouse the value of equality. From such a value one might derive the principle that the state should not discriminate against persons on the basis of their race when the state decides the terms and conditions on which it is appropriate to separate people from the lands on which they and their ancestors have resided for many generations.

When appointed Governor-General in 1995, Sir William Deane explained the two key ideas underpinning all his High Court judgments: the source of all authority being the people as a whole, and the intrinsic equality of all people.¹⁹ After his

¹⁸ Tony Coady, 'From Aquinas to Mabo', *The Age* (Melbourne), 14 February 2004.

¹⁹ Tony Stephens, *Sir William Deane, The Things that Matter* (2002) 96-7.

retirement he explained:

The basis of natural law is the belief that some things are innately right and some innately wrong, flowing from the nature of things, including our nature as human beings. That approach provides a philosophical basis for seeing such things as human rights as going deeper than any particular act of Parliament or what have you. That is not exclusively Catholic. It runs through Christian belief.²⁰

Critics like Evans and Morgan think it inconceivable that a judge discharging his judicial oath could find in favour of common law native title rights. They think it could only occur if the judges are infected by a Gnostic or Catholic conspiracy. *Mabo* was the first case in which the full bench of the High Court was asked to consider the common law recognition of land rights. The superior courts of Canada and New Zealand have since approved the decision. It was no surprise that Brennan J, in light of his earlier experience as an advocate and judge in land rights cases, would write an authoritative, knowledgeable judgment, gaining the concurrence of two other justices including the Chief Justice. Equally it was no surprise that Deane and Gaudron JJ would write a strong judgment insisting upon the equality before the law of all persons including Aborigines. Their religious beliefs and upbringing may well have provided a context and underpinning for their convictions about equality. From the value of equality for all, they derived principles of law which when applied to the facts at hand rendered a decision which even John Howard has described often as being 'based on a great deal of logic and fairness and proper principle'.²¹ Judges of other faiths and

²⁰ Ibid 100.

²¹ Commonwealth, *Parliamentary Debates*, House of Representatives, 6 May 1996, 346 (John Howard, Prime Minister). Again on 26 June 1996, John Howard told Parliament: 'I have always regarded the *Mabo* decision itself as being a justified, correct decision. I have stated that on a number of occasions': Commonwealth, *Parliamentary Debates*, House of Representatives, 26 June 1996, 2792 (John Howard, Prime Minister).

none could have reached the same decision and with similar reasoning, quoting similar legal sources.

Michael Connor is not a lawyer and his writing style is diffuse. His thesis in *The Invention of Terra Nullius* seems to be that we Australians would be a happier lot if we abandoned confusing talk about terra nullius and simply accepted ten propositions which he thinks well founded in history and in law, regardless of the views expressed by six of the seven High Court judges in *Mabo*. His ten propositions are:

1. The Australian colonies were annexed by various legal proclamations of British authorities.
2. Once there was a proclamation of annexation of territory, there was no need to occupy or settle the land in order to maintain sovereignty over the territory.²²
3. 'In reality, Australia was discovered by Captain Cook who formally took possession in an act of annexation.'²³
4. 'The acts of annexation carried out by the British were peaceful'.²⁴ 'Settlement followed annexation.'²⁵
5. Conflict appeared in Australia only 'within the workings out of settlement, and perhaps of effective control'.²⁶

²² Connor asserts this, though he quotes Professor JG Starke with approval: '[d]istinguish the so-called "peaceful annexation", ie the taking over of territory in the name of a State, by proclamation followed by settlement, without the use of force to conquer the territory': Michael Connor, *The Invention of Terra Nullius* (2005) 197.

²³ Ibid 199.

²⁴ Ibid 205.

²⁵ Ibid 199.

²⁶ Ibid 205.

6. 'If the commissions and instructions issued to Governor Phillip and his successors carried within them the assumption of ownership of all the land then...the matter was beyond the reach of any Australian court.'²⁷
7. The Privy Council was unquestionably right to describe the Australian colonies as 'practically unoccupied' because this was simply a way for the court 'to indicate a low Aboriginal population'.²⁸
8. The Crown rightly 'treated the land as its own to dispose of without regard to such interests as the natives might have had prior to the assumption of sovereignty'.²⁹
9. 'With this there came a moral responsibility towards the Aboriginal people',³⁰ it being for the best for all of us, including Aborigines and Torres Strait Islanders, that the common law not recognise any rights to land which could survive the assertion of sovereignty by annexation.
10. 'For people to get on together, to live together, some tactful forgetting is necessary. Anger and hatred for ever and ever mean that our problems will never be resolved. Affection and co-operation are needed, not victims, guilt and retribution'.³¹

If we took this course, Connor thinks we would have a much better understanding of our history and better prospects

²⁷ Ibid 200.

²⁸ Ibid 205.

²⁹ Ibid 201-2, quoting *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 139 (Dawson J) ('*Mabo*').

³⁰ Ibid 202.

