The "Rejection of Terra Nullius" in Mabo: *A Critical Analysis*

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1. *Introduction*

> "There is one matter which has puzzled me a little. In the judgments in *Mabo*, and in much public discussion which has followed, there are frequent references to the doctrine of *terra nullius*, which the Court is said to have rejected."[1]
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> "Pleased as we are with possession, we seem afraid to look back to the means by which it was acquired, as if fearful of some defect in our title; or at least we rest satisfied with the decision of the laws in our favour."[2]
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> "The long shadow of the Eighteenth Century lies athwart the matter of aboriginal land rights in this country ..."[3]

In *Mabo and Others v State of Queensland (No 2)*[4] decided in November 1992, a six member majority of the High Court of Australia held that the indigenous inhabitants of the Murray islands were entitled, as against the whole world, to possession, occupation, use and enjoyment of the lands of the Murray islands. In reaching their conclusions the majority held that, under Australian common law, a form of native title existed, where applicable, as a burden upon the Crown's ultimate title to all Australian land.

One of the most contentious aspects of the *Mabo* decision has been the High Court's treatment of the doctrine of *terra nullius*. It is now repeated wisdom that in *Mabo*, the High Court "rejected" or "reversed" the "doctrine of *terra nullius*", which had held that in 1788 Australia was "nobody's land". The accompanying claim is usually that this rejection had been necessary in order to recognise that a form of native title existed under the common law of Australia.[5]

Contrary to prevailing opinion, in this article it will be argued that the "doctrine of *terra nullius*" did not constitute a legal hurdle to be overcome by

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1 Former Chief Justice of the High Court: Gibbs, H, "Foreword" in Stephenson, M A and Ratnapala, S (eds), *Mabo: A Judicial Revolution* (1993) at xiv.

2 Blackstone, W, *Commentaries on the Laws of England* (18th edn) vol 2 (1823) at 2.

3 Sharwood, R L, "Aboriginal Land Rights — The Long Shadow of the Eighteenth Century" in Graham, D and Hueston, J (eds), *Proceedings of the Medico-Legal Society of Victoria 1980–83* at 109.

4 *Mabo and Others v State of Queensland (No 2)* (1992) 107 ALR 1 (*Mabo*).

5 For a few examples of many instances see: Mellor, B, "Nullius annulled" (1992) *Time Australia* 7 at 52; Lavarch, M, *Native Title: Legislation with Commentary* (1994) at iii–iv; Mason, M, *The Mabo Case — Native Title Ousts Terra Nullius* (1992) at 10.

the High Court of Australia in reaching its conclusion that a form of native title existed under Australian common law. Instead, it is argued that the High Court's apparent "rejection of *terra nullius*" in *Mabo* is highly ambiguous and requires explanation that goes beyond mere doctrine. The central purpose of this article is to propose a broad hypothesis to explain that ambiguity. This hypothesis may be set out briefly.

When Australia was originally colonised by the Crown, neither *terra nullius* or any other legal doctrine was used to deny the recognition of traditional Aboriginal rights to land under the common law. Such a doctrinal denial would not have appeared necessary to the colonists, because the indigenous inhabitants of the colony were seen and defined by the colonists as intrinsically barbarous and without any interest in land. Thus the colonists required no legal doctrine to explain why Aboriginal people's land rights were not to be recognised under law because no doctrine was required for what was axiomatic.

It was not until 1971, in the Federal Court case of *Milirrpum v Nabalco*,[6] that the issue of whether Aboriginal people held some legal right to their tribal lands was litigated for the first time. The difficulty that faced the court in *Milirrpum* was that while, historically, Aboriginal land rights had not been recognised, there was no judicial authority of any sort that provided a doctrinal explanation for why there had been no such recognition. In the absence of any guiding authority, the presiding judge in *Milirrpum* fashioned a doctrinal explanation for why Aboriginal rights to land were not recognised by the common law.

However, by the time *Milirrpum* was determined, the "truths" about Aboriginal people that were held by non-Aboriginal Australian society had changed. Traditional Aboriginal society was no longer seen as having been mendicant and without laws, and Aboriginal people were no longer seen as backward or inferior. The result was that the law as expressed in *Milirrpum*, which acted to deny Aboriginal rights in land, was seen as overtly discriminatory towards Aboriginal people. This created a crisis of legitimacy for the rule of law in Australia.

This crisis of legitimacy was inherited by the High Court when it was required to examine, for the first time in its history, the question of whether Aboriginal people possessed a common law right to land in *Mabo*. The problem for the High Court was that even if it rejected *Milirrpum* as precedent and recognised the doctrine of native title, this would not be enough to solve the discursive crisis that *Milirrpum* had triggered. That is, if the reasoning in *Milirrpum* was held to be wrong, then the Australian judiciary would be left without any doctrinal explanation at all for why Aboriginal rights to land had not been recognised under Australian law.

The solution for the High Court in *Mabo* lay in the "doctrine of *terra nullius*". The concept of *"terra nullius"* was doctrinally irrelevant to whether native title existed under Australian common law, but it emotively connoted the historical reality of how Aboriginal people had been treated upon colonisation. Accordingly, by ostensibly "rejecting" the "doctrine of *terra nullius*", the High Court was able to accomplish two things: first the "doctrine of *terra nullius*"

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6 *Milirrpum v Nabalco Pty Ltd and the Commonwealth* (1971) FLR 141.

provided a convenient scapegoat to explain why traditional Aboriginal rights to land had never been recognised under the Australian common law; second the rejection of *terra nullius* resolved the crisis in Australian legal discourse, by reaffirming the apparent equity of Australian jurisprudence. *Terra nullius* was a stage edifice that was demolished so that the good name of the Australian legal system could be redeemed.

This article contains three parts. The first part outlines the various legal meanings that have been given to *terra nullius*, and then on that basis sets out two propositions. The first proposition is that according to the relevant early case law, the classification of the Australian colonies as something like *"terra nullius"* did not, as a matter of legal doctrine, cause Aboriginal land rights not to be recognised under Australian common law. The second proposition is that it was the discourses of power that accompanied the colonisation of Australia that actually caused Aboriginal people's interests in land to be formally ignored. The middle part is concerned with *Milirrpum v Nabalco*, and the idea is advanced that *Milirrpum* created a crisis of truth, after which the law was openly perceived to be discriminatory in its application. Finally, the significance of *terra nullius* in *Mabo* itself is considered in the third part.

2. *The Discourse of "Terra Nullius" and the Australian Common Law*

> "The injustices suffered by the Aborigines cannot satisfactorily be explained by any line of authority."[7]

A. *"'Terra nullius' means ..."?*

Despite the regularity with which *"terra nullius"* has been bandied about since *Mabo*, uncertainty exists about the precise meaning of the term. This confusion exists because the term has both narrow and expanded meanings; is an international law doctrine, yet is often equated with its common law analogue; and has been subject to sloganisation and careless misinterpretation.

The expression *"terra nullius"* derives from classical Roman law, under which the doctrine of *"Occupatio"* acted to confer title upon the discoverer of an object that was *"res nullius"*, that is, "belonged to nobody". At international law in post-Renaissance Europe, this doctrine was conveniently and analogously applied to the acquisition of territory by states. Territory that was *"res nullius"* could be lawfully acquired by a state through simple occupation[8] and was described to that effect as *"terra nullius"*.

Uninhabited territory,[9] was always uncontroversially classified as *"terra nullius"*.[10] However over time, various international law jurists expanded the

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7 Fairleigh, C F, "Basic Questions on Native Lands" (1972) 46 *ALJ* 663 at 664.

8 This is a standard description of the law in question. See for instance Jennings, R Y, *The Acquisition of Territory in International Law* (1963).

9 Where the phrase "uninhabited territory" is used in this context it means "uninhabited territory that is also not under the control of any sovereign".

10 Lindley, M F, *The Acquisition and Government of Backward Territory at International Law* (1926) at 10.

categories of territory that were *"terra nullius"*[11] to include certain kinds of inhabited territory. Whether or not inhabited land was included within such expanded versions of *"terra* nullius" depended on "the degree of political development and other characteristics of the inhabitants"[12] of the land in question. Opinions differed, both intellectually and by historical context, over exactly what types of inhabited land could be treated as *terra nullius*, but all the expanded definitions of *terra nullius* shared the common feature of explicit ethnocentricity. That is, each expanded version of *"terra nullius"* expressed the right, under certain circumstances, of the European colonial powers to seize territory inhabited by indigenous people, on the basis that those peoples did not conform to European cultural norms.

Thus, *terra nullius* is not a concept of the common law. However the common law concept of colonial acquisition by "settlement" is broadly analogous to the international law mode of acquisition of territory by "occupation".[13] The extension of that analogy is that the category of land that can be lawfully acquired by "settlement" under the common law, is the common law equivalent of *terra nullius*. According to the classic exposition by Blackstone, the only type of land that could be acquired by settlement was land that was found to be "desert and uncultivated".[14] Crucially however, just as the expanded doctrine of *terra nullius* under international law embraced certain inhabited land, so "desert and uncultivated" land under the common law included land that was inhabited, and on the basis of similar criteria.[15] This judicial categorisation of inhabited land as "desert and uncultivated" was applied to the Australian colonies.

