

MABO, INTERNATIONAL LAW, *TERRA NULLIUS* AND THE STORIES OF SETTLEMENT: AN UNRESOLVED JURISPRUDENCE

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[In this article the author argues that Australian judicial interpretation in relation to the acquisition of territorial sovereignty in international law must be seen against a backdrop of competing versions of history and law. He argues that the jurisprudence of the Australian Courts has been marked by an attempt to reconcile a number of legal, historical and political imperatives in this area. The author contends that the legal discourse has generally proved the dominant one, but has occasionally been modified when historical argument has become scientifically or politically compelling. However, he also argues that the use of precedent has led the Courts in Australia to produce historically and logically incoherent judgments that conflict with international law. The Mabo judgment is viewed, then, in the context of an interpretive crisis over the meaning of *terra nullius* in its application to the acquisition of Australia. The author concludes that, while in discarding *terra nullius* the High Court may have resolved one crisis, it has created another in the process, and that the cycle of competing discourses must continue. Only by recognizing that Australia is conquered territory at international law will there be any possibility of resolution.]

'Occupation' was originally a legal means of peaceably acquiring sovereignty over territory otherwise than by secession or conquest. 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.
Justice Lionel Murphy in *Coe v. Commonwealth*.¹

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 . . . can hardly be retained.
Justice Brennan in *Mabo v. Queensland*.²

I have discussed *terra nullius* at some length because it has been turned into a political slogan . . . the term is no longer just an obscure legal phrase but a political slogan in an important power game.
Hugh Morgan.³

1. THE FACTS OF THE CASE

The Australian High Court decision in *Mabo v. Queensland (No.2)*⁴ is the culmination of over ten years of judicial process and Aboriginal litigation concerning land rights in the Murray Island in Northern Queensland. The various phases of the case, as well as the history of the land itself, have been well-documented elsewhere.⁵ To summarize, Eddie Mabo and four other members of

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¹ *Coe v. Commonwealth of Australia and the Government of the United Kingdom of Great Britain and Northern Ireland* ['Coe'] (1979) 24 A.L.R. 118, 137. (Emphasis added.)

² *Mabo v. Queensland* ['Mabo'] (1992) 175 C.L.R. 1, 41.

³ Morgan, H., 'The Dangers of Aboriginal Sovereignty' *News Weekly* (August 29, 1992) 11. This is a good example of the way legal decisions are denigrated as mere politics when they can no longer serve the interests of certain political elites. While this obscure legal term was providing the justification for a denial of land rights to this country's original inhabitants for two hundred years it remained conveniently immune from such criticisms.

⁴ *Supra* n.2.

the Meriam people brought a claim to the High Court in 1982 seeking a declaration that they held title to certain lands in the Murray Island by virtue of the doctrine of communal native title recognized in Australian common law. During the course of the proceedings, the Queensland Coast Islands Declaratory Act 1985 (Qld) was passed by the Queensland Government in an attempt to vest these and other lands in the Crown through an act of retrospective legislation. In the first *Mabo v. Queensland* case,⁶ the High Court found this piece of legislation to be contrary to the Racial Discrimination Act 1975 (Cth). This cleared the way for a hearing on the merits of the claim itself. On the 3rd of June, 1992, the High Court upheld the claim of Mabo and others to enjoy native title over the land in question.⁷ The Court recognized that native title rights survived white settlement in Australia,⁸ and that these inalienable rights could be claimed where the indigenous peoples had maintained their connection with the land,⁹ and to the extent that title to the land had not been extinguished by Government acts incompatible with enjoyment of these rights.¹⁰ The Court also declared that Australia was not *terra nullius* or unoccupied land in 1788, when white settlement occurred.¹¹ In the process it reversed over two hundred years of legal doctrine. However, the Court also warned that it could not entertain a claim challenging the Crown's original acquisition of sovereignty in 1788, and that the Crown therefore held radical title over the continental land of Australia.¹²

2. INTRODUCTION

The *Mabo* case is the Australian judiciary's latest and, arguably, most significant attempt to integrate the claims of justice, Aboriginal human rights, international law, and Australian common law in a single decision. The judgment represents legal decision-making at its most politically charged and emotionally resonant¹³ and has, accordingly, given rise to a spectacularly broad and diverse range of responses.¹⁴ This critique seeks to locate the decision in an embryonic

⁵ See, e.g., Stephenson, M.A. and Ratnapala S. (eds), *Mabo: A Judicial Revolution — The Aboriginal Land Rights Decision and its Impact on Australian Law* (1993).

⁶ (1988) 166 C.L.R. 186.

⁷ No court in Australia had made such a finding at this point. The most recent case concerning native or communal title had been *Gerhardy v. Brown* (1985) 159 C.L.R. 70, 149 where Justice Deane had noted that '... the generally accepted view remains that the common law is ignorant of any communal native title or other legal claim of the Aboriginal clans or peoples even to ancestral tribal lands on which they still live.'

⁸ *Supra* n.2, 69 per Brennan J., 180 per Toohey J. The Court recognized that other areas of Australia might be burdened by native or communal title.

⁹ *Ibid.* 59, 70 per Brennan J., 110 per Deane and Gaudron JJ.

¹⁰ The Court was by no means in agreement over which particular acts constituted extinguishments. *Ibid.* 61, 70 per Brennan J., 89, 109-10 per Deane and Gaudron JJ.

¹¹ *Ibid.* 41-2.

¹² According to the six majority Judges wherever sovereignty was acquired so too was the radical title. *Ibid.* 69 per Brennan J. (Mason C.J. and McHugh J. in agreement), 81 per Deane and Gaudron JJ., 211 per Toohey J.

¹³ *Ibid.* 120 per Deane and Gaudron JJ. noting that, 'we are conscious of the fact that, in those parts of the judgment which deal with the dispossession of Australian Aboriginals, we have used language and expressed conclusions which some may think to be unusually emotive for a judgment in this court.'

¹⁴ E.g. Morgan, *op. cit.* n.3; Keating, P., *Age* (Melbourne), 15 October 1992; Gregory, M., 'Rewriting History I' (1992) 17(2) *Alternative Law Journal* 157; Mansell, M., 'The Court Gives An Inch But Takes Another Mile' (1992) 2 (57) *Aboriginal Law Bulletin* 4.

theory concerning Australian judicial decision-making in two politicized areas. These are the interrelated areas of the international law of acquisition and sovereignty, and what might broadly and rather abstractly be described as indigenous human rights.

Baldly stated, the theoretical position this paper adopts might be termed a *reconciliation* approach. According to this theory courts are obliged, in politically controversial disputes,¹⁵ to attempt a reconciliation of legal, historical and political imperatives. Further, the search for coherence¹⁶ embedded in this project is recognized as invariably doomed because of the deeply conflictual nature of these competing discourses.¹⁷ This necessitates judgments that, while often adroitly finessed, cannot ultimately bear the jurisprudential weight placed upon them.