³¹ Ibid 330.

of our future. Connor points out that ‘terra nullius’ was never mentioned when the British decided to ‘make a settlement in New South Wales’:

The British government acted as if Captain Cook’s discovery and annexation of territory in 1770 gave them sovereignty, real estate, and a responsibility to conciliate the Aboriginal inhabitants.³²

Connor assumes that the British Crown henceforth owned all lands on the Australian continent from 1770 onwards, regardless of whether the lands were subsequently settled by British subjects. For Connor, this is not just a question of historical accuracy and legal principle. He concludes his book with the plea:

Australia is a good country, it is also fragile. Terra nullius locked Australians into a false view of our past. ... Infecting our soul with the old historians’ Australiaphobia, and the imported hatred of terra nullius was not a good idea. ... Terra nullius turned our present into a nullius. Get rid of it and the past is a new land.³³

Presumably, Connor thinks Australia would be a happier place if only we could accept that it was the British who negated any land rights of the Aborigines with a touch of violence upon first settlement, or even better, 18 years earlier, on annexation of their lands in 1770 with no violence at all. Connor wants us to accept that the actual Aboriginal dispossession was not the inevitable result of the law applicable at the time of settlement negating Aboriginal land rights, but rather the result of administrative practices by those who were both legally entitled to act without legal constraint in relation to Aboriginal lands and morally obliged to conciliate with the Aboriginal peoples.

³² Ibid 7.

³³ Ibid 330.

Turning to the *Mabo* decision, Connor mistakenly asserts that ‘[t]he judges were classifying Australia in law as a territory whose sovereignty rested on the occupation, or settlement, of a terra nullius’.³⁴ The judges were careful to distinguish between the assertion of sovereignty and the consequences to Aboriginal land tenure flowing from any assertion of sovereignty. In relation to the Murray Islands, the High Court accepted the assertion of sovereignty by virtue of the proclamation of annexation to the colony of Queensland by the Governor of Queensland acting in accordance with an Act of the Queensland Parliament authorised by Letters Patent passed by Queen Victoria. All members of the High Court accepted the earlier statement of principle by Sir Harry Gibbs in the *Seas and Submerged Lands Case* when he said:

The acquisition of territory by a sovereign state for the first time is an act of state which cannot be challenged, controlled or interfered with by the courts of that state.³⁵

According to Brennan J, this principle enunciated by Gibbs ‘precludes any contest between the executive and the judicial branches of government as to whether or not a territory is or is not within the Crown’s dominions.’³⁶ It is quite incorrect for Connor to assert, ‘[t]he *Mabo* judgment was set on a false foundation, that Australian sovereignty and our legal system, when dealing with land, depended on a doctrine of terra nullius.’³⁷ Australian sovereignty depended on nothing more than an assertion of sovereignty by the Crown, an act of state which could not be questioned in any court set up under the authority of the sovereign. The legal effects of the assertion of that sovereignty was another matter. Courts established by the sovereign have the jurisdiction to determine the legal effects of the assertion of sovereignty, including the making of determinations about the Crown’s holding of the

³⁴ Ibid 197.

³⁵ *New South Wales v Commonwealth* (1975) 135 CLR 337, 388.

³⁶ *Mabo* (1992) 175 CLR 1, 31.

³⁷ Connor, above n 22, 188.

radical title to all lands in a territory subject to the Crown's assertion of sovereignty and about the ongoing rights to land held by previous settlers on the land prior to the assertion of sovereignty. Neither of these questions is dependent on the classification of the land as terra nullius.

All members of the High Court majority also accepted Sir Harry Gibbs' observation in *Coe v Commonwealth*³⁸ that there had in the past been a need to distinguish between colonies established by cession or conquest and those established by settlement. This distinction did not affect the assertion of sovereignty but rather it was thought in the past to determine the legal consequences flowing from the assertion of sovereignty. Connor quoted Gibbs CJ in part, but let me give a more complete quote:

It is fundamental to our legal system that the Australian colonies became British possessions by settlement and not by conquest. It is hardly necessary to say that the question is not how the manner in which Australia became a British possession might appropriately be described. For the purpose of deciding whether the common law was introduced into a newly acquired territory, a distinction was drawn between a colony acquired by conquest or cession, in which there was an established system of law of European type, and a colony acquired by settlement in a territory which, by European standards, had no civilised inhabitants or settled law. Australia has always been regarded as belonging to the latter class ...³⁹

Unlike Gibbs and most other High Court judges who have expressed an opinion on the matter, Connor seems to countenance an effective assertion of sovereignty over annexed Aboriginal lands by proclamation alone without any need for subsequent settlement. The prevailing legal opinion post-*Mabo* remains that the Australian colonies were 'acquired by settlement' as Sir Harry Gibbs said in the foreword to the

³⁸ (1979) 24 ALR 118 ('Coe').

³⁹ *Coe* (1979) 24 ALR 118, 129. 8

post *Mabo* book quoted with approval by Connor.⁴⁰ Gibbs referred to 'the common law rule that if Englishmen establish themselves in 'an uninhabited or barbarous country' the colony will be regarded as acquired by settlement'. The Torres Strait Islands when annexed by the Crown were annexed to the colony of Queensland which had been part of the colony of New South Wales. Both colonies were acquired by settlement, not by cession or conquest.

The key question in *Mabo* was not about the assertion of sovereignty by annexation followed by settlement, but about the effect of the common law on any pre-existing Aboriginal interests in land in the newly acquired territory once it was settled. In particular, did the common law recognise the previously existing Aboriginal rights and interests in land?