B. Australia Defined as "Desert and Uncultivated"

Although it was inhabited by Aboriginal people, under the common law the colony of New South Wales was judicially classified as having been "settled",[16] because it had been "uninhabited"[17] at the time of colonisation. When the issue came before the Privy Council in 1889[18] it was stated authoritatively by Lord Watson on behalf of the Court, that:

> The extent to which English law is introduced into a British Colony, and the manner of its introduction, must necessarily vary according to circumstances.

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11 Ibid.

12 Ibid.

13 Bartlett, R H, *The Mabo Decision* (1993) at ix.

14 Above n2 at 106.

15 McNeil has described the two most important elements in this general picture of Aboriginal society as an "established law" approach, combined with a "vague criterion of nomadism": McNeil, K, *Common Law Aboriginal Title* (1989) at 121.

16 The earliest of these authorities were cases heard before the Supreme Court of New South Wales that determined the extent to which English law had been received into Australia: see *R v Farrell* (1831) 1 Legge 5; *MacDonald v Levy* (1833) 1 Legge 39. New South Wales was also classified as a "settled" colony in the earliest cases dealing with land-ownership in the Australian colonies. See *R v Steel* (1834) 1 Legge 65, *Hatfield v Alford* (1846) 1 Legge 330, *Attorney General v Brown* (1847) 1 Legge 312 and *Doe dem Wilson v Terry* (1849) 1 Legge 505 at 508–9.

17 See *MacDonald v Levy* (1833) 1 Legge 39 at 45.

18 *Cooper v Stuart* (1889) 14 App Cas 286. See also the 1847 decision of *Caterall v Caterall* (1847) 1 Rob Ecc 580 and the Consistory Court case of *Whicker v Hume* (1858) 7 HLC 124.

> There is a great difference between the case of a Colony acquired by conquest or cession, in which there is an established system of law, and that of a Colony which consisted of a tract of territory practically unoccupied, without settled inhabitants or settled law, at the time when it was peacefully annexed to the British dominions. The Colony of New South Wales belongs to the latter class.[19]

Lord Watson held that the English laws of real property ownership had to apply in New South Wales because "[t]here was no land law or tenure existing in the Colony at the time of its annexation to the Crown ...".[20]

C. *The Question of Aboriginal People's Land Rights*

The now conventional interpretation of *Mabo* has it that because Australia had been "settled" as "desert and uncultivated" (which was the common law equivalent of *terra nullius*), this meant that Aboriginal people were denied a common law right to their traditional tribal lands. This conventional interpretation is supported by the historical fact that, by 1850, "the basic features of colonial law on Aborigines in Australia were set firmly ... Australia's indigenous peoples had no recognised, inalienable legal rights to their tribal lands".[21]

However, while the Australian colonies were indeed judicially classified as "desert and uncultivated", and Aboriginal people were apparently treated as having no common law right to their traditional lands, there was no judicial decision that created a nexus between the former legal proposition and the latter historical fact. That is, no early Australian or English case ever stated that because Australia was "*terra nullius*" or "desert and uncultivated", Aboriginal people possessed no common law right to their tribal lands.[22] It is the contention of this article that there was no such case because Aboriginal rights to land were not denied on the basis of any legal doctrine as such. Rather, it was the operation of various discourses of power which explains why the common law failed to recognise Aboriginal rights to their tribal lands.

"Discourse of power" denotes the idea that apparently natural or objective social structures act to privilege the ruling interests in a society, while, at the same time, they will punish non-conformity to the existing social structures. These apparently natural or objective structures owe their social legitimacy to various value-neutral truths. However, these "truths" are actually constructs that have been defined by the ruling interests of the society and are really "system[s] of ordered procedures for the production, regulation, distribution, circulation and operation of statements".[23] Thus a "discourse of power" is both a "form of knowledge and a form of power at the same time"[24] in which truth and power are both co-efficient and co-extensive. As Peter Novick has explained "'[t]ruth' is linked in a circular relation with systems of power

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19 *Cooper v Stuart* (1889) 14 App Cas 286 at 291. Curiously there was no mention of Australia having been "settled" when the case was heard before the Supreme Court of New South Wales: *Cooper v Stuart* (1886) 7 NSWR 1.

20 *Cooper v Stuart* (1889) id at 292.

21 Castles, A, *An Australian Legal History* (1982) at 515.

22 Except for the ruling on allodial title in *Attorney General v Brown* (1847) 1 Legge 312 at 324, but that ruling was only incidentally directed towards Aboriginal people.

23 Foucault, M, *Power/Knowledge* (1980) at 74.

24 Poster, M, *Foucault, Marxism and History* (1984) at 75–6.

which it induces and which extend it [forming a] 'regime' of truth".[25] That is, in crude terms, "truth" legitimates social power relations, while those who are the most powerful in a society determine what is "true", with the result that the existing social order is perpetuated and legitimated. Those who reject the ruling discourses are objectified by those discourses as non-conformist and will be labelled as deviant.[26]

Robert A Williams, an American academic and lawyer concerned with Indigenous peoples' rights, has argued that the European colonisation of North America was underpinned by certain "discourses of power":

> In seeking the conquest of the earth, the Western colonising nations of Europe and the derivative settler-colonized states produced by their colonial expansion have been sustained by a central idea: the West's religion, civilisation, and knowledge are superior to the religions, civilisations, and knowledge of non-Western peoples. This superiority, in turn, is the redemptive source of the West's presumed mandate to impose its vision of truth on non-Western peoples.[27]

According to Williams, law was a pivotal dynamic in the operation of these "discourses of conquest". It was "the West's most vital and effective instrument of empire",[28] because it could justify even the most brutal manifestations of imperialism on the basis that the acts in question were "lawful". The "law of nations", that made the conquest and internal subjugation of North America "legal", although represented as natural or god-given, was actually entirely promulgated by the conquerors, premised on their version of "truth". This law was guaranteed to favour the interests of the European colonial powers, which it did, by legitimating the conquest and internal subjugation of North America. Thus:

> law and legal discourse were the perfect instruments of empire ... The legitimating function of law and legal discourse ... provid[ed] passive defenses and apologies for the exercise of colonial power.[29]

The applicability of Williams' thesis to the colonisation of Australia is obvious.[30] "Law and legal discourse" were also the "perfect instruments of empire" in the Australian colonies. Aboriginal people were continually objectified by the operation of the common law and legal discourse in Australia in a manner that completely denuded them of rights.

D. Aboriginal People and the Rule of Law

In *R v Murrell* in 1836, the New South Wales Supreme Court held that English law extended to Aboriginal people who were accordingly to be judicially treated as subject to the laws of the colony.[31] However, prior to *Murrell* were

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25 Novick, P, *That Noble Dream* (1988) at 356.
26 See eg Foucault, M, *Discipline and Punish* (1979).
27 Williams, R A, *The American Indian in Western Legal Thought* (1990) at 6.
28 Ibid.
29 Id at 8.
30 Id at 325. Williams also made this clear in his video-phone address to the 1994 Australian Society of Labor Lawyers Conference at the University of Notre Dame in Fremantle, Western Australia on September 16–8 1994 (publication of papers pending).
31 *R v Murrell* (1836) 1 Legge 72.

almost 50 years of colonial settlement during which "the colonial legal system had trouble deciding whether the Aborigines should be treated as subjects of the Crown or foreign enemies who could be hunted down in reprisal raids and shot".[32] Even after *Murrell* extra-legal killings and harassment of Aboriginal people were commonplace, as the fundamentally violent "frontier"[33] spread, well in advance of government authority.[34] As legal historian David Neal has remarked, "[d]espite the ruling in *Murrell's* case, as a practical matter, the Aborigines stood outside the protection of the rule of law".[35] Henry Reynolds has commented with bitter irony that:

> Despite coming under the protection of the common law, over 20 000 Aboriginals were killed in the course of Australian settlement ... and neither lawyers nor judges appear to have done much to bring the killing to an end.[36]

Even when Aboriginal people were both formally and actually included within the colonial legal system, the internal ideological mechanisms of the law meant that Aboriginal people were labelled as non-conformists, and denied the law's benefits. The reason for the despotic impact of English law on the Aboriginal population was because the two cultures did not share remotely similar visions of "truth". Two societies "could hardly have been more different"[37] than the capitalistic, Christian, industrialising, white, racist, literate English and the pantheistic, non-literate, nomadic, black, hunter-gatherer Aboriginal people of Australia. Yet the "rule of law" that was imposed on the people of both cultures was only the product of European culture.[38] The inevitable result was that Aboriginal people, when forced to subscribe to a legal system that was based on "truths" that were totally alien to them were disadvantaged by the operation of that legal system. In this situation the common law was bound to regard "the whole of native society [as] deviant, or always potentially deviant".[39] Pat Dodson has described this discursive process with great simplicity:

> the laws of Australian governments [were] for the common good, entrenched in the tradition of the common law and for the benefit of the common man ... [but] ... historically the common man has been the non-Aboriginal man, and excludes the Aboriginal person.[40]

This dynamic explains why the common law implicitly did not recognise Aboriginal people as having any right to their tribal lands. The "private property" that is protected by the common law is a socially-determined construct

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32 Neal, D, *The Rule of Law in a Penal Colony* (1991) at 17.

33 See Reynolds, H, *Aborigines and Settlers* (1972); Reynolds, H, *Frontier* (1987); and Reynolds, H, *The Other Side of the Frontier* (1982); (rev edn) (1990).

