A CURIOUS HISTORY OF THE MABO LITIGATION

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My thanks to our hosts, the Larrakia People.

Yesterday Galarrwuy Yunupingu spoke in engaging terms of how Indigenous Australians understood their connection with their lands, seas, reefs and islands. Let me tell you of my early perceptions of those matters. I still have a large picture book, prepared for primary school children and called *The Australia Book*, written by Eve Pownall and illustrated by Margaret Senior, but ingenuously bearing no date. I infer that it was published in about 1955. It noted the voyages of Spanish and Dutch explorers and the arrival of Captain James Cook in April 1770. It says that Cook had raised an English flag "on an island off Cape York" and claimed for England "the whole of the eastern part of the New Holland, which he called New South Wales". The narrative continued: "At first the English did not bother about the new country", but with the loss of the American colonies, the prisons in England were rapidly filling and there was a need for "something … to be done about the convicts". This, it was explained, led the English to remember "the land that Cook had found. It was just what they needed." Aborigines, whose prior occupation the book described, stood on the cliffs, shook their spears and called "Warra warra!" which, it said, means "go away". That objection was treated as trivial:

> "But the white men took no notice. This time they had come to stay."

No doubt behind the blandness of the account, there lies an aura of threat. Nevertheless, if the claim of British sovereignty dispossessed Aboriginal people of all beneficial interests in their own lands, this remarkable event went unnoticed in the history book. As a result, I and, presumably, millions of other non-Indigenous

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Australians grew up in ignorance of what must have constituted one of the most remarkable uncontested expropriations in world history, without a cent in compensation. (Of course, it had to be "uncontested" because the expropriated owners were blissfully unaware that it had happened.)

In 1987, in *Walden v Hensler*,[2] which involved the prosecution of an Aboriginal man, Herbert Walden, for taking a protected brush turkey, Brennan J stated:[3]

> "It would not have been surprising if a question had been raised by the appellant as to whether and how it came about in law that Aboriginal people had their traditional entitlement to gather food from their own country taken away, but that question was not raised."

That question was, of course, asked and answered in *Mabo v Queensland (No. 2)*.[4] The answer given by the High Court denied that a claim for sovereignty over a large territory effected a disposition of ownership of the land.

Mabo (No.2) was, inevitably, a legally and socially unsettling judgment. That fact is not diminished by acceptance of the conclusion explained by Lisa Strelein in her new book *Compromised Jurisprudence: Native Title Cases Since Mabo*,[5] that *Mabo (No. 2)* brought the common law in Australia into line with that of other former British colonies.[6] The judgment is, appropriately, a subject of historical study. It was addressed by Dr Michael Connor in a recent publication *The Invention of Terra Nullius*.[7]

The subtitle of Connor's book is "Historical and Legal Fictions on the Foundation of Australia". The subtitle may have raised less of an eyebrow than the primary title, with the focus on the Latin label "*terra nullius*" and its description as an "invention". Much of Dr Connor's thesis is wrong-headed and its exposition contradictory, a matter to which I will return. If one learns a lesson from Dr Connor's book, it is to

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2 [1987] HCA 54; 163 CLR 561
3 At 565
4 [1992] HCA 23; 175 CLR 1
5 2006, Aboriginal Studies Press
6 At 1
7 2005, Macleay Press

take care when moving beyond one's own discipline, training and research. I will therefore avoid too much by way of comment on the history, though the vitriol he expends on modern Australian historians, particularly Professor Henry Reynolds, suggests that balanced judgment may not be one of the author's claims to authority.

In a purely historical sense I am happy to assume that *terra nullius* was not, as he explains, a phrase used by the British government in 1770 or 1788. However, from a lawyer's point of view, that would be to accuse the majority judgments in *Mabo (No. 2)* of using a neologism, something less than a serious offence according to the canons of good judgment writing. Importantly, it falls a long way short of demonstrating a fatal flaw in judicial reasoning.

The term "*terra nullius*" has three meanings, as I think Dr Connor accepts, although it does not help his case (based on supposed confusion) to set them out with any particularity. The meanings are:

(a) a country which is not recognised in international law as being under the control of a sovereign power;

(b) a land having no occupants or inhabitants;

(c) an area of territory which is inhabited, but the inhabitants of which do not have a system of laws recognisable under British law, or who do not recognise legal possession of land vested in individuals.