In *Milirrpum v Nabalco*, Blackburn J had restated Blackstone's position:

There is a distinction between settled colonies, where the land, being deserted and uncultivated, is claimed by right of occupancy, and conquered or ceded colonies ... The difference between the laws of the two kinds of colony is that in those of the former kind all the English laws which are applicable to the colony are immediately in force there upon its foundation. In those of the latter kind, the colony already having law of its own, that law remains in force until altered.⁴¹

Blackburn J went on to reject the plaintiffs' argument that there was a system of law already in place in Arnhem Land prior to the assertion of British sovereignty. Blackburn J concluded:

the question is one not of fact but of law. Whether or not the Australian Aboriginals living in any part of New South Wales had in 1788 a system of law which was beyond the powers

⁴⁰ Sir Harry Gibbs, 'Foreword', in Margaret Stephenson and Suri Ratnapala (eds), *Mabo, A Judicial Revolution: The Aboriginal Land Rights Decision and Its Impact on Australian Law* (1993) xiii, xiv.

⁴¹ (1971) 17 FLR 141, 201.

of the settlers at that time to perceive or comprehend, it is beyond the power of this Court to decide otherwise than that New South Wales came into the category of a settled or occupied territory.⁴²

The High Court shared Blackburn J's unwillingness and inability to reclassify the Australian colonies as anything but settled or occupied. But the High Court did have the power to redetermine the legal consequences of such a classification, without undermining the assertion of sovereignty. Brennan J said, '[a]lthough the question whether a territory has been acquired by the Crown is not justiciable before municipal courts, those courts have jurisdiction to determine the consequences of an acquisition under municipal law.'⁴³ So there was a need to determine the manner of acquisition of a territory in order to determine what law would be in force in the new territory. Brennan J distinguished the operation of the common law interpreted by a domestic court which had no option other than to accept the assertion of sovereignty by the Crown, and the operation of international law which determined the manner in which a sovereign might acquire new territory. According to Brennan J:

Although the manner in which a sovereign state might acquire new territory is a matter for international law, the common law has had to march in step with international law in order to provide the body of law to apply in a territory newly acquired by the Crown.⁴⁴

On earlier precedents of the Privy Council, if the inhabitants were judged to be not civilised or to have no settled law, they were deemed to have no rights or interests in land capable of recognition by the common law. In international law, it was as if their lands were terra nullius.

⁴² *Milirrpum v Nabalco* (1971) 17 FLR 141, 244.

⁴³ *Mabo* (1992) 175 CLR 1, 32.

⁴⁴ *Mabo* (1992) 175 CLR 1, 32.

The major points of disagreement between the *Mabo* majority and the sole dissentient Dawson J were not about the validity of assertion of sovereignty. On that they were *ad idem*. There was no disagreement about the possibility that the Aborigines and Torres Strait islanders had rights to land under their own systems of law prior to colonisation. They agreed to the possibility of ongoing rights and interests in land being recognised by the sovereign post-colonisation. Dawson J in dissent had said, '[t]here is ample authority for the proposition that the annexation of land does not bring to an end those rights which the Crown chooses, in the exercise of its sovereignty, to recognise.'⁴⁵ The major points of disagreement were, first, about the circumstances in which the common law recognised Aboriginal rights and interests in land after colonisation and, second, the steps needed for the extinguishment of these Aboriginal rights. Dawson J took his lead from the Privy Council in *Vajesingji Joravarsingji v. Secretary of State for India*:

when a territory is acquired by a sovereign state for the first time that is an act of state. It matters not how the acquisition has been brought about. It may be by conquest, it may be by cession following on treaty, it may be by occupation of territory hitherto unoccupied by a recognised ruler. In all cases the result is the same. Any inhabitant of the territory can make good in the municipal Courts established by the new sovereign only such rights as that sovereign has, through his officers, recognised. Such rights as he had under the rule of predecessors avail him nothing.⁴⁶

The point of major division between Dawson J and the majority was Dawson J's finding that 'the Crown in right of the Colony of Queensland, (on the annexation of the Murray Islands) exerted to the full its rights in the land inconsistently

⁴⁵ *Mabo* (1992) 175 CLR 1, 123.

⁴⁶ (1924) LR 51 Ind App 357, 360 (Dunedin LJ), quoted in *Mabo* (1992) 175 CLR 1, 123 (Dawson J).

with and to the exclusion of any native or Aboriginal rights'.⁴⁷ Dawson J conceded that there were some problems in asserting this universal extinguishment of Aboriginal rights in the Murray Islands as of 1879. After all, most of the lands were still in the possession of the Murray Islanders more than a century later, and the colony of Queensland had long established local courts for the resolution of land disputes among the islanders. There were books of court rulings on local land disputes. On the face of it, the lay observer could make a good case for the officers of the Crown continuing to recognise islander land rights. Dawson J answered this anomaly between his view of the law and facts with a two pronged approach. He adopted the same dim view Moynihan J of the Queensland Supreme Court expressed about the islander court. Dawson J thought:

it appears that the court proceeded upon an ad hoc basis rather than upon the basis of protecting such rights (if any) as may have existed before the annexation of the Murray Islands. Whilst the court did seek to achieve a consistent application of certain basic principles, this was because of the intrinsic value of consistency and predictability rather than an attempt to apply any traditional or customary law. Thus the institutions introduced by the Europeans (in particular, the island court) do not provide evidence of the recognition of any rights in land enjoyed by the native inhabitants before annexation.⁴⁸

Under Queensland law, the island court had 'jurisdiction to hear and determine disputes concerning any matter that is a matter accepted by the community resident in its area as a matter rightly governed by the usages and customs of the community'.⁴⁹ Under Queensland Law, such a decision was 'final and conclusive and no proceeding shall be brought or heard to restrain the Island Court from disposing of a dispute

⁴⁷ *Mabo* (1992) 175 CLR 1, 159.