34 Rowley, C D, *The Destruction of Aboriginal Society* (1970) at 6.

35 See above n32 at 80.

36 Reynolds, H, *The Law of the Land* (1987) at 1–2.

37 Pettman, J, "Learning about power and powerlessness: Aborigines and white Australia's Bicentenary" (1988) 24 *Race and Class* 69 at 73.

38 Ellinghaus, M P (et al), "Preface" in Ellinghaus, M P, et al (eds), *The Emergence of Australian Law* (1989) at ix.

39 Fitzpatrick, P, *The Mythology of Modern Law* (1992) at 111; above n36 at 7; and Rowse, T, *After Mabo* (1993) at 27–53.

40 Department of the Parliamentary Library Information and Retrieval System, "Pat Dodson: Mabo, Reconciliation and National Leadership", National Press Club, 15 September 1993 at 2.

with a "connotative meaning that embraces the values of exclusivist, productivist, individualist and capitalist culture".[41] Such a concept of private property, when introduced with the colonists, bore almost no resemblance to Aboriginal notions of "land tenure".[42] Aboriginal people were not formally unable to own property under the colonial legal system, but the only proprietary rights over land that the judicial system recognised were those that conformed to the English conception of land ownership. The consequence was that traditional Aboriginal land tenure was not recognised.

In practice then, "the law played a major ideological role in the expropriation of the original owners".[43] When the courts addressed the existence of the indigenous population at all, Aboriginal people were described as "wandering ... without certain habitation and without laws";[44] "not in such a position with regard to strength as to be considered free and independent tribes";[45] without sovereignty;[46] and wasteful of arable land.[47] The Aboriginal people that were found on land were seen as "physically present, but legally irrelevant".[48]

E. *Identifying the "Discourse of* Terra Nullius*"*

The "doctrine of *terra nullius*" as such was never used by any Australian colonial court to deny the existence of Aboriginal land rights under the common law. However, the lack of recognition of Aboriginal land rights, and the expanded doctrine of *terra nullius*, were driven by the same racist and ethnocentric "truths": the moral superiority of Western civilisation and the wasteful, primitive, lawless, backwardness of indigenous peoples. It was the operation of the same discourses of power which allowed Australia to be classified as *terra nullius* at international law, and which represented the Aboriginal people of Australia as inherently vagabond under the common law. In this article then, the discourses of power that caused the Australian judiciary not to recognise traditional Aboriginal land rights will be described under the one heading as "the discourse of *terra nullius*".

"*Terra nullius*", a "land belonging to nobody", is an evocative title for the discourses that operated to legitimate the dispossession of Aboriginal people. It describes the "act of ideological genocide"[49] that permitted both the exclusion of Aboriginal people from the rule of law, and, where Aboriginal people were included within the colonists' system of law, the manner in which they were disadvantaged because of their non-conformity to the dominant culture. "Discourse of *terra nullius*" also describes both the "legal framework for the

41 Edgeworth, B, "Post-Property?: A Postmodern Conception of Private Property" (1988) 11 *UNSWLJ* 87 at 89.

42 See Williams, *The Yolgnu and their Land* (1986).

43 See above n32 at 18.

44 *MacDonald v Levy* (1833) 1 Legge 39 at 45.

45 *R v Murrell* (1836) 1 Legge 72 at 73.

46 Ibid.

47 *R v Bonjon*, quoted in *High Court of Australia: Transcripts of Proceedings*, Mabo and Another v Queensland, 28–31 May 1991 at 120–30. In many ways though this case was something of an anomaly see *High Court of Australia: Transcripts of Proceedings* at 130.

48 Simpson, G, "Mabo, International Law, Terra Nullius and the Stories of Settlement: An Unresolved Jurisprudence" (1993) 19 *MULR* 195 at 200.

49 Kerruish, V, *Jurisprudence as Ideology* (1989) at 15.

legal legitimacy of the invasion", and "the development and functioning of the internal colonialism which has characterised the Australian political economy ever since."[50]

It is the operation of the "discourse of *terra nullius*" which explains why the common law failed to recognise Aboriginal rights to their tribal lands. The "truth", in colonial New South Wales, was that Aboriginal people were barbarous and mendicant and the law reflected that truth. These "truths" of colonial Australia acted to legitimise the invaders' procurement of Aboriginal land. Power defined truth, truth legitimated power. In a society in which the dominant discourse defined Aboriginal people as "wandering tribes living without certain habitation and without laws", the absence of Aboriginal land rights was not a matter for judicial decisions, it was a truth that was self-evident, and the development of the law was predicated upon that truth.

3. *The Crisis of "Truth":* Milirrpum v Nabalco *and its Discontents*

> "The Clans at Yirrkala lost their case, but things could not be the same again ...."[51]

A. *Introduction:* Milirrpum v Nabalco — *the Judgment*

The issue of whether Aboriginal people possessed any right to their tribal lands that was enforceable under the common law of Australia was not the subject of any judicial decision until *Milirrpum v Nabalco*,[52] a decision of a single judge of the Supreme Court of the Northern Territory which was handed down in 1971. In that case, for the first time in Australian legal history, it was argued that: "at common law, communal occupation of land by the aboriginal inhabitants of a territory acquired by the Crown is recognised as a legally enforceable right ..."[53]

The conundrum that faced the presiding judge in *Milirrpum*, Blackburn J, was that in terms of domestic Australian jurisprudence, he was adjudicating in a near vacuum.[54] Although the stark realities of Australian history demonstrated that, in practice, Aboriginal land rights had not been recognised, there was no judicial authority of any sort that provided a doctrinal explanation for why there had been no such recognition.

In the result, Blackburn J held that a common law doctrine of communal native title did not form, and had "never ... formed, part of the law of any part of Australia".[55] In reaching this conclusion, Blackburn J utilised the only

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50 Bird, G, and O'Malley, P, "Kooris, International Colonialism and Social Justice" (1989) 16 *Social Justice* 35 at 35.

51 Rowley, C D, *A Matter of Justice* (1978) at 70.

52 This case has also been called the *Gove Land Rights Case*, the *Yirrkala Case*, the *Yolgnu Case* and even the *Land Rights Case*. The action began in *Mathaman v Nabalco Pty Ltd* (1969) 14 FLR 10.

53 Above n6 at 198.

54 Blackburn J himself recognised this; id at 248. See also comments of Deane and Gaudron JJ in above n4 at 78.

55 Above n53 at 245.

group of early cases that discussed Aboriginal people and their relationship to the land at all: that group of authorities which applied the distinction between the automatic (if qualified) reception of the common law into settled colonies, and the non-automatic reception of the common law into ceded and conquered colonies. Relying on the proposition that Australia had been a "settled" colony,[56] he stated that the fundamental inquiry before him was "whether English law as applied to a settled colony,[57] included, or now includes, a rule that communal native title where proved to exist must be recognised ...".[58]

In order to answer this question, Blackburn J reviewed both the state of the common law in 1788[59] and its subsequent development throughout the world, in order to decide whether a doctrine of native title had any place in the common law of Australia.[60] He concluded:

> I have examined carefully the laws of various jurisdictions which have been put before me in considerable detail ... and ... in my opinion no doctrine of communal native title has any place in any of them, except under express statutory provisions.[61]

Extensive evidence was submitted by counsel for the plaintiffs in an effort to demonstrate that Australia could not have been a "settled" colony because, prior to colonisation, it had not been "without settled inhabitants or settled law" and, indeed as a matter of fact, Blackburn J found to that effect.[62] Unfortunately, the judge also ruled that the question was "one not of fact but of law" and so was not to be reversed on the basis of a mere factual re-evaluation.[63]

The judgment of Blackburn J, was an heroic[64] effort to explain, formalistically, why Aboriginal people had been deprived of land rights in the course of the colonisation of Australia. Faced with chaos Blackburn J did his best to articulate some sort of judicial order.

B. Milirrpum *and the International Common Law*

In addressing international common law precedent Blackburn J paid particular attention to *Calder v Attorney General of British Colombia*,[65] a Canadian decision of the Court of Appeal of British Colombia. Blackburn J stated that *Calder* was authority for the rule that "[i]n a settled colony there is no principle of communal native title except such as can be shown by prerogative or legislative act, or a course of dealing".[66]

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56 Id at 242–5.
57 This is Blackburn J's emphasis.
58 Above n53 at 244.
59 Id at 206.
60 Id at 209–52.
61 Id at 244.
62 Id at 223 and 250.
63 Id at 244 and 263.
64 This word is used in the sense of "against the odds" rather than "morally admirable", although it is tempting to use the word in the latter sense, and then add "goak" after the manner of A J P Taylor.
65 (1971) 13 DLR (3d) 64.
66 Above n53 at 223. See also 218–23.

