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The National Centre for Indigenous Studies, supported by the Centre for International and Public Law, presents:

THE CONFESSIONS OF AN ERSTWHILE LAND RIGHTS ADVOCATE

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Law Link Lecture Theatre, Fellows Road, ANU

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I am an unashamed, erstwhile land rights advocate who confesses an ongoing conviction that we should not put the *terra nullius* mindset behind us, and that we should continue to espouse the right of indigenous Australians to self-determination, which includes the right to seek government assistance with the provision of basic services to indigenous communities.

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.²
3. “In reality, Australia was discovered by Captain Cook who formally took possession in an act of annexation.”³
4. “The acts of annexation carried out by the British were peaceful”.⁴
“Settlement followed annexation.”⁵

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² Connor asserts this though he quotes professor J G Starke with approval at p. 197: “Distinguish 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” (italics added).

³ M. Connor, *The Invention of Terra Nullius*, Macleay Press, Sydney, 2005 , p. 199

5. Conflict appeared in Australia only “within the workings out of settlement, and perhaps of effective control”.⁶
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.”⁷
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”.⁸
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”.⁹
9. “With this there came a moral responsibility towards the Aboriginal people”¹⁰, 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”.¹¹

If we took this course, Connor thinks we would have a much better understanding of our history and better prospects of our future. Connor points out that “*terra nullius*” was never mentioned when the British decided to “make a settlement in New South Wales”.¹²

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 with the Aboriginal inhabitants.

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:¹³

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’ Australiophobia, 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.

4 Ibid., p. 205

5 Ibid.

6 Ibid.

7 Ibid., p. 200

8 Ibid.

9 Justice Dawson in *Mabo*, (1991-1992) 175 CLR 1 at p 139, quoted with approval by Connor, op. cit. p. 201-2

10 Connor, op. cit., p. 202

11 Ibid., p. 330

12 M. Connor, *The Invention of Terra Nullius*, Macleay Press, Sydney, 2005, p. 7

13 Ibid., p. 330

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.

Turning to the *Mabo* decision, Connor mistakenly asserts that “the judges were classifying Australia in law as a territory whose sovereignty rested on the occupation, or settlement, of a *terra nullius*”¹⁴. 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:¹⁵

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.

According to Justice Brennan, 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.”¹⁶ It is quite incorrect for Connor to assert, “The *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*.”¹⁷ 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 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* 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

14 Ibid., p. 197

15 *New South Wales v Commonwealth* (1975) 135 CLR at p. 388

16 (1991-1992) 175 CLR 1 at p.31

17 Connor, op. cit., p. 188

past to determine the legal consequences flowing from the assertion of sovereignty. Connor quoted Gibbs in part but let me give a more complete quote:¹⁸

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.

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 post *Mabo* book quoted with approval by Connor.¹⁹ 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*, Justice Blackburn had restated Blackstone’s position:²⁰

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.

Blackburn 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 concluded:²¹

[T]he 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 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.

18 (1979) 24 ALR 118 at p. 129

19 Sir Harry Gibbs, Foreword, *Mabo: A Judicial revolution: The Aboriginal Land Rights Decision and Its Impact on Australian Law*, University of Queensland Press, 1993, p. xiv

20 (1971) 17 FLR 141 at p. 201

21 *Ibid.*, p. 244

The High Court shared Justice Blackburn'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. Justice Brennan said, "Although 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."²² 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. Justice Brennan distinguished the operation of the common law interpreted by a domestic court which had no option 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:²³

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.

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*.

The major points of disagreement between the *Mabo* majority and the sole dissentient Justice Dawson 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. Justice Dawson in dissent had said, "There 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."²⁴ 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. Justice Dawson took his lead from the Privy Council in *Vajesingji Joravarsingji v. Secretary of State for India*²⁵

(W)hen 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 recognized 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, recognized. Such rights as he had under the rule of predecessors avail him nothing.

The point of major division between Justice Dawson and the majority was Dawson's finding that "the Crown in right of the Colony of Queensland, (on the annexation of

22 (1991-1992) 175 CLR 1 at p.32

23 Ibid.

24 (1991-1992) 175 CLR 1 at p. 123

25(1924) LR 51 Ind App 357, at p 360, quoted by Dawson J at (1991-1992) 175 CLR 1 at p. 123

the Murray Islands) exerted to the full its rights in the land inconsistently with and to the exclusion of any native or aboriginal rights”.²⁶ Dawson 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 answered this anomaly between his view of the law and facts with a two pronged approach. He adopted the same dim view Justice Moynihan of the Queensland Supreme Court expressed about the islander court. Dawson thought:²⁷

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.