Mabo is a classic example of this reconciliation process. Here the High Court was well aware of these legal, historical and political conflicts. In the majority judgments, the various Judges spoke of the change in community attitudes towards justice for the Aborigines,¹⁸ and the acceptance of a history of settlement that refuses to cast the Aborigines as primitive or without social organization. However, the need to preserve the structure of Australian law and a concern to make sense of the previous case law in this area, combined with an implicit acknowledgement of the political factors limiting the judicial agenda, were also factors influencing the decision.

Briefly, Justice Brennan's leading judgment in the case was an attempt to resolve an interpretive crisis¹⁹ which arose when conflicts of this nature became particularly acute. His Honour contrived an apparent resolution by discarding the doctrine of *terra nullius* in Australia. However, while the twin pressures of accepted social history and international law obliged the Court to dispose of *terra nullius* (thereby rejecting strong judicial precedent), political exigencies forced it to break the logic of the legal argument following from this at a critical point. This occurred when the Court refused to abide by the implications of its own arguments, and find that Australia was conquered territory. The result was doctrinal inconsistency. More specifically, the High Court appears to have developed

¹⁵ These might be termed hard cases with overt political implications. See Dworkin, R., *Taking Rights Seriously* (1977) Ch. 2.

¹⁶ See Dworkin, R., *Law's Empire* (1986) 19-21, 227-8. For an international law application of Dworkin's methods see Franck, T., 'Legitimacy in the International System' (1988) 82 *American Journal of International Law* 705.

¹⁷ These are becoming increasingly antagonistic given the fragmentation of social values in most Western liberal democracies.

¹⁸ *Supra* n.2, 42.

¹⁹ This term is drawn from Thomas Kuhn's highly influential text explaining the manner in which scientific ideas (or truths) are changed. Kuhn, T., *The Structure of Scientific Revolutions* (2nd ed. 1970). According to Kuhn, interpretive crises occur when flaws or anomalies are recognized in a community's structure of beliefs. During the crisis the interpretive community will look for resolution by broadening its philosophical reach, discarding an erstwhile dominant idea, or producing a new explanation. In Kuhn's words, 'all crises close with the emergence of a new candidate for paradigm and with the subsequent battle for its acceptance' (at 84). The crisis in the case under discussion arose partly because of the proliferation of competing social visions expressed during the renaissance in Koorie identity. The link between this and the construction of alternative stories about law and history, unfortunately, cannot be the subject of this paper. For a very able explanation of Kuhn's theories as they relate to law, see Katz, M., *After the Deconstruction: Law in the Age of Post-Structuralism* (1987).

a theory of acquisition at international law that is politically expedient but ultimately indefensible.

The necessary connection between *terra nullius* and occupation is well-established at international law.²⁰ In the event of land not being *terra nullius*, acquisition can only occur through conquest or cession.²¹ This would explain the enormous jurisprudential effort made by the Australian judiciary in *Cooper v. Stuart*,²² the *Gove Land Rights* case (*Milirrpum v. Nabalco*),²³ and *Coe v. Commonwealth*,²⁴ to argue, in the face of historical evidence to the contrary,²⁵ that Australia was *terra nullius* at the time of settlement. In the absence of such a determination the Judges in these cases realized that it would be untenable to propose that Australia had been occupied. In such a case, the Courts would have had to have gone on to consider whether Australia had been ceded by treaty from the Aborigines, or conquered by the British. In *Mabo* the Court, having found that Australia was not *terra nullius*, balked at considering these two alternatives and instead invented a completely new category of acquisition — *i.e.* the occupation of already occupied territory (or occupation of land that is not *terra nullius*). The semantic impossibility of such a finding is matched by its apparent lack of authoritative support in international law.

To understand how the High Court came to this decision we have to consider the historical development of both the Australian case law and international law prior to the *Mabo* case.²⁶

3. AUSTRALIAN JURISPRUDENCE AND TERRA NULLIUS

In *Coe v. Commonwealth*, Justice Gibbs reminded the Court that:

It is fundamental to our legal system that the Australian colonies became British possessions by settlement and not by conquest.²⁷

This was the axiomatic foundation principle that the High Court in *Mabo* felt obliged to accept but forced to modify. In order to understand the dilemma this posed for the Court, we have to examine both the rationale and the development of the doctrine of *terra nullius*. It is, after all, the unstated assumption that Australia was *terra nullius* at the time of settlement that lies at the heart of Gibbs J.'s statement.²⁸

Terra nullius has enjoyed a long and confused reign as the key to the law of territorial acquisition.²⁹ Its relationship to the methods of acquiring territory at

²⁰ The reasons for this are elaborated later in the article.

²¹ See Crawford, J., *The Creation of States in International Law* (1979) 182; *Advisory Opinion on Western Sahara* ['Western Sahara case'] [1975] I.C.J.R. 12, 39.

²² *Cooper v. Stuart* (1889) 14 App. Cas. 286.

²³ *Milirrpum and Others v. Nabalco Pty Ltd and the Commonwealth of Australia* ['*Milirrpum*'] (1970) 17 F.L.R. 141 (Blackburn J.).

²⁴ *Supra* n.1.

²⁵ See, e.g., Reynolds, H., *The Law of the Land* (1981).

²⁶ See generally Lante Wallace-Bruce, N., 'Two Hundred Years On: The Acquisition of Australia' (1989) 19 *Georgia Journal of International Law and Comparative Law* 87-116.

²⁷ (1979) 24 A.L.R. 118, 129. Occupation and settlement are used interchangeably. 'Settlement' is the term preferred by Australian writers and judges when referring to the international law method of acquisition known as 'occupation'.

²⁸ I have taken as the time of settlement 1788. It was in that year on February 7th that a ceremony was held in Sydney Harbour at which the British flag was raised. The process of settlement took place over a period of some sixty years from 1770 when Captain Cook first landed at Botany Bay until 1830 when the first British settlers arrived in Western Australia.

international law has been the subject of some controversy, and the debate is bound to be revived in the light of the *Mabo* decision.