Within 18 months of *Milirrpum*, the Supreme Court of Canada presented its decision on an appeal from *Calder*.[67] The six judges who considered the substantive issue all held that native rights to land in Canada had "survived annexation and were founded in the common law".[68] This constituted a complete contradiction of how Blackburn J had characterised the relevant Canadian law. Hall J (with whom Spence and Laskin JJ concurred) expressly described Blackburn J as having been "wholly wrong" and in "error" in accepting that "after conquest or discovery the native peoples have no rights at all except those subsequently granted or recognised by the conqueror or discoverer".[69] The comments of the Supreme Court of Canada in *Calder* were followed by a steady stream of academic critics[70] who denounced Blackburn J as having mis-stated the common law.[71]

C. Milirrpum *as a "Crisis of Truth"*

"Res judicata facit de albo nigrum et de quadrata rotundum."[72]

Another notable feature about the judgment of Blackburn J in *Milirrpum* was that he evinced a revisionary version of Aboriginal history and culture. In contrast to Australia's long-prevailing historiographical traditions,[73] Blackburn J characterised Aboriginal society prior to colonisation as a "subtle", "elaborate" and "stable" "order of society",[74] and acknowledged with reference to colonialism that "[e]veryone knows that the white race has a great deal to be ashamed of".[75] Such comments by Blackburn J are evidence that by 1971, what was seen by the White majority to be "true" about Aboriginal society had fundamentally changed.

By 1971, anthropologists had documented the subtlety and complexity of Aboriginal society and land tenure. Australian historiography was undergoing a paradigm shift towards including Aboriginal and other previously marginalised historical experiences within its ambits. Australia's ethical "truths" had also altered, with racism and social Darwinism becoming discredited ideas. Aboriginal people were granted formal electoral equality in the 1967 Commonwealth referendum, and the winds of anti-colonialism and the Black rights movement were blowing, even in Australia. *Milirrpum* as an historical event is itself evidence that the dominant discourse had fundamentally

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67 *Calder v Attorney General for British Colombia* (1973) 34 DLR (3d) 145 (SC).

68 Id at 200.

69 Id at 218. A later Canadian decision followed this trend, describing the conclusions in *Milirrpum* as "untenable" and "not the law of Canada": *Hamlet of Baker Lake v Minister of Indian Affairs* (1980) 107 DLR (3d) 513 (FTD) at 542. See Bartlett, R H, "The Aboriginal Land which may be claimed at Common Law" (1974) 6 *UWALR* 282 at 283.

70 See McNeil, K, "A Question of Title" (1990) 16 *Monash ULR* 91 at 93; Blumm, M C and Malbon, J, "Aboriginal Title, the Common Law and Federalism" in above n38 at 41; Bartlett, R H, "Aboriginal Land Claims at Common Law" (1983) 15 *UWALR* 293 at 293; McNeil, K, *Common Law Aboriginal Title* (1989) at 293; Morse, B, (1984) 12 *Melanesian LJ* 49.

71 McNeil, K, "A Question of Title" id at 93.

72 In other words, even if hypothetically wrong in law and, or, in fact, a final legal decision creates its own truth.

73 See Stanner, W E H, *After the Dreaming* (1969) at 24. See also above n34 at 7–9 and Reynolds, H, *The Breaking of the Great Australian Silence* (1984).

74 Above n53 at 267.

75 Id at 256.

changed: what had always been so obvious that it required no judge's decision to express it had become the subject of a judicial challenge.

Yet while the "truth" had changed,[76] *Milirrpum v Nabalco* revealed that the law had apparently remained "locked into concepts imported with the first settlers and dropped on the sail at Sydney Cove".[77] Blackburn J's judgment in *Milirrpum* drew on the intellectual heritage of the "discourse of *terra nullius*" in a number of ways. First, the result of the judgment reinforced the practical outcome of the operation of the discourse of *terra nullius*. Second, by asserting that his position was supported by the case law, Blackburn J made the common law "provide an apologia for the forceful and often violent taking of land belonging to Aboriginal and Torres Strait Islander people".[78] Third, by drawing support for his position from the Australian cases which classified Australia as "settled", he relied on authorities that were themselves products of the discourse of *terra nullius*.

Thus while Blackburn J acknowledged the fresh historical "truths" about Aboriginal society, the law as he expressed it remained unmoved in the face of these revelations.[79] This created an "incongruity between legal characterisation and historical reality".[80] The *Milirrpum* judgment contained on its face an "enormous discrepancy between historical fact and law" that seemed "inexplicable in terms of any logical method".[81]

Seen in this light, *Milirrpum* constituted a discursive breakdown, a moment in Australian legal history when the law seemed to no longer reflect the "truth", creating a disjunction between truth and power within Australian legal discourse. The law was seen as no longer an impartial and objective structure that was based on certain true principles, but as a biased and discriminatory construct. The result was that, because it was not based on "truth", the law no longer acted to legitimate the existing social order in Australia. The law as represented by *Milirrpum* was seen to be tyrannous and it was criticised as such by "[l]awyers, anthropologists and historians ... for ... generally taking a Eurocentric approach which eliminated any possibility of victory for the Aboriginal claimants".[82]

Not only was *Milirrpum* seen as wrong at law, but as "surely immoral",[83] as perpetrating a wrong committed by the Australian legal system upon the indigenous people of the country. The case seemed to confirm that:

> The truly amazing achievement of Australian jurisprudence was to deny that the Aborigines were ever in possession of their own land, robbing them of

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76 Above n48 at 210.
77 Above n36 at 172.
78 Malbon, J, "The Illegitimacy of Terra Nullius" (1988) 5 *Ormond Papers* 43 at 43.
79 Above n53 at 202–3.
80 Above n3 at 93.
81 Above n48 at 201.
82 McRae, H, et al, *Aboriginal Legal Issues: Commentary and Materials* (1991) at 104.
83 Above n78 at 49; see also comments in Brysland, G, "Rewriting History 2. The Wider Significance of Mabo v Queensland" (1992) 17 *Alt LJ* 162 at 162.

> the great strength of that position, and of compensation which should have been paid ....[84]

The discursive crisis precipitated by *Milirrpum* was partially averted by some movement towards legislative land rights,[85] but the very momentum of statutory reform also served to admit the authority of the new "truths" and illustrated the inequity of the common law.[86] It was not by coincidence that the head of the Australian legislature stated in 1973 that the nation stood to be morally judged on the treatment of its indigenous people.[87]

Even members of the High Court noted, in restrained judicial language, that blood could be on the hands of the Australian judiciary. Murphy J in *Coe v Commonwealth* gasped at the gaping hiatus between the case law dogma of "peaceful settlement" and the historical facts of attempted genocide,[88] while in *Gerhardy v Brown*, Deane J remarked that the law of Australia had failed to reach "the stage of retreat from injustice" by acknowledging native land rights, that some American states had reached as early as 1823.[89]

D. *The Apogee of the Crisis:* Coe v Commonwealth

The discursive crisis sparked off by *Milirrpum* reached its height[90] in *Coe v Commonwealth*. In that case Sydney lawyer Paul Coe submitted that, in 1788, Australia had not been "*terra nullius*" but rather had been occupied by a sovereign Aboriginal nation, and accordingly that Australia had become an English colony by conquest.[91] Furthermore, Coe asserted that as this sovereign Aboriginal nation had neither ceded its territory or conceded any "conquest", the "Aboriginal nation" still retained some sovereignty. Based on these submissions, Coe made expansive claims for relief including a declaration to the effect that all lands and waterways still used by Aboriginal people "remain at the absolute command of the Aboriginal people free from interference at the suit of the defendants ...".[92] In a single action, then, Paul Coe sought to have the Aboriginal people of Australia acknowledged to be sovereign, have Australia re-classified as partly "conquered", and to establish the existence of land rights under the common law of Australia.

With regard to sovereignty, both Mason J, sitting alone,[93] and then the four High Court judges who heard the appeal, held that Australian sovereignty was not justiciable in a municipal Court.[94] All four judges condemned the statement of claim in the strongest possible language, calling it, among other things, "embarrassing",[95] "inconsistent within itself", "marked by eccentricity", "absurd",

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84 Above n36 at 7.
85 See eg Bartlett, above n70 at 337–43 and Olbrei, E (ed), *Black Australians the Prospects for Change* (1982) at 34–42.
86 At any rate, legislative momentum faltered in the 1980s. See Nettheim, G, "Justice or Handouts?" (1986) 58 *Aust Q* 60 at 73.
87 Prime Minister Gough Whitlam, referred to in Reynolds, above n36 at 178.
88 *Coe v Commonwealth* (1979) 53 ALJR 403 at 412.
89 *Gerhardy v Brown* (1985) 59 ALJR 311 at 346.
90 See also *R v Wedge* [1976] 1 NSWLR 581.
91 Above n88.
92 Id at 405.
93 *Coe v Commonwealth* (1978) 52 ALJR 334 at 336.
94 Above n88 at 408 and 410.
95 Id at 410.