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”.²⁸ 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 concerning that matter by reason that such a decision is incorrect.”²⁹ Justice Dawson decided that the grant of these powers to the island court by the sovereign “do not constitute a recognition of customary rights which, at least so far as land is concerned, are inconsistent with Queensland laws introduced upon annexation”.³⁰

Having satisfied himself that an island court set up under Act of the Queensland parliament could not entail any ongoing recognition by the Crown of native title rights, Justice Dawson 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:³¹

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 recognized 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.

26(1991-1992) 175 CLR 1 at p. 159

27 (1991-1992) 175 CLR 1 at pp. 157-8

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

29 S. 41(3), *Community Services (Torres Strait) Act 1984*

30(1991-1992) 175 CLR 1 at p. 161

31(1991-1992) 175 CLR 1 at p. 160

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*.³²

The estimation of the rights of aboriginal tribes is always inherently difficult. Some tribes are so low in the scale of social organization that their usages and conceptions of rights and duties are not to be reconciled with the institutions or the legal ideas of civilized 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.

For his part, Justice Brennan (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 and McHugh, Connor asserts that “the most important opinion was written by Justice Brennan and in it *terra nullius* became the basis of our sovereignty”³³. 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 organization were not regarded as *terrae nullius*.”³⁴ Judge Ammoun, Vice President of the Court had concluded that “the concept of *terra nullius*, employed at all periods, to the brink of the twentieth century, to justify conquest and colonization, stands condemned.”³⁵ Having reviewed this ICJ decision, Justice Brennan said:³⁶

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 organization” 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.

So Brennan’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

32 (1919) AC 211, at pp 233-234

33 Connor, op. cit., p. 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”. (at p. 215)

34 [1975] ICJR, at p. 39

35 [1975] ICJR, at p. 86

36 (1991-1992) 175 CLR 1 at pp. 41-2

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, Justice Brennan 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:³⁷

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 recognizes in the indigenous inhabitants of a settled colony the rights and interests recognized by the Privy Council in *In re Southern Rhodesia* as surviving to the benefit of the residents of a conquered colony.

In so doing, Connor asserts that Justice Brennan logically destroyed "the basis for the idea of Australian sovereignty he himself had established".³⁸ Connor wrongly proclaims, "The judges were classifying Australia in law as a territory whose sovereignty rested on the occupation, or settlement, of a *terra nullius*."³⁹ He then claims, "Australian sovereignty in the *Mabo* decision is a judicial fantasy".⁴⁰

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 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 Justices Deane's and Gaudron'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"⁴¹ still have to contend with Justice Dawson's observations, no matter how peaceful was the initial annexation by proclamation.⁴²

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.

37 (1991-1992) 175 CLR 1 at p. 57

38 Connor, op. cit., p. 194

39 Connor, op. cit., p. 197

40 Connor, op. cit., p. 203

41 (1991-1992) 175 CLR 1 at p. 104

42 (1991-1992) 175 CLR 1 at p. 145

Justice Dawson concluded his judgment with the observation:⁴³

[I]f 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.

In the end, the Parliament did take action with the passage of the *Native Title Act 1993* which was then extensively amended by the Howard government in 1998 in the wake of the *Wik* decision. 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 good deal of logic and fairness and proper principle".⁴⁴ 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."⁴⁵ 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 those land occupied by those persons "so low in the scale of social organization" that it is "idle to impute to such 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.⁴⁶

Occasionally, but only occasionally, changes in the enduring values of a society may evoke changes in the common law. Perhaps *Mabo [No 2]*⁴⁷ 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)⁴⁸ had perceived Aborigines as: "so low in the scale of social organization that their usages and conceptions of rights and duties are not to be reconciled with the institutions or the legal ideas of civilized 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.

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, "The Aborigines were dispossessed not by the law of the land, but by administrative practices which developed as the colony was established and expanded."⁴⁹ When the dust has settled on Connor's

43 (1991-1992) 175 CLR 1 at p. 175

44 (1996) CPD (HofR) 345; 6 May 1996.