Blackstone is generally credited with the first articulation of the concept in English common law,³⁰ though he did not refer to it explicitly. The major Australian cases in this area all refer to Blackstone's Commentaries.³¹ Interestingly, and despite this, his description of the modes of acquisition offers only equivocal support for those who would argue that Australia was *terra nullius* in 1788, and could therefore be acquired through mere occupation. For Blackstone, as for Brennan J. in *Mabo*,³² there were three principal means of claiming sovereignty over a piece of territory. These were occupation, conquest and cession. According to Blackstone, the latter two methods were relevant when the acquired land was 'already cultivated.'³³ Occupation,³⁴ on the other hand, could only occur where the land was 'desert and uncultivated.' This distinction had implications for the reception of English common law into the territory concerned. In the case of conquered and ceded territories, the ancient laws remained in place unless expressly repealed by the new sovereign. Conversely, according to Blackstone,

if an uninhabited country be discovered and planted by English subjects, all the English laws then in being, which are the birth right of every subject, are immediately there in force.³⁵

These categories were the subject of judicial review in *Cooper v. Stuart*.³⁶ Here the Privy Council was asked to determine which law was to be applied in deciding the validity of a land grant made by Governor Brisbane to a settler in 1823. Blackstone's distinctions were accepted as part of the common law. The Privy Council stated that:

[T]he often-quoted observations of Sir William Blackstone appear to their Lordships to have a direct bearing upon the present case.³⁷

This left the Privy Council with a difficulty conceptually similar to the one that faced the High Court in *Mabo*. Political necessity and legal precedent were in conflict. On the one hand, there was a political imperative that Australia be declared *terra nullius* prior to settlement. Yet awkwardly, Blackstone, the legal authority called on to vest historical and juridical legitimacy on the decision,³⁸

²⁹ The area of acquisition has been confused with colonization. While many of the rules relating to acquisition grew out of the colonial period (*e.g.* discovery, conquest), some have nothing to do with colonization (*e.g.* accretion and avulsion) and others (*e.g.* self-determination) were developed as a result of the rejection of colonialism. See, *e.g.*, *The Declaration on the granting of independence to colonial countries and peoples* (1960), G.A. Res. 1514.

³⁰ Blackstone, W., *Commentaries on the Laws of England* (9th ed. 1793) I, 107-8. The international law publicists developed *terra nullius* along a different path. This development will be discussed in the next section.

³¹ It is not altogether clear why Blackstone was regarded so highly. It is unimaginable that a textbook could be as influential today. Nonetheless, Blackstone's influence on the Anglophone tradition in law in this area is immense and can be compared with legal systems in which his work is thought much less significant, *e.g.*, the United States and Canada.

³² *Supra* n.2, 32.

³³ Blackstone, *op. cit.* n.30, 107.

³⁴ Blackstone uses the term 'occupancy'. *Ibid.*

³⁵ *Ibid.* 107. Note that Blackstone placed 'our American plantations' into the category of ceded or conquered territory. The original laws in these regions were to remain in force according to the rules of conquest.

³⁶ *Supra* n.22.

³⁷ *Ibid.* 291.

³⁸ The source of Blackstone's authority is not a subject capable of being adequately addressed here.

had insisted that such territory be 'desert and uncultivated.'³⁹ The Court chose to reinterpret Blackstone by stating that the land must be 'practically unoccupied'⁴⁰ to satisfy the requirement of *terra nullius*. In this way, the people that did inhabit the land were redefined as physically present but legally irrelevant and their history was obliterated. Thus began the series of elisions and slippages that came to characterize Australian judicial pronouncements on acquisition, and to provide the tools for a series of artificial and purely formal reconciliations of law, politics and history.

The 'expanded'⁴¹ doctrine of *terra nullius* began its one hundred year ascendancy in *Cooper v. Stuart*. From this point, *terra nullius* was thought to encompass not only territories where the land was uninhabited, but also land 'without settled inhabitants or settled law. . .'⁴² The accepted and prevailing version of Australian history in 1889 could not deny the existence of the Aboriginal peoples entirely, but could easily accommodate a construction of them as unsettled, primitive and without law. The existing law of acquisition was then, itself, modified to include groups without law or social organization.

Almost eighty years later the increasing activism and assertiveness of the Aboriginal peoples, which found political expression in the 1967 Referendum, was mirrored in another highly significant case, *Milirrpum v. Nabalco* (The *Gove Land Rights* case).⁴³ Here the Aboriginal plaintiffs argued that they possessed proprietary rights in land that the Commonwealth had leased to the Nabalco Mining Company. In his judgment, Justice Blackburn was faced with the familiar problem of reconciling conflicting 'truths'. Insights drawn from the accepted versions of history and anthropology had made it difficult to deny the nature of the Aboriginal communities in Australia prior to acquisition.⁴⁴ These materials were admitted in evidence and Blackburn J. concluded that 'the existence of a community was proved . . . [and] . . . I must recognize the system revealed by the evidence as a system of law.'⁴⁵ In accepting these propositions, Blackburn J. was put in an extremely awkward position in relation even to the then-prevailing expanded version of *terra nullius*. Here was an indigenous people with social organization and a legal system. No version of *terra nullius* yet invented had embraced such groups. The inevitable conclusion was that Australia had been either conquered or ceded. However, neither result was politically acceptable, and so Justice Blackburn simply declined to be persuaded by the historical facts that he himself had recognized. He stated:

It is also in my opinion clear that whether a colony comes into one category or the other [occupied or conquered/ceded] is a matter of law. . . [T]his is established for New South Wales by an authority which is clear and, as far as this Court is concerned, binding: *Cooper v. Stuart*.⁴⁶

³⁹ Blackstone *op. cit.* n.30, 108.

⁴⁰ *Supra* n.22, 291.

⁴¹ *Supra* n.2, 31.

⁴² *Supra* n.22, 291. (Emphasis added.)

⁴³ *Supra* n.23.

⁴⁴ These disciplines had not always been so supportive of Aboriginal claims. Standard history and anthropology had previously reduced the Aboriginal presence in Australia to a time period of a few thousand years as opposed to the 50,000 year time period now viewed as correct among non-Aboriginal scientists. The Aborigines themselves believe they have inhabited the continent since the beginning of time.

⁴⁵ *Supra* n.23, 268.

⁴⁶ *Ibid.* 242.

The enormous discrepancy between historical fact and law is inexplicable in terms of any logical method. However, the mere assertion of legal doctrine is regarded by Blackburn J. as sufficient to dispel inconvenient historical facts. In the case, Blackburn J. went on to find that no doctrine of communal native title existed at English or Australian common law, and that the Aboriginal group had no proprietary rights to the land in question. In *Mabo*, the Judges, using the same series of authorities as Blackburn J., came to the opposite conclusion.