"clearly vexatious", "an abuse of the process of the Court"[96] and "exhibit[ing] a degree of irresponsibility rarely found in a statement intended to be seriously entertained by a court".[97]

On the issue of the classification of Australia as "settled" the four appeal judges divided evenly. However, they were unanimous in declaring that the question of whether any native land rights existed under Australian common law was still open, regardless of whether Australia was considered to be "settled" or not.[98] Gibbs CJ warned though that "the resolution of such questions ... will be best served if [the] claims are put before the Court dispassionately, lucidly and [in] proper form".[99]

Coe v Commonwealth also marked the first occasion on which the term *"terra nullius"* was used by an Australian court to describe the legal condition ascribed to the Australian continent prior to English colonisation. In part, this usage can be construed as an attempt to invoke the jurisdiction of the International Court of Justice.[100] This aim had been encouraged by the landmark *Western Sahara* case[101] decided in 1975, in which the World Court considered whether the Western Sahara had been *terra nullius* at the time of its colonisation by Spain in 1884.[102] In holding that the Western Sahara had not been *terra nullius* in 1884, the Court relied on evidence that:

> at the time of colonisation Western Sahara was inhabited by peoples which, if nomadic, were socially and politically organised in tribes and under chiefs competent to represent them[103]

In paragraph 8A of the amended statement of claim that the plaintiff sought to file in *Coe*, it was pleaded that:

> The proclamations by Captain James Cook, Captain Arthur Phillip and others and the settlement which followed the said proclamations and each of them wrongfully treated the continent now known as Australia as terra nullius whereas it was occupied by the sovereign Aboriginal nation ....[104]

The various members of the High Court acted differentially to Paul Coe's introduction of *terra nullius*, a Latin phrase denoting a somewhat obscure concept of international law, to domestic Australian jurisprudence. At first instance, Mason J was under no illusions as to why Coe had used the phrase *"terra nullius"*. He felt that Coe had "sought to derive support for the proposition that Australia was not *terra nullius* at the date of British occupation and settlement from the Advisory Opinion of the International Court of Justice on *Western Sahara*".[105] Mason J was dismissive of this aim, stating that

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96 Id at 407.
97 Id at 412.
98 Id at 412.
99 Id at 409.
100 Hodgson, D, "Aboriginal Australians and the World Court" (1985) *NZLJ* 33 at 34.
101 *Advisory Opinion on Western Sahara* [1975] 1 ICJR 12. Other efforts to use international law were made through the instrumentalities of the United Nations. See for instance Simpson, T, "On the Track to Geneva" (1986) 19 *Aboriginal L Bull* 8.
102 *Advisory Opinion on Western Sahara*, id at 30.
103 Id at 31.
104 Above n88 at 404.
105 Above n93 at 336.

"[w]hatever that advisory opinion may say it has no relevance to the domestic or municipal law of Australia based on the Constitution which this Court is bound to apply".[106] However, while Mason J shrugged at the value of the International Court of Justice's Advisory Opinion, he did not comment on the pertinence of the *terra nullius* doctrine itself to municipal proceedings in Australia.

On appeal, the use of *"terra nullius"* was apparently ignored by Gibbs CJ and Aickin J, and Jacobs J construed it as a matter related to "the law of nations", that was not for consideration by a municipal court.[107] Murphy J, by contrast, obviously believed that the international law doctrine of *terra nullius* was of some importance under domestic law. He explained that, at international law, "[t]erritory inhabited by tribes or peoples having a social and political organisation" could not be classified as 'terra nullius'",[108] and that traditional Australian Aboriginal society was characterised by "complex social and political organisation" and settled laws "of great antiquity".[109] He cited the *Western Sahara* case as authority for the proposition that nomadic occupants of a territory could prevent it from being classified *"terra nullius"*.[110] Finally, having made these observations, Murphy J stated that:

> [t]he plaintiff is entitled to endeavour to prove that the concept of *terra nullius* had no application to Australia, that the lands were acquired by conquest, and to rely upon the legal consequences which follow.[111]

Thus, while Murphy J was formally non-committal,[112] and did not provide any reasoning, he patently did believe that the international law of occupation and *terra nullius* were of intrinsic significance under Australian domestic law.

Coe v Commonwealth marked the zenith of the rupture that had been caused by *Milirrpum* between truth and power within Australian legal discourse. Paul Coe had openly challenged the super-structure of power-relations in Australia, that is, the plenary authority of Australian law and government, purely on the basis that the "truths" to which it owed its legitimacy were false. Coe argued that Australia had not been without an existing legal system in 1788, that white settlement was wrongful, and that the Australian nation state was illegitimate. In response, the High Court was forced into a naked exercise of its power, largely unaided by the authority of any "impartial" "truths". The High Court simply declared that the matters raised by the plaintiff were unarguable, because the supreme authority of the Australian nation-state and its laws were inviolate and unjusticiable. Naturally, this result did not end the discursive crisis prompted by *Milirrpum*, but rather illustrated even more strikingly the growing chasm between truth and power.

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106 Ibid.
107 Above n88 at 410.
108 Id at 412.
109 Ibid.
110 Ibid.
111 Ibid.
112 Ibid. At 412 Murphy J stated that "[t]he extent to which the international law of occupation is incorporated in Australian municipal law" was a question that could be determined later in the proceedings.

E. *The Crisis Unsolved*

The discursive product of *Milirrpum* was that truth and power were no longer synchronised: a disjunction had appeared in which the law had lagged behind the evolution of "truth". This was a discursive crisis that questioned the very legitimacy of the Australian nation state itself, because "the monolith which is Australian society and its prosperity" had been erected on "Aboriginal dispossession".[113] The Australian colonies had been founded on the legitimacy of the discourse of *terra nullius*, but after *Milirrpum*, that discourse was revealed to be thoroughly discredited. What then was the legitimacy of white settlement and of the assumptions that underpinned the identity of the Australian nation? What chance was there for Australia to continue to see itself, as, "by definition 'a just society'",[114] or, in Michael Detmold's telling phrase as a "just Commonwealth"?[115]

4. *The Rise to Fame, Reconstruction, and Rhetorical Rejection in* Mabo, *of the Doctrine of* Terra Nullius

"As I was going up the stair,
I met a man who wasn't there.
He wasn't there again today.
I do so wish he'd go away."[116]

"They had no real reason to do away with the doctrine of *terra nullius* in the *Mabo* case because *Mabo* had nothing to do with *terra nullius*."[117]

A. *The Substantive Unimportance of "*Terra Nullius*" to the* Mabo *Litigation*

A decade after the institution of proceedings, the High Court of Australia finally heard substantive argument from counsel in *Mabo* over the last four days of May in 1991. The plaintiffs proposed that irrespective of the mode of acquisition of a colony, native interests in land were preserved as a burden upon the title of the Crown.[118] In reliance on *Calder* and other North American authorities, the "basic proposition" of the plaintiffs was that "the effect of annexation was not to abolish pre-existing rights" and that a doctrine of native title was known to the common law.[119] Counsel made it expressly clear that such submissions were not directed towards arguing that Australia had not been "settled".[120] The term *"terra nullius"* was not the subject of any submissions by counsel, and was not mentioned by name even a single time.

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113 Brennan, F, "The Absurdity and Injustice of Terra Nullius" (1988) 5 *Ormond Papers* 51 at 54.
114 Briscoe, G, "Land Reform: Mabo and 'Native Title', Reality or Illusion" (1993) 6:4 *Pacific Research* 3 at 4.
115 Detmold, M, *The Australian Commonwealth: A Fundamental Analysis of its Constitution* (1985) 65.
116 Taylor, A J P, "goaking" in describing the spirit of European diplomacy in the summer of 1939 in *The Origins of the Second World War* (1961) at 306.
117 Coe, P and Lewis, P, "100% Mabo" (1992) 3 *Polemic* 142 at 142.
118 *High Court of Australia: Transcripts of Proceedings*, above n47 at 3.
119 Ibid at 83.
120 Ibid at 146.

"*Terra nullius*" was not mentioned in any of the plaintiff's submissions in *Mabo* because the fundamental issue in the case was whether the doctrine of native title existed under Australian common law, irrespective of how the colonisation of Australia had been legally justified. The logic behind this proposition is simple: regardless of how it had been introduced into Australia, the fact was that the common law had been introduced, and the question was simply whether the common law included a doctrine of native title. As John Hookey summarised as early as 1972, "one does not look to the events connected with annexation to determine the nature of rights existing after annexation".[121] Dawson J eventually suggested this much in his dissenting opinion in *Mabo*:

> There is no need to classify the Murray Islands as conquered, ceded or settled territory. These classifications have been used to determine the question of what law, if any, is introduced to acquired territory, but they are irrelevant where the law which is introduced is expressly declared by the new sovereign. There is thus no need to resort to notions of *terra nullius* ....[122]

Terra nullius was not relevant to the plaintiff's case in *Mabo*. As Richard Bartlett has summarised:

> [T]he concept [of *"terra nullius"*] ... is essentially *irrelevant* to native title at common law .... Whether or not a region was "terra nullius" ... was never considered to be a bar to native title in Australia or elsewhere ....[123]

The "doctrine of terra nullius" had never been seen as a barrier to establishing the existence of native title. To the extent that Aboriginal rights had been recognised in other jurisdictions "it was not on account of how lands were classified, whether the lands were *terra nullius* or otherwise".[124] The Commonwealth Government acknowledged as much in a formal communication to the United Nations in 1989, stating that "[*t*]*erra* nullius is a concept of public international law; it would be inappropriate to use it in the context of domestic land claims".[125]

*B. The Prominence of "*Terra Nullius*" in the* Mabo *Judgments*

The decision in *Mabo and Others v State of Queensland* was handed down on the morning of 3 June 1992. The seven members of the High Court delivered a total of five judgments. Brennan J wrote what is generally considered to be the leading judgment, in which he concluded that under Australian common law, a form of native title existed as a burden on the Crown's radical title. Mason CJ and McHugh J presented a short combined judgment in which they concurred with Brennan J, and explained the cumulative result of all five judgments. Deane and Gaudron JJ in a joint judgment, and Toohey J alone, also agreed with Brennan J, that a form of native title existed under the common law of Australia. Dawson J was the lone dissentient who concluded that no doctrine of

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121 Hookey, J, "The Gove Land Rights Case" (1972) 5 *Fed LR* 85 at 96. See also above n78 at 46–7; and Blumm and Malbon above n69.