Dr Connor asserts that the phrase "means a territory without sovereignty".[8] That, he later observes, was a concept of international law and not part of the domestic common law of England. That meaning can be put to one side.

The second meaning (unoccupied land) may be one in ordinary parlance amongst those who use Latin tags, but if it is, it too can properly be put to one side. No one believed in 1788 (as I assume the picture on the dust cover of Dr Connor's book was intended to demonstrate) that Australia was a land without inhabitants. However, the

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[8] At 2

real question which Connor needed to address, and possibly needed some legal understanding in order to do so effectively was the third meaning.

Before embarking on that issue on needs to identify the principles applied by the common law in relation to Indigenous interests in land in settled colonies in order to determine whether Indigenous Australians had such interests. In other words, there are both legal and factual questions.

The legal question has several limbs. The first issue is whether the acquisition of sovereignty of itself instantly dispossessed all Indigenous Australians of land which they had previously owned, so that the Indigenous inhabitants immediately became potential trespassers, capable of exclusion from the whole landmass, subject to the continued occupation under licence from the Crown. This, as Brennan J noted, would "make nonsense of the law".[9] The next issue focuses on the kinds of interest which Indigenous people held in land. In the judgment of the Privy Council in *In re Southern Rhodesia*[10] Lord Sumner had stated:

> "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."

One way of describing that phenomenon was that the land in such colonies was owned by no one, because the Aboriginal tribes had no relevant concept of interests in land of a kind capable of protection by the common law. As a factual issue, in relation to Australia, that issue was addressed in *Milirrpum v Nabalco Pty Ltd,*[11] a decision of Blackburn J sitting as a single judge of the Northern Territory Supreme Court. *Milirrpum* was the only case before *Mabo (No. 2)* in which an Australian court had ruled on a traditional land claim based on extensive evidence of the culture, structures, laws and customs of the traditional claimants. Although Blackburn J accepted that Aboriginal people had a close relationship with land, based on fixed principles conforming to our concept of the rule of law, he dismissed the claim

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9 *Mabo*, at66
10 [1919] AC 211 at 233
11 (1971) 17 FLR 141

primarily on the basis that the nature of the interest was not one which the common law recognised. That was because the interest was both communal and inalienable. The basis of the belief that the common law would not protect such an interest might indeed be a fascinating topic for historical research, but it is not the subject of the present discussion. The High Court in *Mabo (No. 2)* rejected the proposition that the common law was so constrained. As noted by Deane and Gaudron JJ:[12]

> "In different ways and to varying degrees of intensity, [Indigenous people] used their homelands for all the purposes of their lives: social, ritual, economic. They identified with them in a way which transcended common law notions of property or possession."

The history of British attitudes to the settlement of Australia may be seen to have reflected, somewhat inconsistently, on the one hand the ideas expressed by Lord Sumner and, on the other, a recognition that settlement involved a deprivation of Aboriginal rights in land.

I do not wish to belabour the point that the decision of the High Court in *Mabo (No. 2)* was less radical in legal terms than both its champions and its denigrators would have it. That point can be made good by a careful comparison of the reasoning of Brennan J, speaking for the majority, and Dawson J in dissent. The points of departure are readily identifiable and even more readily referable to different applications of established principles of legal reasoning. However, in a passage with which I would wish to agree, Dawson J stated:[13]

> "There may not be a great deal to be proud of in this history of events. But a dispassionate appraisal of what occurred is essential to the determination of the legal consequences, notwithstanding the degree of condemnation which is nowadays apt to accompany any account."

Although the footnote to that statement is a reference to a judgment of Murphy J, it is equally apt as a reservation about the language used by Deane and Gaudron JJ, which their Honours themselves described as "unusually emotive for a judgment in

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[12] At 99-100
[13] At 145

this Court".[14] Indeed, Brennan J, whose judgments are often a delight to read, also adopted colourful language.