In *Coe v. Commonwealth*,⁴⁷ the issue of acquisition was confronted again but this time in a rather more explicit manner. In this case, the plaintiff sought declarations and relief on behalf of the Aboriginal people in respect of the acquisition of territorial sovereignty by the Crown, and regarding the rights to property and sovereignty which the plaintiff claimed were still possessed by the Aboriginal Nation. The plaintiffs, in their statement of claim, argued that:

Australia was acquired by the British Crown by conquest, after which the Aboriginal people and nation retained their rights in respect of their lands.⁴⁸

Gibbs J. (in the leading judgment) was uncompromising in his rejection of this argument, stating:

The allegations [that Aboriginal Australia was conquered] summarized [by the plaintiffs] . . . also do not raise an issue fit for consideration.⁴⁹

It was necessary to Gibbs J.'s contention that Australia be deemed *terra nullius* at the time of acquisition, but it was equally clear that *Milirrpum* had created an element of doubt about the validity of the doctrine in its application to Australia. *Cooper v. Stuart* and *stare decisis* remained in reserve if the prevailing cultural anthropology of pre-settlement Australia and the doctrine of *terra nullius* simply could not be reconciled in logic or history. The Chief Justice, however, was reluctant to rely merely on precedent, perhaps sensing the inadequacy of such an approach. Gibbs J., therefore, could not resist the temptation to reformulate the concept of *terra nullius* yet again. The newly-accepted facts in law (according to the most recent decision in *Milirrpum*) were that the Aborigines had a legal system and a system of advanced social organization in 1788. Could *terra nullius* be expanded to embrace even these groups? Gibbs J. argued that settlement could occur 'in a territory which, by *European standards*, had no civilized inhabitants or settled law.'⁵⁰ This was surely an expansion of *Cooper v. Stuart*, and marks what was to be the most liberal reading of *terra nullius*; the high-watermark of indeterminacy in this area. After this, and given contemporaneous judgments in international law where the application of *terra nullius* was being severely restricted,⁵¹ Australian judicial reasoning could no longer absorb the anomalies in the principle of *terra nullius* and occupation.

To recapitulate briefly, the Australian legal system had redefined *terra nullius*

⁴⁷ *Supra* n.1.

⁴⁸ *Ibid.* 128.

⁴⁹ *Ibid.* 129.

⁵⁰ *Ibid.* (Emphasis added.) Though it is fair to say that this view did have its proponents in international law albeit that these writers tended to be in a minority. *E.g.*, Westlake, who stated that sovereignty could only belong to 'a native government capable of controlling white men or under which white civilization can exist.' See Oppenheim, L. (ed.), *Collected Papers of J. W. Westlake on Public International Law* (1914) 39-57, 157. Quoted in Lante Wallace-Bruce, *op. cit.* n.26, 90-1.

⁵¹ *Western Sahara* case, *supra* n.21, 39.

on three important occasions. Each time the Court expanded the category to include the prevailing characterization of pre-settlement Australia, and thus accommodate fresh insights about the structure of Aboriginal society. The original English common law position articulated in Blackstone's writings was that occupation became possible only where land was strictly *terra nullius* (i.e. uninhabited, 'desert' land). In the first Australian case, *Cooper v. Stuart*, the Privy Council held that occupation remained possible where land was inhabited but only by primitive groups. This was the principle of restricted *terra nullius* (i.e. land already occupied by peoples who nevertheless lacked social organization). In *Milirrpum* and *Coe*, the Courts held that occupation was possible even where the land was inhabited by groups possessing a form of social organization and a legal system, providing these structures were not European in style. This reworking of the principle can be described as enlarged *terra nullius*. This articulation of *terra nullius*, preferred by the majority in *Coe v. Commonwealth*, was one which had ceased to bear any resemblance to the original doctrine.

It is clear, then, that the High Court, as it approached the *Mabo* case, was in a state of interpretive crisis. In Kuhnian terms, a major paradigm shift was long-overdue.⁵² By the time of the *Coe* judgment, the High Court was patently having grave difficulties explaining these historical and, eventually, legal anomalies. Even Gibbs J. could no longer state that Australia had been *terra nullius*, but instead chose to distance himself from the doctrine, saying 'Australia has always been regarded as belonging to the latter class [*terra nullius*].'⁵³

It is worth recalling that the dissenting opinions in this case were powerfully argued indictments of the Australian judiciary's neglect of Aboriginal reality. Murphy J.⁵⁴ and, to a lesser extent, Jacobs J., not only anticipated the *Mabo* judgment but perhaps went beyond it in arguing that the method of acquisition itself was a justiciable issue. Jacobs J. took note of the authorities in this area but regarded them as only of persuasive effect.⁵⁵ In discussing the occupation/conquest controversy he admitted that:

The plaintiff should be entitled to rely on the alternative arguments when it comes to be determined whether the aboriginal [*sic*] inhabitants of Australia had or have any rights in land.⁵⁶

Murphy J. went one step further than this, stating that the plaintiffs were entitled to argue that Australia had been acquired through conquest, and that this, in turn, might give rise to a different set of legal rights from that existing on settlement or occupation.⁵⁷ In this he found himself in agreement with international law. Before examining the *Mabo* decision in light of the Australian jurisprudence on settlement, I want to consider the international legal rules of acquisition. It was, after all, at the intersection of these two bodies of law that the High Court found itself in the *Mabo* case.

⁵² See generally *supra* n.19.

⁵³ *Supra* n.1, 129. (Emphasis added.)

⁵⁴ *Ibid.* 137-8. Murphy J.'s dissent is a perfect encapsulation of the choices open to the High Court in *Mabo*. He is particularly scornful of the *dicta* in *Cooper v. Stuart*.

⁵⁵ *Supra* n.1, 136. The authorities referred to are *supra* n.22, and *Randwick Municipal Council v. Rutledge* (1959) 102 C.L.R. 54.

⁵⁶ *Supra* n.1, 136.

⁵⁷ *Ibid.* 138.

4. THE INTERNATIONAL LAW OF TERRITORIAL ACQUISITION

The international law of territorial acquisition (and occupation) has emerged from a similar tradition to that of the Australian common law. This is hardly surprising given the enormous influence that Anglophone common law has had on international law. Nevertheless, there are significant distinctions to be drawn between the Australian approach to acquisition and that of international law. In particular, the European civil law tradition was formative in the early development of international law generally, and acquisition of territory specifically. Indeed, many of the methods of acquisition derive from Roman law concepts of property ownership.⁵⁸ The five classic modes of acquisition of territory at international law⁵⁹ were thought to be occupation (or settlement), conquest, cession,⁶⁰ accretion,⁶¹ and prescription.⁶²

Occupation derives from the natural mode of acquisition in Roman law known as *occupatio*. *Occupatio* could only confer title over objects which were *res nullius* — *i.e.* belonging to no-one. This term appears to have been incorporated into international law by the European civil lawyers such as Vattel and Grotius.⁶³ The doctrine, of course, became known as *terra nullius* when it was applied exclusively to land rather than objects generally. If land was *terra nullius* it could be acquired through occupation. The corollary to this was that title could only be acquired through occupation if the land was *terra nullius*. *Terra nullius* was land that was either deserted or uninhabited (this was the classic Blackstonian version of *terra nullius*), or inhabited by uncivilized or disorganized groups (this was the general international law view).⁶⁴ In cases where the land was occupied by peoples having a system of social organization, land could only be acquired or colonized through either conquest or cession (treaty). This was typically the practice in Asia, Latin America and North America.⁶⁵ In Asia, *terra nullius* was

⁵⁸ See, *e.g.*, Thomas, J., *Textbook of Roman Law* (1976) 151-83.