⁴⁸ *Mabo* (1992) 175 CLR 1, 157–8.

⁴⁹ *Community Services (Torres Strait) Act* 1984 (Qld), s 41(2)(b)(i).

concerning that matter by reason that such a decision is incorrect.⁵⁰ Dawson J decided that the grant of these powers to the island court by the sovereign '[did] not constitute a recognition of customary rights which, at least so far as land is concerned, are inconsistent with Queensland laws introduced upon annexation'.⁵¹

Having satisfied himself that an island court set up under an Act of the Queensland Parliament could not entail any ongoing recognition by the Crown of native title rights, Dawson J then had to deal with the Murray Islands reality that most of the land had been left in the uninterrupted enjoyment of Murray Islanders since annexation. He turned to the mainland and resolved the ambiguity to his satisfaction. He said:

If any ambiguity arose from the fact that practically the whole of the Murray Islands were reserved and the fact that the Aboriginal inhabitants were allowed to continue in occupation of the land more or less as they had been in the past (or at all events since European contact), that ambiguity is resolved when it is recognised that the scheme under which the islands were reserved extended to the whole of the colony and was elsewhere plainly incompatible with the preservation of any native title and consistent only with the assertion by the Crown of full and complete dominion over land.⁵²

For their part, the majority in *Mabo* were open to the ongoing recognition of native title rights after the assertion of sovereignty by the Crown. Which native title rights were capable of recognition? In the past, the Privy Council had distinguished between conquered and settled colonies, and in the case of settled colonies, their Lordships had distinguished those natives whose rights and interests in land were capable of recognition by the common law and those which were not. Lord Sumner had said in *In re Southern Rhodesia*:

⁵⁰ *Community Services (Torres Strait) Act 1984 (Qld)*, s 41(3).

⁵¹ *Mabo* (1992) 175 CLR 1, 161.

⁵² *Mabo* (1992) 175 CLR 1, 160.

The estimation of the rights of Aboriginal tribes is always inherently difficult. Some tribes are so low in the scale of social organisation that their usages and conceptions of rights and duties are not to be reconciled with the institutions or the legal ideas of civilised society. Such a gulf cannot be bridged. It would be idle to impute to such people some shadow of the rights known to our law and then to transmute it into the substance of transferable rights of property as we know them.⁵³

For his part, Brennan J (with Mason CJ and McHugh J agreeing) made a survey not only of the earlier Privy Council decisions, but also of the changes in thinking both in international law about terra nullius, and in community values. In view of the concurrence by Mason CJ and McHugh J, Connor asserts that ‘the most important opinion was written by Justice Brennan and in it terra nullius became the basis of our sovereignty’.⁵⁴ In its 1975 *Advisory Opinion on Western Sahara*, the majority of the International Court of Justice had ruled that:

‘Occupation’ being legally an original means of peaceably acquiring sovereignty over territory otherwise than by cession or succession, it was a cardinal condition of a valid ‘occupation’ that the territory should be terra nullius – a territory belonging to no-one – at the time of the act alleged to constitute the ‘occupation’ ... Whatever differences of opinion there may have been among jurists, the State practice of the relevant period indicates that territories inhabited by tribes or peoples having a social and political organisation were not regarded as terrae nullius.⁵⁵

Judge Ammoun, Vice President of the Court had concluded that ‘the concept of terra nullius, employed at

⁵³ (1919) AC 211, 233–4.

⁵⁴ Connor, above n 22, 193. Connor is particularly peeved with Brennan’s judgment because he ‘scored 27 uses of terra nullius’ while Deane and Gaudron ‘managed to pull in three distinct meanings’ of the term ‘in just two usages’: 215.

⁵⁵ [1975] ICJ 12, 39.

all periods, to the brink of the twentieth century, to justify conquest and colonisation, stands condemned.⁵⁶ Having reviewed this ICJ decision, Brennan J said:

If the international law notion that inhabited land may be classified as terra nullius no longer commands general support, the doctrines of the common law which depend on the notion that native peoples may be 'so low in the scale of social organisation' that it is 'idle to impute to such people some shadow of the rights known to our law' can hardly be retained. If it were permissible in past centuries to keep the common law in step with international law, it is imperative in today's world that the common law should neither be nor be seen to be frozen in an age of racial discrimination.⁵⁷

So Brennan J's reasoning about the common law and the need to abandon the common law distinction between indigenous groups high and low on the scale of social organisation was informed by a desire to have the common law keep pace with international law which had abandoned an expanded notion of terra nullius to include territory inhabited by primitive peoples. Having distinguished the Crown title to colonies from Crown ownership of colonial land, and having established the distinction between the Crown's radical title to all lands and the ongoing beneficial interest in lands, Brennan J then concluded that there was no need to distinguish between conquered and settled colonies nor to distinguish between natives high and low in the scale of social organisation. He concluded:

The preferable rule, supported by the authorities cited, is that a mere change in sovereignty does not extinguish native title to land. ... The preferable rule equates the indigenous inhabitants of a settled colony with the inhabitants of a conquered colony in respect of their rights and interests in land and recognises in the indigenous inhabitants of a settled

⁵⁶ [1975] ICJ 12, 86.