45 (1996) CPD (HofR) 2791; 26 June 1996

46 F. G Brennan, "The Common Law: Law for a Time, Law for a Place", Judicial Conference of Australia, 2005 Colloquium Papers, 3 September 2005, p. 8

47 (1992) 175 CLR 1.

48 *In re Southern Rhodesia* (1919) AC 211, at pp233-234.

49 Connor, op. cit., p.322

sandy track through the thickets of *terra nullius*, one wonders what has changed. Presumably he agrees with Justice Brennan's claim in *Mabo*.⁵⁰

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.

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:

- 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.

50 (1991-1992) 175 CLR 1 at pp. 68-9

The belated recognition of native title has helped to put right what Justices Deane and Gaudron described as our "national legacy of unutterable shame".⁵¹ The High Court still has its work cut out interpreting the fine print of the excessively amended *Native Title Act* and filling in the detail of 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*, and *Risk v Northern Territory of Australia* 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. Justice Mansfield's observations about the Larrakia people in Darwin apply to most urban Aboriginal groups in contemporary Australia:⁵²

[T]he 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 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*.

Justice Sackville in the recent decision of *Jango v Northern Territory of Australia* even seems to be raising doubts about the capacity of desert groups to establish a coherent native title claim. Late in his term on the High Court, Justice McHugh, 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:⁵³

⁵¹ *Mabo v Queensland (No) 2* (1992) 175 CLR 1 at 104

⁵² [2006] FCA 404 at para 839

⁵³ *Western Australia v Ward* (2002) 213 CLR 1 at 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 the earlier case *Fejo v Northern Territory* (1998) 195 CLR 96, Justice McHugh said during argument: "My view was that native title would apply basically to only unalienated 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

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.

Other High Court judges have voiced similar concerns.⁵⁴ 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.”⁵⁵ 16% 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:⁵⁶

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.

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

Dawson(the sole dissident in Mabo), and it may well be that that was also the view of other members of the Court." (Transcript 22 June 1998)

54 In *Wilson v Anderson* (2002) 213 CLR 401 at 454, Justice Kirby said: "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."

In *Western Australia v Ward* (2002) 213 CLR 1 at 398-9, Justice Callinan J said: "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."

55 N Pearson, "Where we've come from and where were at with the opportunity that is Koiki Mabo's legacy to Australia", Mabo lecture, AIATSIS Native Title Conference 2003, "Native Title on the Ground", Alice Springs, 3-5 June 2003.

56 G. Neate, "The 'Tidal Wave' of Justice and the 'Tide of History'", Address to 5th World Summit of Nobel Peace Laureates, Rome, 10 November 2004, p. 27

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*⁵⁷, Stuart McIntyre published *The History Wars*⁵⁸ and has now edited a collection entitled *The Historian's Conscience: Australian Historians on the Ethics of History*.⁵⁹ Greg Dening 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 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:⁶⁰

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.

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, "The past is in us, and not behind us. Things are never over."⁶¹

57 Keith Windschuttle, *The Fabrication of Aboriginal History*, volume one, Van Dieman's Land 1803-1847, Macleay Press, Sydney, 2002

58 Stuart McIntyre, *The History Wars*, Melbourne University Press, 2003

59 Stuart McIntyre (ed.), *The Historian's Conscience: Australian Historians on the Ethics of History*, Melbourne University Press, 2004

60 Greg Dening "Living with and in deep time", in Stuart McIntyre (ed.), *The Historian's Conscience: Australian Historians on the Ethics of History*, Melbourne University Press, 2004, at p. 43.

61 T. Winton, "Aquifer", in *The Turning*, Picador, 2004, 37 at p. 53

The words of Chief Justice Marshall of the United States Supreme Court in *Johnson v McIntosh* still ring out today:⁶²

[H]umanity 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.

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:⁶³

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.

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 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, "We 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."⁶⁴

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.

62 21 US (1823) 240 at 260. 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."

63 P. Keating, Australian Launch of the International Year for the World's Indigenous People, Redfern, 10 December 1992

64 2004 CPD (HofR) 6; 29 November 2004

I thank you for the opportunity to return briefly 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.