⁵⁹ This list, I would argue, is far from comprehensive and omits a number of methods by which title is transferred or acquired. Independence or secession can be seen as methods by which a new sovereignty is created over a piece of territory through an effective act of self-determination.

⁶⁰ While this article is primarily concerned with the first two, the issue of cession may become increasingly significant in Australia in future years. In New Zealand the Treaty of Waitangi, the instrument by which the Maori Chiefs were said to have ceded New Zealand to the British Crown, has been used as the basis for resolving Maori land claims.

⁶¹ Accretion is usually bracketed in a single category with erosion and avulsion. They each refer to the method of acquiring title to territory by the formation of new land masses or the movement of land from one sovereign to the other through the influence of natural forces. See the *Island of Palmas* case (*Netherlands v. U.S.A.*) (1928) 2 R.I.A.A. 829; *Chamizal Arbitration (U.S. v. Mexico)* (1911) 5 *American Journal of International Law* 782.

⁶² Taking as my cue Ian Brownlie's warning that 'labels are never a substitute for analysis' (Brownlie, I., *Principles of Public International Law* (4th ed. 1990) 139), I would argue that prescription is simply a form of occupation where there is a competing claim to sovereignty. In international law prescription is less like adverse possession, to which it has often been compared, and more like the Roman law doctrine of *uscapio* which conferred full title on the possessor rather than simply barring action by the person previously in possession.

⁶³ *E.g.* Vattel states: 'When, therefore, a Nation finds a country uninhabited and without an owner, it may lawfully take possession of it . . .' Vattel, E., *The Law of Nations or The Principles of Natural Law* (1758 ed. 1916) 84.

⁶⁴ There seems to have been a school of thought in international law that accepted the more expanded version of occupation/*terra nullius*. This group of scholars argued that occupation could occur over land that was *res nullius* (meaning land belonging to no *sovereign state*). They are perhaps best represented in Jennings, R., *The Acquisition of Territory in International Law* (1963).

⁶⁵ This is not to suggest that these treaties were entered into voluntarily or that the conquests

thought to have little relevance to the well-organized tribal societies in existence at the time of European colonization, and most territorial acquisitions occurred by cession or treaty.⁶⁶ The Spanish, on the other hand, acquired sovereignty over Latin America by conquest,⁶⁷ while in North America a whole variety of methods were used ranging from treaties to conquest, but generally not mere occupation.⁶⁸ In New Zealand the Maori people were thought to fall into category of cession, and therefore treaties were concluded between the indigenous inhabitants and the European settlers.⁶⁹

Notoriously, of course, Australia was regarded as falling into the category of *terra nullius*.⁷⁰

It is worth remembering that jurists as far back as Cicero were drawing distinctions between occupation, conquest and cession.⁷¹ Grotius drew on Cicero's writing 1600 years later in his *De Jure Belli ac Pacis*.⁷² Grotius enumerates several modes of acquisition and regards the mere taking of possession as sufficient to establish a title over 'ownerless objects.'⁷³ Interestingly, Grotius anticipates the *Mabo* decision by around 400 years when he makes a careful distinction between property and sovereignty analogous to the distinction drawn by Brennan J. between the Crown's acquisition of a radical title on settlement, and the rights in property that survive that settlement. Referring to conquest, Grotius notes that:

Whatever was originally occupied by the people, and has not since been distributed, must be considered the property of the people.⁷⁴

So rights in property, according to Grotius, remain with the original inhabitants when the land is taken by force — *i.e.* by conquest as opposed to peaceable occupation. Sovereignty, of course, passes to the State acquiring the new territory.⁷⁵ The Grotian typology of acquisition was followed by contemporaries such

somehow gave rise to rights greater than those existing under occupation. It is far more likely that the various settlers and colonizers were entirely unaware of the nuances of Blackstone's typology. As Pollard states, 'European colonialism was violent everywhere, leaving a global legacy of injustice and a deep sense of loss, but in Australia there was an almost universal contempt for black life': Pollard, D., *Give and Take: The Losing Partnership in Aboriginal Poverty* (1988).

⁶⁶ Lante Wallace-Bruce, *op. cit.* n.26, 93.

⁶⁷ *Ibid.* 94.

⁶⁸ See Blackstone, *op. cit.* n.30, 108. Indeed, many Indian Nations are regarded as domestic dependent nations. See, e.g., *Cherokee Nation v. Georgia* (1831) 30 U.S. 1.

⁶⁹ The Treaty of Waitangi (1840) art. 1 states, 'The chiefs of the confederation of the united tribes of New Zealand, and the separate and independent chiefs who have not become members of the confederation, cede to Her Majesty the Queen of England . . . all the rights and powers of sovereignty.'

⁷⁰ Treaties were of course made between the Aborigines and individual European settlers. The doctrine of pre-emption, however, rendered these null and void on the basis that only the Crown held any title to the land on settlement and that only it could therefore dispose of the land to private settlers. Initially the doctrine was supported on the grounds that it protected the Aborigines from unscrupulous entrepreneurs. Presumably, of course, as an alternative to cession the European powers could have simply conquered the territory (in legal terms). Indeed a physical conquest did in fact take place but was not described as such in law. See generally O'Connell, D.P., *International Law* (2nd ed. 1970) I, 409. In fact, the instructions given to Captain Cook and Captain Phillip prior to landing in Australia suggest that the colonial authorities anticipated the possibility that treaties would be made between the indigenous peoples and the settlers — e.g. 'Instructions to Captain Arthur Phillip', 23 April 1787, *Historical Records of Australia* vol 1: 'You are to endeavour by every possible means to open an intercourse with the natives, and to conciliate their affections . . .'

⁷¹ Quoted in Grotius, H., *De Jure Belli ac Pacis*, Book II (1646, ed. 1925) 300.

⁷² *Ibid.*

⁷³ *Ibid.* 298.

⁷⁴ *Ibid.* 300.