⁵⁷ *Mabo* (1992) 175 CLR 1, 41-2.

colony the rights and interests recognised by the Privy Council in *In re Southern Rhodesia* as surviving to the benefit of the residents of a conquered colony.⁵⁸

In so doing, Connor asserts that Brennan J logically destroyed 'the basis for the idea of Australian sovereignty he himself had established'.⁵⁹ Connor wrongly proclaims, '[t]he judges were classifying Australia in law as a territory whose sovereignty rested on the occupation, or settlement, of a terra nullius.'⁶⁰ He then claims, 'Australian sovereignty in the *Mabo* decision is a judicial fantasy'.⁶¹

It is common ground in all the judgments in *Mabo* that there was a change of sovereign with the annexation of land by the British Crown followed by settlement. It is common ground that the radical title to all land is held by the Crown once sovereignty is effectively asserted. It is common ground that Aborigines and Torres Strait Islanders could have had rights and interests in land capable of recognition by the Crown. The dispute is about what types of interest in land could survive the mere assertion of sovereignty by the Crown and what additional action was required by the Crown to extinguish or affirm those rights. There is nothing in the *Mabo* judgments to undermine the sovereignty of the British Crown over the lands of Australia, including the Torres Strait. It is common ground that many wrongs were committed in the past by the dispossession of Aborigines and Torres Strait Islanders. Those who were offended by Deane's and Gaudron JJ's description of 'the conflagration of oppression and conflict which was, over the following century, to spread across the continent to dispossess, degrade and devastate the Aboriginal peoples and leave a national legacy of unutterable shame'⁶² still have to contend with Dawson J's observations, no matter how peaceful was the initial annexation by proclamation:

⁵⁸ *Mabo* (1992) 175 CLR 1, 57.

⁵⁹ Connor, above n 22, 194.

⁶⁰ *Ibid* 197.

⁶¹ *Ibid* 203.

⁶² *Mabo* (1992) 175 CLR 1, 104.

There may not be a great deal to be proud of in this history of events. ... The policy which lay behind the legal regime was determined politically and, however insensitive the politics may now seem to have been, a change in view does not of itself mean a change in the law. It requires the implementation of a new policy to do that and that is a matter for government rather than the courts.⁶³

Dawson J concluded his judgment with the observation:

if traditional land rights (or at least rights akin to them) are to be afforded to the inhabitants of the Murray Islands, the responsibility, both legal and moral, lies with the legislature and not with the courts.⁶⁴

In the end, the Parliament did take action with the passage of the *Native Title Act 1993* (Cth) which was then extensively amended by the Howard government in 1998 in the wake of the *Wik* decision.⁶⁵ In light of the present political attacks on the *Mabo* decision, it is salutary to recall Prime Minister Howard's comments on the decision. He thinks the decision was 'based on a great deal of logic and fairness and proper principle'.⁶⁶ Back in 1996, he told Parliament: 'I have always regarded the *Mabo* decision itself as being a justified, correct decision. I have stated that on a number of occasions.'⁶⁷ Just as international law moved on from the notion that terra nullius could include territory occupied by so called primitive peoples, so too the Australian common law set down by the High Court of Australia has moved on from the spurious classification of lands occupied by those persons 'so low in the scale of social organisation' that it is 'idle to impute to such

⁶³ *Mabo* (1992) 175 CLR 1, 145.

⁶⁴ *Mabo* (1992) 175 CLR 1, 175.

⁶⁵ *Wik Peoples v Queensland* (1996) 187 CLR 1; *Native Title Amendment Act 1998* (Cth).

⁶⁶ Commonwealth, *Parliamentary Debates*, House of Representatives, 6 May 1996, 346.

⁶⁷ Commonwealth, *Parliamentary Debates*, House of Representatives, 26 June 1996, 2792.

people some shadow of the rights known to our law'. The matter was well summarised by Sir Gerard Brennan in his 2005 Address to the Australian Judicial Conference:

Occasionally, but only occasionally, changes in the enduring values of a society may evoke changes in the common law. Perhaps *Mabo* [No 2] is the most dramatic modern example. The recognition of native title flowed from the change in the values of a society which, in earlier times (to adopt the language of Lord Sumner) had perceived Aborigines as: 'so low in the scale of social organisation that their usages and conceptions of rights and duties are not to be reconciled with the institutions or the legal ideas of civilised society. Such a gulf cannot be bridged. It would be idle to impute to such people some shadow of the rights known to our law and then to transmute it into the substance of transferable rights of property as we know them.' But now we are in a society which regards all people as equal before the law. Thus the enduring value which led to the decision in *Mabo* was the value of equality.⁶⁸

Mabo left our national sovereignty intact. It left unaffected all other rights and interests in land. It spared the Crown any debt for compensation for past dispossession. It recognised surviving native title rights two centuries after the initial assertion of sovereignty. And it shaped our common law consistent with developments in international law, and true to the Australian value of equality for all before the law.