122 Above n4 at 106.

123 Bartlett, R H, *The Mabo Decision* (1993) at ix.

124 Bartlett, R H, "Review of H McRae, G Nettheim, L Beacroft: Aboriginal Legal Issues: Commentary and Materials" (1992) 22 *UWALR* 225 at 226.

125 Included in the Australian Government's written response to the draft United Nations Declaration on the Rights of Indigenous Peoples, quoted in n48 at 210.

native title existed under Australian common law, but was in the majority in finding that in the absence of clear legislative intention to the contrary, extinguishment of native title did not give rise to a right to compensation.

In reaching this result, the majority of the High Court followed the authority of the Supreme Court of Canada in *Calder*.[126] The majority were not persuaded by *Milirrpum* and rejected it as a mis-statement of the common law. The *Mabo* decision was not a "judicial revolution", but rather was a "cautious correction to Australian law".[127] The "common law world" had already "developed a uniform jurisprudence upon native title"[128] within which *Mabo* merely represented the "correction of a local anomaly".[129] *Mabo* then was a "careful and scholarly application" of "long established common law doctrines, amply supported by precedents, under which pre-existing land rights in newly acquired British territories received protection under British law".[130] Anthony Mason himself publicly defended the *Mabo* decision in similar terms:

> Far from being an adventure on the part of the High Court, the decision reflects what's happened in the great common law jurisdictions of the world and in the International Court, except that in the case of Australia it's happened later than it's happened elsewhere.[131]

However, the majority decision in *Mabo* did depart from the international jurisprudence to the extent to which it focused on *terra nullius*. Despite the fact that *terra nullius* was close to doctrinally irrelevant to the case, all of the majority judges in *Mabo* pondered its relevance, laboured about its meaning, and then went out of their way to ultimately "reject" its applicability. The significance attached to "*terra nullius*" in each of the majority judgments will now be examined in turn.

i. *"Terra Nullius"* in the Judgment of Brennan J

Brennan J, with whom Mason CJ and McHugh J concurred, stated that in order to address the defendant's argument that on settlement the Crown had acquired the absolute beneficial ownership of all land in the territory,[132] it was necessary to review the legal theories that related to the introduction of the common law into Australia.[133] "Occupation of territory that was *terra nullius*" had, according to Brennan J, been the judicial justification used by the European nations in order to legally acquire sovereignty over territory that was already inhabited by indigenous peoples:

> The great voyages of European discovery opened to European nations the prospect of occupying new and valuable territories that were already inhabited. As among themselves, the European nations parcelled out the territories newly discovered to the sovereigns of the respective discoverers, provided

126 Above n4 at 41, 46–7, 61, 143 and 146–7.
127 Nettheim, G, "Judicial Revolution or Cautious Correction?" (1993) 16 *UNSWLJ* 1 at 2.
128 Bartlett, R H, "Mabo: Another Triumph for the Common Law" (1993) 15 *Syd LR* 178 at 181–4.
129 Above n127 at 18.
130 Id at 16.
131 Mason, A, "Putting Mabo in Perspective" (1993) 28 *Australian Lawyer* 23 at 23.
132 Above n4 at 16.
133 Although the legality of sovereign territorial acquisition was not itself "justiciable before municipal courts", the acquisition of sovereignty could be examined in order "to determine the consequences of an acquisition under municipal law": id at 20.

> the discovery was confirmed by occupation and provided the indigenous inhabitants were not organised in a society that was united permanently for political action. To these territories the European colonial nations applied the doctrines relating to acquisition of territory that was *terra nullius*.[134]

Some of the ethical reasoning that had been used to explain why inhabited territory could be treated as *terra nullius* included the "benefits of Christianity and European civilisation", and the "right to bring lands into production if they were left uncultivated by the indigenous inhabitants".[135]

However, from considering *"terra nullius"* in the context of post-Renaissance European international law and diplomacy, Brennan J smoothly transposed the concept into the Australian common law. He explained this easy admixture by suggesting that the operation of the international law principles governing acquisition of territory had created an anomaly for the domestic common law. This anomaly had arisen because, while under international law Australia had been considered to be *terra nullius*, and therefore amenable to colonisation by mere occupation, in fact Australia had been inhabited by Aboriginal people, which therefore

> raised some difficulties in the expounding of the common law doctrines as to the law to be applied when inhabited territories were acquired by occupation (or 'settlement' to use the term of the common law).[136]

In other words, while "the enlarged notion of *terra nullius*" allowed Australia to be acquired by occupation even though it was inhabited, the common law did not provide any indication as to whether the law of England should be automatically received into a colony that was inhabited but had not been obtained by conquest or cession.[137] Consequently, it became "necessary for the common law to prescribe a doctrine relating to the law to be applied in such colonies".[138] The doctrine that was prescribed was that

> when sovereignty of a territory could be acquired under the enlarged notion of terra nullius, for the purposes of municipal law that territory (though inhabited) could be treated as a 'desert uninhabited' country.[139]

This doctrinal "solution" was supported by a kind of *post hoc ergo propter hoc* logic: if a colony had been acquired under international law as *terra nullius*, then there obviously could not have been any "local law already in existence in the territory":[140] "The indigenous people of a settled colony were thus taken to be without laws, without a sovereign and primitive in their social organisation."[141]

The contradiction between the judicial characterisation of Australia as *terra nullius* at international law and the fact of the Aboriginal presence in Australia, was jurisprudentially managed by stating that, in effect, although Aboriginal people inhabited Australia, these Aboriginal people were without laws. The result was that "the settlement of an inhabited territory [was] equated

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134 Id at 21.
135 Ibid.
136 Id 21–2.
137 Id at 24.
138 Ibid.
139 Ibid.
140 Ibid.
141 Ibid.

with settlement of an uninhabited territory in ascertaining the law of the territory on colonisation ...".[142]

One result of the indigenous inhabitants of Australia being treated as if they were without laws, was that, axiomatically, they could not have any recognisable interest in land. In the absence of any party having any interest in the lands of Australia, the Crown held ultimate title to, and was sole beneficial owner of, the whole continent. Thus: "the Crown's sovereignty over a territory which had been acquired under the enlarged notion of *terra nullius* was equated with Crown ownership of the lands therein ...".[143]

This explanation, according to Brennan J, left the contemporary Australian judiciary with an option. The introduction of English law to Australia was not open to question, but the tortured judicial reasoning that had accompanied that introduction could be abandoned.[144] Given this dichotomy, between the concepts underlying the reception of the common law into Australia, and the actual reception of the common law, Brennan J felt bound to reject the former: "The facts as we know them today do not fit the 'absence of law' or 'barbarian' theory underpinning the colonial reception of the common law of England."[145]

With the "absence of law" theory itself demolished, there was no reason to apply in contemporary Australia "rules of the English common law which were the product of that theory".[146] One of the most significant of these "rules" was the failure of the Australian judiciary to recognise any Aboriginal land rights under the common law. Thus, famously and infamously, Brennan J "rejected the doctrine of *terra nullius*" and concluded that:

> the common law of Australia rejects the notion that, when the Crown acquired sovereignty over territory which is now part of Australia it thereby acquired the absolute beneficial ownership of the land therein, and accepts that the antecedent rights and interests in land possessed by the indigenous inhabitants of the territory survived the change in sovereignty. Those antecedent rights and interests thus constitute a burden on the radical title of the crown.[147]

ii. *"Terra Nullius"* in the Judgment of Deane and Gaudron JJ

In their combined judgment, Deane and Gaudron JJ also "rejected *terra nullius*", but conceptualised the doctrine rather differently to Brennan J. Having reviewed the common law authorities from around the world, Deane and Gaudron JJ disagreed with the conclusions of Blackburn J, but acknowledged that they were to some degree supported by "some general statements of great authority in earlier Australian cases".[148] One of these cases was *Cooper v Stuart*, which, according to Dean and Gaudron JJ, had subsequently been seen as:

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142 Id at 25.
143 Id at 27.
144 Id at 26.
145 Ibid.
146 Ibid.
147 Id at 41.
148 Id at 77.