⁷⁵ The distinction between sovereignty and property is central to the law of acquisition. Sovereignty passes to the new sovereign on acquisition who then holds the radical title to the land. Property rights

as Vattel,⁷⁶ Victoria,⁷⁷ and Pufendorf,⁷⁸ and by early modern writers such as Lindlay⁷⁹ and Westlake.⁸⁰ This view has been reiterated by current writers such as Brownlie, who states:

Effective occupation is commonly related to extension of sovereignty to *terra nullius*, i.e. new land, for example a volcanic island, territory abandoned by a former sovereign, or territory not possessed by a community having a social and political organization.⁸¹

Modern international jurisprudence tends to support this version of the occupation-*terra nullius*-conquest axis. Occupation was associated exclusively with *terra nullius* in the *Eastern Greenland* case,⁸² and in the following definitive passage quoted in Brennan J.'s judgment from *Western Sahara*:

'Occupation' being legally an original means of peaceably acquiring 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 occupation. In the view of the court [*sic*], therefore, a determination that Western Sahara was a *terra nullius* at the time of colonization by Spain would be possible only if it were established that at the time the territory belonged to no-one in the sense that it was then open to acquisition through the legal process of acquisition.⁸³

The necessary connection between *terra nullius* and occupation is well-established, then, at international law. In the event of the land not being *terra nullius*, acquisition can only occur through conquest or cession. The leading judgment in *Mabo* must be examined in the light of these conclusions about the development of international law.

5. MABO AND THE REDEFINITION OF TERRA NULLIUS

The *Mabo* litigation preceding the High Court's decision and the property law and constitutional law implications of the decision itself have been well-documented and thoroughly analysed elsewhere.⁸⁴ This present analysis will concentrate exclusively on the issue of acquisition and *terra nullius*, and will only consider the questions of communal native title or traditional title when these are relevant to the preceding discussion.

In *Mabo*, the High Court was obliged to engage with the ramifications of an interpretive crisis over the application and definition of *terra nullius*, and the historical and juridical meaning of the Crown's acquisition of sovereignty over Australia. It was faced with the awkward task of breaking the link between *terra nullius* and pre-1788 Australia (a link that had become unacceptable to an emerging human rights consciousness in Australia),⁸⁵ while maintaining the position

may continue to be held by the original inhabitants even though they exercise no sovereign or administrative control over the land.

⁷⁶ See *supra* n.50.

⁷⁷ Lindlay, M., *The Acquisition and Government of Backward Territory in International Law* (1926) 12.

⁷⁸ See Pufendorf, S., *De Officio Hominis et Civis* vol. II (1682 ed. 1927) 63, where he states, 'the only original method of acquiring ownership of the substance of a thing is occupancy. By this means then we acquire desert regions which no man ever claimed as his.'

⁷⁹ *Supra* n.77.

⁸⁰ See Westlake, J., *International Law* (1904-1907) 140. There was, however, something of a break in this tradition. This is documented in Crawford, J., *The Creation of States* (1978) 178-82.

⁸¹ Brownlie, *op. cit.* n.62, 139.

⁸² *Legal Status of Eastern Greenland*, P.C.I.J., Series A/B, No 53, 44.

⁸³ *Western Sahara* case, *supra* n.21, 39.

⁸⁴ See, e.g., Stephenson, M.A. and Ratnapala S. (eds), *op. cit.* n.5.

⁸⁵ Neither the Australian public nor the legal community could tolerate a doctrine that continued

that Australia had been peaceably occupied in 1788. Justice Brennan's judgment,⁸⁶ then, can be seen as a courageous attempt to satisfy a number of fairly compelling and often competing versions of law, history and politics. That he failed to provide a wholly coherent reconciliation is unsurprising (this is not to belittle the significant advances that are achieved in the case). What is fascinating about the decision are the elements of each discourse Brennan J. was prepared to dispose of or disregard, and how he set about justifying these decisions.

The one element that could not be discarded, of course, was the sovereignty upon which the Court's jurisdiction rested. In discussing the issue of sovereignty the Court followed the *Coe* judgment and that in the *Seas and Submerged Lands* case,⁸⁷ warning that the acquisition of sovereignty itself was an unchallengeable act of state. In other words, the existence of Crown sovereignty over the Australian land mass was not a justiciable matter.⁸⁸ Despite the reservations of many Aboriginal groups, this may be the only possible finding a court in Australia can make without undermining the very basis of its jurisdiction to hear the issue. In Brennan J.'s own words:

Recognition by our common law of the rights and interests in land of the indigenous inhabitants of a settled colony would be precluded if the recognition were to fracture a skeletal principle of our legal system.⁸⁹

However, he makes the further point that:

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.⁹⁰

Implicitly, the Court accepted that it could enquire as to the method of acquisition as well as the consequences, the consequences being, of course, dependent on the method: cession and conquest giving rise to continuing communal native title, occupation, in traditional international law, extinguishing that interest. In contrast to Gibbs J.'s leading judgment in *Coe*, where his Honour regarded the manner of acquisition as settled in law, the High Court in *Mabo* chose to re-examine the manner of acquisition and, in particular, the concept of *terra nullius*. This principle was, of course, rejected. In the process over two hundred years of legal tradition was overturned.

What justifications were given for such a reversal? In the course of his judgment Brennan J. seemed to provide four reasons for overruling the *Cooper v. Stuart* precedent. First, he stated that the theory of *terra nullius* was false in fact.⁹¹ While

to define the Aborigines as primitive or virtually non-existent in 1788. The former was concerned with Australia's position in the world community given recent criticisms over Aboriginal deaths in custody while the latter was eager to witness a change in the judicial position that might bring it in line with community and international attitudes. The Australian legal definition had become an increasingly indefensible and incongruous anachronism.

⁸⁶ This article concentrates on the leading majority judgment for the obvious reason that it represents the most authoritative statement on *terra nullius*. The Gaudron/Deane JJ. judgment departs only slightly from the Brennan J. judgment on this issue, though the methodology adopted is significantly different. The greatest difference between the two judgments concerns the question of compensatory damages for wrongful extinguishment of native title with Justices Toohey, Gaudron and Deane all holding that in some cases extinguishment was wrongful and could give rise to such a claim. See *supra* n.2, 112, 119 *per* Gaudron and Deane JJ., 201-2 *per* Toohey J.

⁸⁷ *New South Wales v. The Commonwealth* (1975) 135 C.L.R. 337.

⁸⁸ *Supra* n.2, 69 *per* Brennan J.

⁸⁹ *Ibid.* 43.

⁹⁰ *Ibid.* 32.