Towards the end of his book, Connor observes, '[t]he Aborigines were dispossessed not by the law of the land, but by administrative practices which developed as the colony was established and expanded.'⁶⁹ When the dust has settled on Connor's sandy track through the thickets of terra nullius, one wonders what has changed. Presumably he agrees with

⁶⁸ Sir Gerard Brennan, 'The Common Law: Law for a Time, Law for a Place' (Speech delivered at the Judicial Conference of Australia, 3 September 2005).

⁶⁹ Connor, above n 22, 322.

Brennan J's claim in *Mabo*:

To treat the dispossession of the Australian Aborigines as the working out of the Crown's acquisition of ownership of all land on first settlement is contrary to history. Aborigines were dispossessed of their land parcel by parcel, to make way for expanding colonial settlement.⁷⁰

Without land rights and self-determination, indigenous peoples in previously colonised societies are treated as the members of one polity without a voice and as people without distinctive rights. With land rights and self-determination they are members of two polities with their own conflicting voices (realist, liberal and idealist), living under two laws which require reconciliation when the indigenous law and the coloniser's law collide or when the indigenous person asserts individual rights against the collective rights of the clan or community. Land rights and self-determination provide the space and the time for these indigenous peoples to live in their two worlds.

Indigenous people without land rights and without a modicum of self-determination are individuals and societies denied the place and opportunity to maintain themselves with their distinctive cultural identity in a post-colonial, globalised world. Indigenous people with land rights and a modicum of self-determination are individuals and societies with an enhanced choice about how to participate in the life of the nation state and of the global economy while being guaranteed the place and opportunity to maintain their cultural and religious identity with some protection from State interference and from involuntary assimilation into the predominant post-colonial society.

I remain convinced of four propositions about previously colonised societies with indigenous minorities:

⁷⁰ *Mabo* (1992) 175 CLR 1, 68–9.

- Law and policy should recognise that even today indigenous minorities in these societies have to live in two worlds, and the common good of these societies (as well as respect for the rights of the indigenous citizens) requires some recognition of land rights and self-determination.
- Indigenous leaders are like politicians dealing in international affairs. They have to deal with their domestic constituencies and treat with the leaders of other governments which happen to be the elected governments of all the people in the post-colonial society. As in the field of international relations, there will be indigenous leaders and theorists who are realists or idealists and others seeking reconciliation in the centre, who are liberals. All must be heard.
- Indigenous people should be free to opt for their individual rights as citizens regardless of the arrangements between government and the indigenous leadership.
- Only by tolerating the uncertainty and complexity of land rights and self-determination can non-indigenous people own their history and their responsibility for the continuing plight of their indigenous citizens.

The belated recognition of native title has helped to put right what Deane and Gaudron JJ described as our 'national legacy of unutterable shame'.⁷¹ The High Court still has its work cut out interpreting the fine print of the excessively amended Native Title Act 1993 (Cth) and filling in the detail of

⁷¹ *Mabo* (1992) 175 CLR 1, 104.

common law native title, providing considerable feasting for lawyers. Indigenous communities still have their problems and we still have a national problem in reconciling ourselves. The denial of land rights and the failure to accord equal protection and respect under the law are no longer part of the Australian solution. That is a better starting point than the terra nullius mindset which preceded *Mabo*.

Two centuries on, there are many Aborigines who have lost the requisite connection with land to be able to succeed in a native title claim. That is why the Indigenous Land Fund was set up. That is why the Keating government conceded the need for a social justice package negotiated with Aboriginal Australia heralding a commitment to putting right the present injustices exacerbated by two centuries of dispossession and marginalisation.

Cases like *Yorta Yorta*⁷² and last month's decision of Mansfield J in *Risk v Northern Territory of Australia*⁷³ highlight that *Mabo*, *Wik* and their progeny have not delivered any windfall to urban Aborigines and those whose fertile lands have long been dedicated to intensive farming activity. Mansfield J's observations about the Larrakia people in Darwin apply to most urban Aboriginal groups in contemporary Australia:

the Larrakia people were a community of Aboriginal people living in the claim area at the time of sovereignty. The settlement of Darwin from 1869, the influx of other Aboriginal groups into the claim area, the attempted assimilation of Aboriginal people into the European community and the consequences of the implementation of those attempts and other government policies (however one might judge their correctness), led to the reduction of the Larrakia population, the dispersal of Larrakia people from the claim area, and to a breakdown in Larrakia people's observance and acknowledgement of traditional laws and customs. In the 1970s the land claims drew interest to the Larrakia culture and there has since been a revival of the Larrakia community

⁷² *Yorta Yorta v Victoria* (2002) 214 CLR 422.