> authoritatively establishing that the territory of New South Wales had, in 1788, been terra nullius not in the sense of unclaimed by any other European power, but in the sense of unoccupied or uninhabited for the purposes of the law.[149]

According to Deane and Gaudron JJ, the *Cooper v Stuart* line of cases stood for two propositions:

> [that] the territory of New South Wales was, in 1788, terra nullius in the sense of unoccupied or uninhabited for legal purposes and that full legal and beneficial ownership of all the lands of the Colony vested in the Crown, unaffected by any claims of the Aboriginal inhabitants.[150]

In the result, Deane and Gaudron JJ found that the common law contained a doctrine of native title and, correspondingly, over-ruled the Australian obiter that seemed to suggest the contrary. It was in that sense that Deane and Gaudron JJ, "rejected the doctrine of *terra nullius*":

> [T]he two propositions in question provided the legal basis for the dispossession of the Aboriginal peoples of most of their tribal lands ... the court is under a clear duty to re-examine the two propositions ... [T]hat re-examination compels their rejection. The islands of this continent were not terra nullius or "practically unoccupied" in 1788.[151]

Deane and Gaudron JJ, then, seemed to use the term *"terra nullius"* to describe what were purported to be the implicit legal effects on Aboriginal people of the *Cooper v Stuart* line of cases, and in the sense of rejecting the validity of those effects, rejected *terra nullius*.

iii. *"Terra Nullius"* in the Judgment of Toohey J

Toohey J, like Brennan J before him, acknowledged that the land in question had been acquired at international law, under the expanded doctrine of *"terra nullius"*, but that this legal classification was anomalous:

> One thing is clear. The Islands were not terra nullius. Nevertheless, principles applicable to the acquisition of territory that was terra nullius have been applied to the land that was inhabited.[152]

He then stated that while he refused to accept the "idea that land which is in regular occupation may be terra nullius" as both "unacceptable in law as well as in fact", in any event, the doctrine was only of limited relevance:

> The operation of the notion of terra nullius only arises in the present case because of its theoretical extension to the Islands. But clearly it can have no operation. The plaintiffs accept that the Islands were settled by Britain rather than conquered or ceded. But it does not follow that principles of land law relevant to acquisition of vacant land are applicable ... The Crown did not acquire a proprietary title to any territory except that truly uninhabited.[153]

Toohey J, then, both "rejected *terra nullius*" in the sense of its applicability to inhabited territory at all, and also rejected the idea that because, at international or domestic law the Murray Islands may have been judicially considered

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149 Id at 78.
150 Id at 82.
151 Id at 82–3.
152 Id at 141.
153 Id at 142.

to be *terra nullius*, this stood as a barrier to the common law recognition of Indigenous interests in land.

C. *The Ambiguity of it all ...*

What then did the various members of the majority of the High Court seek to achieve in "rejecting *terra nullius*"? Their "rejection of *terra nullius*" definitely did not, and was not meant to, have the effect of re-classifying Australia as a "conquered" rather than a "settled" colony.[154] Neither was the "rejection of *terra nullius*" an attack on Australian sovereignty, which remains unjusticiable.[155] As demonstrated above, it certainly was not clear among the majority judges what was being reversed by the "rejection of *terra nullius*". As Ian Hunter has highlighted:

> the majority's critique of the [*sic*] *terra nullius* slides between three different (though not unrelated) concepts and domains of reasoning. First, *terra nullius* is an (absurdly false) anthropological and historical description of the state of Aboriginal society at the time of colonisation. Second, something like *terra nullius* has been accepted as doctrine in the small set of Australian precedents that, without exception, affirm the Crown's 'radical title' to all colonial lands, and in the one case that has applied this framework to an Aboriginal land claim (*Milirrpum v Nabalco*). Third, *terra nullius* is (together with conquest and cession) one of the three instruments of the acts of state through which Britain founded colonies and, as such, is acknowledged in various Privy Council judgments as the instrument of a supralegal exercise of foreign power.[156]

The question remains then: in rejecting *"terra nullius"* what were the majority in *Mabo* rejecting?

D. *A Problem for the High Court*

As precedent, *Milirrpum* obviously did not represent a problem for the High Court. However a simple rejection of *Milirrpum*, accompanied by a concomitant recognition of the doctrine of native title, would not alone have resolved the discursive crisis caused by *Milirrpum*. This crisis had only been heightened by events in the eighties, including the Royal Commission into Black Deaths in Custody,[157] the faltering of momentum towards legislative land rights,[158] and the problematic celebration of the Bicentenary in 1988.[159] In the absence of any complete rupture in the continuity of a judicial system,[160]

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154 Id: see Brennan J at 41, Deane and Gaudron JJ at 58, Toohey J at 142 and Dawson J at 106–7. Some authors have suggested that this leaves the colonisation of Australia as anomalous under international law: see above n78 at 197–8.

155 See also *Coe v Commonwealth* (1993) 118 ALR 193 at 199–200.

156 Hunter, I, "Native title: Acts of state and the rule of law" in Goot, M, and Rowse, T (eds), *Make a Better Offer: The Politics of Mabo* (1994) at 101–2.

157 The prevalence of Aboriginal deaths in custody was expressly linked to the land rights issue. See for example Wootten, H, *Royal Commission into Black Deaths in Custody. Regional Report of Inquiry in New South Wales, Victoria and Tasmania* (1991).

158 See above n86.

159 See "Preface" in above n38; above n37; and Castles, P, et al, "The Bicentenary and the failure of Australian Nationalism" (1988) 24 *Race and Class* 69.

160 The best example is of course post-second World War Germany. After World War Two,

the only fashion in which a court is able to divorce itself from a wrong that has been committed in its institutional name in the past is by a reversal of precedent or doctrine. In 1992 the High Court could rely on neither form of catharsis.[161] That is, simply over-ruling *Milirrpum* would not explain why the judiciary had not protected Aboriginal land rights for the first 183 years of white settlement. Indeed, although *Milirrpum* was legally fallacious, it had at least provided a doctrinal explanation for why Aboriginal land rights had not been recognised. If the reasoning in *Milirrpum* was rejected as wrong, then the Australian judiciary would be left without any doctrinal explanation for why Aboriginal people had been dispossessed. The problem for the High Court in *Mabo* was how to address this ongoing discursive crisis.

E. *The Rise to Fame of the "Doctrine of* Terra Nullius*"*

A combination of *Coe v Commonwealth* and the *Western Sahara* case introduced the term "*terra nullius*" to the vocabulary of Australian jurisprudence, but it was the historian Henry Reynolds that launched the term into mainstream Australian public debate. In *The Law of the Land*,[162] first published in 1987, Henry Reynolds[163] sought to explain both how, legally, Aboriginal dispossession had been justified and how, historically, this dispossession had occurred. According to Reynolds, "underlying the traditional view of settlement was that before 1788 Australia was *terra nullius*, a land belonging to no-one".[164] This had two implications: first, Australia had been annexed by the Crown as apparently "without political organisation, recognisable systems of authority or legal codes".[165] Second, the land in question was judicially treated as if it had no proprietary occupants at all, because the Aboriginal people had "ranged over it rather than resided on it".[166] Reynolds stated that it was on this second "extraordinary" basis that the British Crown had claimed actual ownership over all the territory of Australia.[167]

However, Reynolds argued that within a few decades of settlement "the misconceptions of 1788" had been "buried" and the better informed colonists became aware that "Aborigines had a 'proprietary [right] in the soil' and that they enjoyed the land in a wide variety of ways".[168] Reflecting this growing awareness, Reynolds claimed that land rights in Australia had, in fact, been legally recognised between 1838 and 1848, particularly by the Imperial Colonial

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the German institutions were able to exorcise the crushing weight of recent German history by going through a formal process of denazification. It was purported to be *anno zero* in German history; a complete rupture of past from present.

161 There was also no cleansing rupture in the continuity of the rule of law in Australia. Australia actually has "one of the longest continuous legal pedigrees of any country in the world, a pedigree which extends at least as far back as 1788"; See Upjohn, I, "Terra Nullius; the legitimacy of 1788" (1988) 5 *Ormond Papers* 31 at 31.

162 See also Reynolds, H, *Dispossession* (1989); and Reynolds, H, *Frontier* (1987).

163 For some short biographical details see Reynolds, H, "Beyond the Frontier" (1991) 49 *Island* 30.

164 Above n36 at 12.

165 Ibid.

166 Id at 13.

167 Ibid.

168 Id at 79–80.

Office in London.[169] In the colonies however, "settlers, governments and courts ignored land rights in defiance of the law".[170] Reynolds also claimed that this recognition had been overlooked by the chief interpreters of Australian legal history: historians and jurists.[171] It was this grievous omission from Australian historical understanding that had allowed Blackburn J to have held that there had never been any recognition of native title in Australia.[172] Reynolds concluded that, if it could be demonstrated that Australia had not been *terra nullius* in 1788, and that Aboriginal land rights in Australia had been institutionally recognised, then the Courts would have no choice but to recognise the existence of native title under Australian common law. Only then, "[w]ith terra nullius out of the way [could] Aboriginal prior possession ... be assumed as the starting point for legal argument".[173]

The influence of the Reynolds' thesis of "*terra nullius*" cannot be overstated. One commentator has called the intellectual popularity of Reynolds' interpretation of Australian legal history an "obsession",[174] as his arguments concerning "*terra nullius*" were adopted in articles[175] and textbooks[176] alike.

F. A Solution for the High Court

Although Reynolds had passionately attacked the judgment of Blackburn J in *Milirrpum* for lagging behind the pace of historical awareness, at all times his attack remained within a conceptual framework that endorsed liberal-legal discourse, and the paramount authority of the rule of law. Reynolds attacked the doctrinal application of laws, but he did not see that "the law" per se had been the tacit instrument of violent dispossession. As Val Kerruish has argued, Reynolds seemed to suggest "that the law in general ought to be respected" even if "some particular institutionalisations of it [were] corrupt".[177] Reynolds remained essentially uncritical of the role of "law" itself and rather than addressing "the fact that law has played an active role in the dispossession of people from their land" preferred to argue that it was "only the 'corrupted' legal definitions of Australian law which failed to fit the facts of Aboriginal land tenure".[178]

Reynolds seemed to assume that "law" was "the solution rather than the problem",[179] and that "Aboriginal dispossession was simply a mistake" that could "be rectified by the correct interpretation of the law".[180] Above all, Reynolds identified this "mistake" as being that the continent of Australia had

169 Id at 97–103.
170 Id at 140.
171 Id at 121.
172 Id at 122.
173 Id at 174.
174 Above n82 at 226.
175 See for some striking examples; above n161 at 35; Blumm and Malbon above n70 at 33; and Wallace-Bruce, N, "Two Hundred Years On" (1989) 19 *Georgia J Int'l Comp L* 87 at 102.
176 See Hanks, P and Keon-Cohen, B (eds), *Aborigines and the Law* (1984); and above n82.
177 Kerruish, V, "Reynolds, Thompson and the Rule of Law" (1989) 7 *Law in Context* 87 at 120.
178 Gollan, V in Lilley, R, et al, "The Appropriation of Terra Nullius" (1989) 59 *Oceania* 222 at 229.
179 Ibid.
180 Id at 230.

been classified as *terra nullius* in 1788 and that, at law, this mistaken assumption had never been corrected. In articulating this argument, which established that a particular legal doctrine accounted for the dispossession of the Aboriginal people of Australia, Reynolds absolved "the law" itself of culpability.