I would be inclined to put the use of the phrase "*terra nullius*" into the category of emotive phrases which might well have been left out or better explained. Nevertheless, a critic must also adopt dispassionate appraisal of the reasoning and should ignore the emotive elements and analyse the underlying substance. If that course is taken, and references to *terra nullius* are understood appropriately, the reasoning of the majority is easily supportable.

Brennan J sought to adapt the common law to what he identified as modern notions of justice and fundamental values of equality. He did not need to do this. The facts about Aboriginal and Islander culture were established in *Milirrpum* and by Moynihan J in *Mabo (No. 2)*. They rendered irrelevant the racist and denigratory views expressed in *In re Southern Rhodesia*. The ability of the common law to protect an allodial, communal and inalienable title was all that needed to be addressed. There is a danger with colourful or emotive language in judgments: it can suggest that the court has stepped outside its proper role of dispassionate appraisal and has allowed emotion or prejudice to colour its judgment, either with respect to matters of fact or with respect to legal principles. What the judges may have been anxious to dispel was the impression that what was being recognised was belatedly and grudgingly conceded. Indeed, as Dawson J himself approached the matter, much depended ultimately not on recognition of pre-existing rights in land, but on questions of extinguishment. The reasoning of Deane and Gaudron JJ to the effect that expropriation by inconsistent grant was wrongful and did not extinguish native title had much to commend it. The majority view, identified in the judgment of Brennan J, was that, although native title must be accepted and discriminatory views of Indigenous society rejected, a Crown grant would validly extinguish native title, although it would be invalid if the land was subject to private rights acquired pursuant to an earlier Crown grant. The non-discrimination principle was not applied consistently in determining the scope and operation of the common law. As a result, the colourful language tended to satisfy no one and led to a charge of hypocrisy.

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[14] At 120

Similarly, whereas the existence of the power of the government to grant titles under Crown lands legislation was held not to extinguish native title, until exercised in respect of particular land, there is little explanation in the jurisprudence as to why a grant which has never been taken up and has later been relinquished should extinguish, rather than suspend, the pre-existing native title which depended for its recognition, as a factual matter, on evidence of continued use and enjoyment of the land under traditional law and custom. *Fejo v Northern Territory*[15] established that as part of the common law principle, thus missing an opportunity to limit the extent to which a Crown grant extinguished native title in a manner which would not have occurred with respect to an earlier entitlement derived directly from the Crown. Lisa Strelein says the flaw in the reasons lies in the language (again emotive) of the "vulnerability" of native title and the failure to address with particularity the concept of inconsistency, so as to distinguish necessary from merely preferred consequences.

It is not necessary to suggest that *Fejo* was wrong, as a matter of application of the principles established in *Mabo (No 2)*; rather the point is that *Fejo* was an application of those principles, thus demonstrating the limited scope of the judgment in *Mabo (No. 2)*. Those limitations would have been better understood and the conservative nature of the judgment better appreciated, had emotive language not been deployed.

Exaggerated language is the language of politics. Thus, no doubt appealing to one audience, but appalling another, the Prime Minister in 1997 announced his "Ten Point Plan", which the Deputy Prime Minister promised would provide to his constituents "bucket loads of extinguishment". It is then something of an irony to note that the resulting legislation was more protective of traditional rights than the High Court in *Fejo*, accepting in ss 47A and 47B of the *Native Title Act 1993* (Cth) the very principle which had been rejected as a matter of the common law.

To those who remain devoted, for political reasons, to the hypothesis that the present Government has been largely responsible for undermining the judgment in *Mabo (No. 2)* and is responsible for funding (and therefore approves of) popular texts such as that produced by Dr Connor, it is necessary to offer a more nuanced picture.