⁷³ *Risk v Northern Territory of Australia* [2006] FCA 404 ('*Risk*').

and culture. A large number of people who now identify as Larrakia only became aware of their ancestry during these land claims, and acquired much 'knowledge' at this time. The Larrakia community of 2005 is a strong, vibrant and dynamic society. However, the evidence demonstrates an interruption to the Larrakia people's connection to their country and in their acknowledgement and observance of their traditional laws and customs so that the laws and customs they now respect and practice are not 'traditional' as required by s 223(1) of the *Native Title Act*.⁷⁴

Late in his term on the High Court, McHugh J, one of the majority in the *Mabo* decision and one of the dissentients in *Wik*, had cause to look back over the history of native title litigation:

The dispossession of the Aboriginal peoples from their lands was a great wrong. Many people believe that those of us who are the beneficiaries of that wrong have a moral responsibility to redress it to the extent that it can be redressed. But it is becoming increasingly clear – to me, at all events – that redress can not be achieved by a system that depends on evaluating the competing legal rights of landholders and native–title holders. The deck is stacked against the native–title holders whose fragile rights must give way to the superior rights of the landholders whenever the two classes of rights conflict. And it is a system that is costly and time–consuming. At present the chief beneficiaries of the system are the legal representatives of the parties. It may be that the time has come to think of abandoning the present system, a system that simply seeks to declare and enforce the legal rights of the parties, irrespective of their merits. A better system may be an arbitral system that declares what the rights of the parties ought to be according to the justice and circumstances of the individual case.⁷⁵

⁷⁴ *Risk* [2006] FCA 404, [839].

⁷⁵ *Western Australia v Ward* (2002) 213 CLR 1, 240–1 (this case deals with the claim by the Miriuwung and Gajerrong People to lands in the East Kimberley region of Western Australia, including part of the Ord River scheme). In an earlier case Justice McHugh said during argument: '[m]y view was that native title would apply basically to only unalienated

Other High Court judges have voiced similar concerns.⁷⁶ The issue now is not the legitimacy of land rights but determining the cut-off point for recognising native title rights when other parties also have rights over the same land, and matching the remaining native title rights with the real, rather than imagined, Aboriginal and Torres Strait Islander aspirations. Noel Pearson, says that ‘native title is all about what is left over. And land rights have never been about the dispossession of the colonisers and their descendents. Whether it be statutory land rights or common law land rights – these land rights have always been focused on remnant lands’.⁷⁷ 16 per cent of the Australian continent is now owned or controlled by Aboriginal and Torres Strait Islander people. And yet Graeme Neate, the President of the Native Title Tribunal, says:

Crown land. If, for example, I thought it was going to apply to freehold, to leaseholds, I am by no means convinced that I would have not joined Justice Dawson [the sole dissident in *Mabo*], and it may well be that that was also the view of other members of the Court’: Transcript of Proceedings, *Fejo v Northern Territory* (High Court of Australia, McHugh J, 22 June 1998). 15

⁷⁶ ‘The legal advance that commenced with *Mabo v Queensland [No 2]* or perhaps earlier, has now attracted such difficulties that the benefits intended for Australia’s indigenous peoples in relation to native title to land and waters are being channelled into costs of administration and litigation that leave everyone dissatisfied and many disappointed’: *Wilson v Anderson* (2002) 213 CLR 401, 454 (Kirby J). ‘I do not disparage the importance to the Aboriginal people of their native title rights, including those that have symbolic significance. I fear, however, that in many cases because of the chasm between the common law and native title rights, the latter, when recognised, will amount to little more than symbols. It might have been better to redress the wrongs of dispossession by a true and unqualified settlement of lands or money than by an ultimately futile or unsatisfactory, in my respectful opinion, attempt to fold native title rights into the common law’: *Western Australia v Ward* (2002) 213 CLR 1, 398–9 (Callinan J).

⁷⁷ Noel Pearson, ‘Where We’ve Come From and Where We’re at With the Opportunity that is Koiki Mabo’s Legacy to Australia’ (Mabo Lecture delivered at the AIATSIS Native Title Conference 2003, Alice Springs, 3–5 June 2003).

It is my view that far too great a weight of expectation has been put on native title to deliver what it was not capable of delivering. There are areas of Australia where native title will deliver little or nothing.⁷⁸

A country's system of land law and governance is undoubtedly more complex once indigenous land rights are recognised. The cost of this complexity is high when a country like Australia has long delayed the recognition. The benefits to indigenous people are less and patchy when many of the dispossessed have had no option except to live away from their lands for generations. The complexity and patchiness provide no warrant for returning to the terra nullius mindset.

While Australia's indigenous leaders are seeking a way forward for their people in the short and long terms, the academic historians have been at war interpreting and re-interpreting the conflict and meeting between Aborigines and the colonisers. Following the publication of Keith Windschuttle's *The Fabrication of Aboriginal History*,⁷⁹ Stuart Macintyre published *The History Wars*⁸⁰ and has now edited a collection entitled *The Historian's Conscience: Australian Historians on the Ethics of History*.⁸¹ Greg Denning writes an essay in the latest collection entitled 'Living With and In Deep Time'. He recalls the celebration at the National Library in Canberra when two items of Australian heritage were placed on the Memory of the World Register. Those items, joining documents from other countries such as the Magna Carta and the US Declaration of Independence, were not the Australian Constitution or even the batting records of Donald Bradman, but rather Captain James Cook's journal from the Endeavour

⁷⁸ Graeme Neate, 'The "Tidal Wave" of Justice and the "Tide of History"' (Speech delivered at the Fifth World Summit of Nobel Peace Laureates, Rome, 10 November 2004).