⁹¹ *Ibid.* 40.

this had not been a decisive consideration in the previous case law, perhaps the sheer weight of evidence and scientific opinion had made it impossible to continue describing Australia as *terra nullius*. Second, and more compellingly, it had become politically increasingly unacceptable in a self-proclaimed multicultural society to subscribe to a doctrine that consigned the indigenous peoples of Australia at settlement to the status of primitives lacking organization or a legal system.⁹² Third, Australia had committed itself more fully to the observance of a number of human rights norms in the period between *Coe* and *Mabo*, including the International Covenant on Civil and Political Rights and, in particular, the Optional Protocol to that Covenant.⁹³ There was also an increasing receptiveness to international law principles in the High Court generally.⁹⁴

Fourth, and finally, there was the *Western Sahara* decision at the International Court of Justice⁹⁵ in 1975, where the enlarged version(s) of *terra nullius* had been comprehensively rejected.⁹⁶ Indeed, Brennan J. dwelt on this decision at some length.⁹⁷ This is somewhat surprising since it does not form part of Australian common law, and has much less precedential value than say *Cooper v. Stuart* or *Coe*.

Nonetheless, the *Western Sahara* case is central to understanding *Mabo* not so much because of its content but because of the symbolic value of the case as a precedent of a legal character. The High Court only rejected the dominant legal narrative when it became unsustainable because of the various social, political and historical pressures operating on it. This was nevertheless a potentially traumatic fissure. The *Western Sahara* case takes on enormous value in this context. Yet, in strictly legal or formal terms, it could have just as easily been ignored altogether (after all this is precisely what Gibbs J. did in *Coe*). Brennan J., in considering *Western Sahara* at such length, was engaging in a largely symbolic legitimization ritual. With the domestic legal tradition so clearly at odds with political and historical requirements, what was required was a system of law or a different legal history that could enter the discourse and domesticate or legitimate a decision that might otherwise have been seen as excessively political.⁹⁸ International law was the *deus ex machina* in this regard.

⁹² *Ibid.* 42.

⁹³ 999 United Nations Treaty Series 171. See also Charlesworth, H., 'Australia's Accession to the First Optional Protocol to the International Covenant on Civil and Political Rights' (1991) 18 M.U.L.R. 428. Brennan J. states that 'Australia's accession to the Optional Protocol to the International Covenant on Civil and Political Rights brings to bear on the common law the powerful influence of the Covenant and the international standards it imports.' *Supra* n.2, 42.

⁹⁴ This was illustrated in the *Tasmanian Dams* case (*Commonwealth v. Tasmania*) (1983) 158 C.L.R. 1 and *Koowarta v. Bjelke-Peterson* (1982) 153 C.L.R. 168, and has been re-emphasized in *Polyukhovich v. Commonwealth* (1991) 172 C.L.R. 501.

⁹⁵ *Supra* n.21.

⁹⁶ Indeed, since the *Western Sahara* case the Working Group on Indigenous Peoples has been established by the United Nations Human Rights Commission (in 1982). In 1989 it produced its First Revised Draft Declaration on the Rights of Indigenous Peoples. The Draft included at principle 15 a statement saying that indigenous peoples have '[t]he right to reclaim land and surface resources or where this is not possible, to seek just and fair compensation for the same, when the property had been taken away from them without consent, in particular, if such deprivation has been based on theories such as those related to discovery, *terra nullius* ...' See Sanders, D., 'The U.N. Working Group on Indigenous Populations' (1989) 11 *Human Rights Quarterly* 406, 432.

⁹⁷ *Supra* n.2, 40-2.

⁹⁸ The *Mabo* decision has already been described as excessively political by commentators from the mineral industry. The fears expressed here concern the apparently short step from claims to

Unfortunately, it proved to be a false god. The logic employed in *Western Sahara* permitted the High Court to declare that Australia was not *terra nullius* at the time of settlement, but thereby obliged the Court to reject that Australia had been occupied. In the absence of either a treaty (cession) or a determination that Australia was *terra nullius* (occupation), the only method of acquisition was conquest.⁹⁹ The Court refused to consider this possibility and instead produced a new method of acquisition combining the symbolism of one (occupation) with the consequences of another (conquest). The legal consequences of this decision are difficult to gauge, and may have been no different had the Court made a finding of conquest.¹⁰⁰ In either case, the position of Aborigines in relation to communal property is vastly improved. What is clearer, however, is that the Court missed an opportunity to dispel the myths of peaceable occupation, with the enormous symbolic and psychological impact grasping this opportunity would have had on both Aborigines and non-Aborigines in Australia.

Brennan J. alludes to various justifications for the Court's failure to follow its own logic. One is the fear that such a finding would have a destructive impact on the fabric of Australian law.¹⁰¹ Ironically, from an international law perspective, the failure to describe Australia as conquered territory is a fracturing of two thousand years of international legal tradition. Cicero, for example, stated that:

By nature, moreover, there is no private ownership, but such arises either from ancient occupation, as in the case of those who formerly entered unoccupied territory; or from victory, as in the case of those who have gained possession by war; or from some law, agreement, condition. . .¹⁰²

Cicero, here, listed the three principle modes of acquisition mentioned by Brennan J.: occupation, conquest and cession. Brennan J., however, refused to follow the logical progression, traced in the previous section, from Cicero through Grotius to the International Court of Justice in *Western Sahara*. In no period in the last two thousand years has a land with inhabitants employing a legal system and possessing a sophisticated form of social organization been thought capable of mere occupation. The High Court has broken the golden thread that makes the theory of acquisition comprehensible. It can only be repaired by declaring Australia conquered territory, and recognizing the indigenous property rights to which this regime gives rise.

It is important to realize that the High Court can do this without challenging the basis of Australian sovereignty.¹⁰³ Conquest was a legitimate method of

property to sovereign claims. Even a cursory reading of the *Mabo* judgment would allay such concerns. It should be clear from my comments so far that this article is not concerned with discourse about politics at this intemperate and ill-considered level. See, e.g., Morgan, *op. cit.* n.3.

⁹⁹ It is important to recognize the principle of intertemporality in international law when we consider the issue of conquered territory. Clearly, conquest is simply illegal in current international law and has been since at least 1945. According to the doctrine of intertemporal law, however, the nature of Britain's acquisition of territory at the time of settlement must be determined according to the rules existing at the time of the act. See the *Island of Palmas* case, *supra* n.62, 100. In 1788 conquest was a perfectly lawful method of acquiring territory in international law. To hold otherwise would be to render sovereign rights in the modern international legal order highly unstable.

¹⁰⁰ In each case there would probably have been a recognition of communal native title. In the case of conquest however there is the possibility that Aboriginal customary law might be recognized. This was not discussed in *Mabo* but has been denied in previous cases in Australia — e.g. *Cooper v. Stuart*, *supra* n.22; *R v. Walker* [1989] 2 Qd R. 79; *R v. Wedge* (1976) 1 N.S.W.L.R. 581

¹⁰¹ *Supra* n.2, 43.

¹⁰² *Supra* n.71.