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[15] [1998] HCA 58; 195 CLR 96

As Father Frank Brennan has pointed out, the *Native Title Amendment Act 1998* (Cth) involved an acceptance by the Howard Government of the basic principles underlying not only *Mabo (No. 2)*, but the political outcome of that judgment, namely the *Native Title Act*. More importantly, one can say from experience of the negotiations which continued between the National Indigenous Working Group ("NIWG") and the Government during 1997 and 1998, that there was a willingness to consult and address the significant practical difficulties that the recognition of native title entailed. Both the NIWG and the Government operated, as is common in the political process, at a number of levels. I want to comment only on that level in which I had personal involvement, namely the identification of policy and the transmission of it into statutory language. Those discussions took place primarily with Phillipa Horner, then working in the Department of Prime Minister and Cabinet, and Robert Orr, now senior counsel in the Office of Parliamentary Counsel. The fact that those discussions continued over many months and probably involved weeks of face-to-face negotiations demonstrated a commitment of the Government to a level of detailed consultation which is, I suspect, rare in the history of legislative drafting in this country. I am not an apologist for the *Native Title Amendment Act*, but the point should be recognised that, to a significant extent, the amendments finally accepted by the Government reflected some, though of course not all, of the legitimate Indigenous concerns. Furthermore, to the extent that the *Native Title Act* failed to deal with particular problems, all parties should be willing to bear some level of responsibility. One area of weakness is the failure of the Act to deal in any significant fashion with the results of a successful native title claim. But that is a topic I will leave to Professor Marcia Langton. To return to Dr Connor's thesis that *terra nullius* was a doctrine critical for the majority reasoning in *Mabo (No. 2)*, the answer is found in the statement of Dawson J:[16]

> "There is no need to resort to notions of terra nullius in relation to the Murray Islands. The law which applied on annexation was the of Queensland … there is no issue about that in this case."

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[16] At 138-139

Once one accepts that proposition, and Dr Connor does not refute it – indeed he quotes it at one point – a major part of his thesis collapses.

Let me finish by drawing together some lessons which I think may be derived from the comparison, which is apt at this conference, of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) and the *Native Title Act*.

First, the *Land Rights Act* did not give Aboriginal communities rights to oil, gas or minerals, but it did give them a share of royalties. In that respect the *Native Title Act* denied the possibility of returning land with economic value to native title holders.

Secondly, the *Land Rights Act* automatically returned reserves and set up an administrative tribunal to determine connection to other areas. The *Native Title Act* took neither of these procedural steps.

Thirdly, the *Land Rights Act* established Aboriginal controlled Land Councils which have been extraordinarily effective in both pursuing claims and protecting Aboriginal lands from ill-advised development or alienation, whilst providing traditional owners with administrative support. The administrative structures under the *Native Title Act* almost entirely neglected these lessons. Escape from the cycle of poverty, indignity and frustration requires economic development and employment. Without these the effectiveness of education and health spending will be at best severely limited. Recovering traditional lands is a step in the process of recognising basic humanity and personal dignity. But if the land restored is limited to that for which others have as yet found no economic value, its return will not solve the basic problems.

The judgment of the High Court in *Mabo (No. 2)* was far less radical than was widely thought at the time; but it was not fundamentally flawed as new historians would have it. *Mabo (No. 2)* provided an opportunity for resolution of many afflictions facing Indigenous peoples. It was an opportunity which was embraced by the government of the day, but only in part. *Mabo (No. 2)* gave Aboriginal people a place at the negotiating table, although, unfortunately, that was seen by too many as a threat rather than an opportunity.

The primary weaknesses in *Mabo (No. 2)* were twofold. First, it accepted the validity of extinguishment by inconsistent government grants of title to land, thus limiting

successful claims to areas with which the traditional owners had been able to maintain their connection and which had not been the grant of anything more invasive than a pastoral lease or grazing licence. Secondly, the common law did not recognise native title in minerals or oil which had not been the subject of exploitation by Aboriginal people. The combined effect of these two factors was to diminish almost to vanishing point the possibility that native title would restore to Aboriginal peoples land having economic potential. To a significant extent, that goal must be sought through the fitful, but now solid progress achieved by the Indigenous Land Corporation. The availability of funding to acquire and purchase valuable land for development has been successfully exploited by the Larrakia Development Corporation, a story which will need to be replicated in other parts of the country.

These things grew out of the opportunity created by *Mabo (No. 2)*; this conference has grown out of the existence of the judgment in *Mabo (No. 2)*. There is reason to hope that with some level of mutual trust, which still needs to be developed, the progress which the Government has asserted this morning it wishes to achieve will occur.