⁷⁹ Keith Windschuttle, *The Fabrication of Aboriginal History* (2002) vol 1.

⁸⁰ Stuart Macintyre and Anna Clark, *The History Wars* (2003).

⁸¹ Stuart Macintyre (ed), *The Historian's Conscience: Australian Historians on the Ethics of History* (2004).

voyage of 1768–1771 culminating in his hoisting the flag on Possession Island, and the papers relating to Eddie Mabo’s case in the High Court. Dening describes the reverence with which he donned the cotton gloves to peruse these documents in the Manuscript Reading Room of the library. He takes up Eddie Mabo’s drawings of his land and his people. This file ‘needs a slow, slow read’. Dening says this file is Mabo’s ‘expression of how deep time has left its mark on the present.’ Here is Dening’s evocative description of his reading of these papers:

He (Eddie Mabo) taps a truth the way we all tap truths from living, but in ways which need to be tolerated by those whose notion of law and evidence is blinkered by legal tradition and constitution and who need to find some entry into Eddie Mabo’s otherness. The other papers in the Mabo Papers – of judges, lawyers, anthropologists, historians, witnesses of first people telling their stories – belong to the Memory of the World because the whole world faces the issue of how it lives with the Deep Time of all its first peoples, overrun and dispossessed as they are. It belongs to World Memory because the papers are we, the Australian people, struggling to do justice and to live with the Deep Time all around us. And we are in this instance the world.⁸²

Though land rights and self-determination provide no utopia for the contemporary indigenous Australian community, they have belatedly put right an ancient wrong. The cost and inconvenience are unavoidable. Terra nullius is no longer an option. The Australian novelist Tim Winton reminds us, ‘[t]he past is in us, and not behind us. Things are never over.’⁸³

The words of Marshall CJ of the United States Supreme Court in *Johnson v McIntosh* still ring out today:

⁸² Greg Dening ‘Living With and In Deep Time’, in Stuart McIntyre (ed), *The Historian’s Conscience: Australian Historians on the Ethics of History* (2004) 40, 43.

⁸³ Tim Winton, ‘Aquifer’, in *The Turning* (2004) 37, 53.

humanity demands, and a wise policy requires, that the rights of the conquered to property should remain unimpaired; that the new subjects should be governed as equitably as the old, and that confidence in their security should gradually banish the painful sense of being separated from their ancient connections, and united by force to strangers.⁸⁴

We Australians belatedly have come to the right starting point on an endless search for justice between indigenous and non-indigenous citizens. Though it is no longer fashionable or politically correct in Australia, there is no getting away from Prime Minister Keating's insight that we white Australians must start with an act of recognition:

Recognition that it was we who did the dispossessing. We took the traditional lands and smashed the traditional way of life. We brought the disasters. The alcohol. We committed the murders. We took the children from their mothers. We practised discrimination and exclusion. It was our ignorance and our prejudice. And our failure to imagine these things being done to us. With some noble exceptions, we failed to make the most basic human response and enter into their hearts and minds. We failed to ask – how would I feel if this were done to me? As a consequence, we failed to see that what we were doing degraded all of us.⁸⁵

These sentiments should rightly continue to haunt all citizens of post-colonial societies where indigenous people 'united by force to strangers', still live on the fringes. With a confident identity and secure sense of belonging in

⁸⁴ (1823) 21 US 240, 260. Chief Justice Marshall goes on to say: 'When the conquest is complete, and the conquered inhabitants can be blended with the conquerors, or safely governed as a distinct people, public opinion, which not even the conqueror can disregard, imposes these restraints upon him; and he cannot neglect them, without injury to his fame, and hazard to his power.'

⁸⁵ Paul Keating, 'Australian Launch of the International Year for the World's Indigenous People' (Speech delivered at Redfern, 10 December 1992).

both worlds, indigenous people might 'gradually banish the painful sense of being separated from their ancient connections'. Those citizens who are recent migrants are joined with the descendants of the colonisers, accepting the national responsibility of correcting past wrongs so that the descendants of the land's traditional owners might belong to their land, their kin and their Dreaming in the society built upon their dispossession. While we continue to blame the victims, we are haunted by Andrew Robb's observation from the opposite side of the parliamentary chamber echoing the Keating declaration. In his maiden speech to the Australian Parliament, Robb said, '[w]e have basically poisoned recent generations; poisoned their bodies with alcohol and other substances and poisoned their spirit and self-belief with handouts and welfare dependency.'⁸⁶

Land rights and self-determination are necessary but insufficient antidotes for indigenous minorities wanting to belong in post-colonial societies coming to terms with their history. Just because the indigenous people amongst us also need work and education, that is no reason to deny them their land rights and self-determination.

Thank you for providing me the opportunity by honouring Sir Ninian Stephen to return to the fray of Aboriginal land rights and to offer my confessions as an unashamed public advocate for putting the terra nullius mindset behind us.

⁸⁶ Commonwealth, *Parliamentary Debates*, House of Representatives, 29 November 2004, 9 (Andrew Robb).