¹⁰³ *Mabo* now stands as authority for the proposition that the manner of acquiring sovereignty can be challenged even if the sovereignty itself cannot.

acquisition at international law prior to 1945 and, according to the doctrine of intertemporal law, the acquisition of Australia can be judged according to international law norms prevailing at the time.¹⁰⁴ This would allow the Court to declare Australia as conquered territory and, at the same time, maintain Crown sovereignty over the territory. This would be significant in respect of both native title and the recognition of Aboriginal customary law generally. Both the common law and international law regulating conquered territory from Blackstone to the present day, insist that the indigenous or sovereign laws in existence at the time of conquest shall remain in force until expressly extinguished by the Crown. These would include Aboriginal customary laws covering areas other than property — e.g. family law and criminal law.¹⁰⁵ This can be contrasted with occupation where indigenous custom is not regarded as law and is automatically displaced by the laws of the occupying sovereign.

In *Mabo*, of course, the High Court described the settlement of Australia as occupation, but developed a theory of communal native title that was an expression of the legal manifestations of a finding of conquest in international law. This jurisprudentially unsatisfying result was forced on the Court by the factors already discussed. Brennan J.'s judgment is only explicable as a skilfully reasoned attempt to reconcile the competing discourses of history, politics, common law, precedent and international law. Despite this, the interests represented by each of these discourses are unlikely to be appeased by the judgment. The claims of Aboriginal history in particular remain unsatisfied. The genocide Murphy J. spoke of in *Coe* remains unrecognized by the legal system.¹⁰⁶ Already the judgment is being assailed by Aboriginal groups for ruling out future claims to sovereignty, and by mining representatives for being too 'political' (this complaint is really not one directed at the political nature of the judgment itself, but is a perception that the wrong politics informed the decision).¹⁰⁷ Of course, it would be churlish to deny that this is also a judgment that includes the most forthright, if flawed, attempt so far on the part of the Australian judiciary at reconciling a vision of justice with historical, legal and ideological imperatives.

Ultimately, however, it is a judgment that shows the manipulation of the common law and the disregarding of two hundred years of precedent on *terra nullius*,¹⁰⁸ resulting in a theory of acquisition that lacks a foundation in international law.

¹⁰⁴ See *Western Sahara* case, *supra* n.21, 38-9; *Island of Palmas* case, *supra* n.61, 845 where the Arbitrator stated, 'both parties are agreed that a juridical fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time when a dispute in regard to it arises or fails to be settled.'

¹⁰⁵ See Australian Law Reform Commission, *Report No.31: The Recognition of Aboriginal Customary Laws*, (1986 AGPS Canberra). See also, Johnstone, R., 'Aboriginal Issues in Legal Scholarship: The Australian Law Reform Commission's Report on the Recognition of Aboriginal Customary Law' in Ellingham, Bradbrook and Duggan (eds), *The Emergence of Australian Law* (1989) 4-7.

¹⁰⁶ *Supra* n.1, 138 where Murphy J. (diss.) said: 'Although the Privy Council referred in *Cooper v. Stuart* to peaceful annexation, the aborigines [*sic*] did not give up their lands peacefully; they were killed or removed forcibly from the lands by United Kingdom forces or the European colonists in what amounted to attempted (and in Tasmania almost complete) genocide. The statement by the Privy Council may be regarded either as having been made in ignorance or as a convenient falsehood to justify the taking of aborigines' [*sic*] land.'

¹⁰⁷ See, e.g., Morgan, *op. cit.* n.3; Mansell, *op. cit.* n.15.

¹⁰⁸ The leading work in this area remains, Lindlay, *op. cit.* n.77. He states, after examining a long line of juristic opinion: 'It appears that their opinion may be fairly said to amount to this: that wherever

CONCLUSION

Indeed, one can see all the cases on acquisition as an attempt to reconcile the imperatives of law, history and politics.¹⁰⁹ Each of these reconciliations has required the utilization of a number of interpretive techniques¹¹⁰ in law, and a variety of often conflicting constructions of historical truth. As new historical constructions become compelling, denial of their accuracy by the judiciary is impossible. In such cases the law has had to be modified in order to maintain the myth of peaceful occupation. In every case there has been wholesale ellipses of certain historical experiences. Most obviously, Aboriginal history has been consistently omitted from the the judicial narrative of settlement.¹¹¹ This has proved relatively unproblematic for the legal system which supplied its own discrete historical narrative from *Cooper v. Stuart* onwards — *i.e.* the *terra nullius* story. The durability and resilience of this discourse is at once impressive and surreal. Until 1992, the *terra nullius* story proved resistant to mere historical fact (apart from Murphy J.'s dissenting opinion in *Coe v. Commonwealth*, the genocide of a number of Australian Aboriginal communities during the time of occupation and subsequently has been absent from the prevailing legal version of history). Indeed, even after the dominant version of scientific history had belatedly, and reluctantly, absorbed the Aboriginal experience into its narrative, the legal system continued to withstand the advance of these 'scientifically approved' histories (*Milirrpum*). This is because, unlike science, law can be alternately protective of and cavalier with its own authorities. Political imperatives can force the legal system to jettison in one case (*Mabo*) the very same doctrines which enabled it to ignore accepted history in another (*Milirrpum*). Thus, for example, precedent is a deity greater than universally accepted history in some cases (*Milirrpum*), but a disposable adjunct to interpretation in others (*Cooper v. Stuart*; *Mabo*). Finally, in *Coe v. Commonwealth* and *Milirrpum* the judiciary ignored international law and history, and called its decisions 'precedent'; in *Mabo*, it rewrote international law and the common law, and called the decision 'justice'.

What must the original inhabitants of this land make of such mysticism?

a country is inhabited by people who are connected by some political organization, however primitive and crude, such a country is not to be regarded as *territorium nullius* and open to acquisition by occupation' (at 17).

¹⁰⁹ As recently as 1988 the politics of *terra nullius* were very different from those that exist now. In that year the Australian Government, in common with other affected governments, was invited to respond to the draft Universal Declaration on Rights of Indigenous Peoples. In this official response drafted in 1989 the Australian Government argued that: 'The reference to the concept of *terra nullius* is inappropriate and misleading from Australia's point of view. *Terra nullius* is a concept of public international law; It would be inappropriate to use it in the context of domestic land claims.' (U.N. doc. E/CN.4/Sub.2/1989/33).

¹¹⁰ *E.g.* the use of precedent, the consideration of anthropological materials, the incorporation of international legal principles and the employment of the writings of early jurists.

¹¹¹ See Healy, C., 'We Know Your Mob Now: Histories and their Cultures' (1990) 49/3 *Meanjin* 512. Healy states that '. . . for a long time Aboriginal history was an impossibility. History was both the product and self-contemplation of European civilization.'