Reynolds turned the dispossession of Aboriginal people into a "legal" event, in the sense of an event recognised as traceable to the operation of a legal rule. He had created something jurisprudentially tangible that could be reversed to cure the ongoing injustice. *Terra nullius* was "still at the heart of the Australian legal system",[181] but once this cancer had been excised from the legal body, it would be healthy once more, because Aboriginal land rights would be recognised within its framework. Reynolds translated the discourse of *terra nullius* into the "doctrine of *terra nullius*". The Aboriginal people of Australia had been dispossessed because of the simple misapplication of a single Eurocentric, factually incorrect, antiquated, wicked legal doctrine: the "doctrine of *terra nullius*".

G. *Reconstructing the Discourse of* Terra Nullius

It is the chief contention of this article, that, in order to solve the discursive crisis stimulated by *Milirrpum*, the High Court implicitly adopted the approach of Henry Reynolds[182] and, accordingly, in *Mabo*, "rejected the doctrine of *terra nullius*". This theoretical dynamic can be seen at work in the three judgments that "rejected *terra nullius*". Their confusion over what the "doctrine of *terra nullius*" actually entailed is evidence that, when Australia's top legal minds attempted to construe "the 'straw' concept of *terra nullius*",[183] as legally determinative, they were unable to convince themselves. Accordingly both Dawson and Toohey JJ were dismissive of the relevance of *terra nullius*,[184] Mason CJ and McHugh J when summarising the most important effects of the collective *Mabo* judgments did not mention "*terra nullius*", and Deane and Gaudron JJ ended up rather awkwardly interpreting *terra nullius* as "the legal context" of dispossession.[185] Even Brennan J, who so elaborately attempted to divine the significance of *terra nullius*, finished his judgment by, quite remarkably, actually explaining that the displacement of the Aboriginal people could not be accounted for by the operation of any legal rule:

> Aboriginal rights and interests were not stripped away by operation of the common law on first settlement by British colonists, but by the exercise of a

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181 Above n36 at 173.

182 Reynolds himself has characterised the outcome of *Mabo* as in accordance with his theories; see Reynolds, H, *The Law of the Land* (rev edn) (1992) at 185–202; and Reynolds, H, "What is Native Title" (1993) 1 *Wiser* 25. This is also the conclusion in Briscoe, G, "Land Reform: Mabo and 'Native Title', Reality or Illusion" (1993) 6:4 *Pacific Research* 3 at 4–5; and Hughes, I and Pitty, R, "Australian Colonialism after Mabo" (1994) June/July *Current Affairs Bulletin* 13 at 13. Reynolds is actually referred to in *Mabo* itself by Toohey J in above n4 at 141, while Gaudron and Deane JJ stated at 91 that "in the writing of this judgment, we have been assisted not only by the material placed before us by the parties but by the researches of the many scholars who have written in the areas into which this judgment has necessarily ventured. We acknowledge our indebtedness to their writings ...."

183 Above n124 at 226.

184 Above n4 at 106 and 141–2.

185 Id at 82.

> sovereign authority over land exercised recurrently by governments. To treat the dispossession of the Australian Aboriginals as the working out of the Crown's acquisition of ownership of all land on first settlement is contrary to history. Aboriginals were dispossessed of their land parcel by parcel, to make way for expanding colonial settlement .... [I]t is appropriate to identify the events which resulted in the dispossession of the indigenous inhabitants of Australia, in order to dispel the misconception that it is the common law rather than the action of governments which made many of the indigenous people of this country trespassers on their own land.[186]

In context the significance of these comments cannot be overstated. The premier judge in *Mabo* who had gone to such inordinate lengths to explain the significance of *terra nullius*, completed his judgment by acknowledging that no legal doctrine accounted for the lack of recognition of Aboriginal land rights. It was a succinct admission that Reynolds' *terra nullius* thesis was simplistic and not altogether persuasive. The whole notion, that once it had "been judicially recognised that Australia was not uninhabited at the time of colonisation then the rights of the Aboriginal peoples [would be] assured", had always been "an overly simplistic analysis of the causes and resolution of the conflict between Aboriginal peoples and colonising peoples".[187]

In contrast, the rhetoric of the High Court's "rejection of *terra nullius*" was that the High Court was wrenching off the strangling chains of obsolete precedent that had held in thrall the growth of equitable law in Australia. This rhetoric is clearly evidenced in the judgment of Brennan J:

> 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. The fiction by which the rights and interests of the indigenous inhabitants in land were treated as non-existent was justified by a policy which has no place in the contemporary law of this country ... an unjust and discriminatory doctrine of that kind can no longer be accepted.[188]

As such the dumping of the doctrine of *terra nullius* was seen as evidence of the progress of law, the goodness of the rule of law, the triumph of liberty and equality over tyranny, and the teleology of Australian jurisprudence.

Just as Reynolds had translated discourse into doctrine, when the High Court "rejected the doctrine of *terra nullius*" they were actually "rejecting" the discourse of *terra nullius*. That is, the High Court was rejecting as no longer appropriate or legitimate the configuration of power and knowledge that had legitimated the colonial dispossession of Aboriginal people. This rejection performed a profound discursive function: it provided the solution to the conundrum posed by *Milirrpum*. Within the judgments in *Mabo*, the High Court acknowledged the new historical and ethical "truths" that had made the results of *Milirrpum* look unjust and ludicrous, and it was purportedly on the basis of these new "truths" that the High Court re-fashioned the law. The "rejection of *terra nullius*" was a symbolic legitimation ritual,[189] in which the

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186 Id at 50.
187 Above n124 at 226.
188 Above n4 at 28–9.
189 Above n48 at 207.

law was once again aligned with the "truth" in order to legitimate existing power-relations.

Within the judgments, the High Court judges went out of their way to explain that they were shaping the law to conform to the new "truths" in Australian society: that pre–1788 Aboriginal society had been sophisticated and had been in possession of the land; that this culture had been violently and unjustly dispossessed; and that this injustice had certain ongoing effects.[190] Thus Deane and Gaudron JJ recognised "the conflagration of oppression and conflict", that had "spread across the continent to dispossess, degrade and devastate the Aboriginal peoples" and left "a legacy of unutterable shame",[191] while Brennan J stated that "no case can command unquestioning adherence if the rule it expresses seriously offends the values of justice and human rights",[192] and that "an unjust and discriminatory doctrine" like *terra nullius* could no longer be accepted.[193] The common law, according to Brennan J "should neither be, nor be seen to be frozen in an age of racial discrimination".[194]

In this regard the *Western Sahara* case played a highly significant role. As Gerry Simpson has outlined "in strictly legal or formal terms it could just as easily have been ignored altogether",[195] as Mason J had done in *Coe v Commonwealth*. However, as Simpson has adroitly explained:

> 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.[196]

Brennan J justified reference to international law in terms that conform to Simpson's hypothesis as "a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights".[197] Mason CJ who had dismissed the relevance of the *Western Sahara* case in such stern terms in *Coe v Commonwealth* not only concurred with the judgment of Brennan J in *Mabo*, he also defended the decision in a subsequent interview on the basis that it was "entirely consistent with the rejection of that doctrine by the International Court in the *Western Sahara* case"![198]

The Court in *Mabo* had undoubtedly shown the pragmatic, flexible and equitable nature of the common law,[199] by revealing its ambits to include the doctrine of native title. However in the very act of so moulding the common law, what had begun as a challenge to the rule of law itself became simply a matter of claiming legal rights. This process is illustrated poignantly by a quotation

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190 This is not to say, of course, that all or any of these "truths" are now universally accepted in Australian society.
191 Above n4 at 79.
192 Id at 19.
193 Id at 26, 28–9.
194 Id at 28.
195 Above n48 at 207.
196 Ibid.
197 Above n4 at 29.
198 Above n131 at 23.
199 See above n128; and Churches, S, "Mabo. A Flexible Sinew of the Common Law" (1993) 20:11 *Brief* 8.

from the late Eddie Mabo himself who remarked with reference to the High Court challenge that: "I suppose ... the only way that we can prove that the system [the Murray Islander's system of land tenure] do [*sic.*] exist is to convince the white man's law system".[200]

As a result of the *Mabo* case huge legal gains have, at last, been made by the indigenous people of Australia: but the point here is precisely that these are "legal gains", achieved within and acknowledging the supremacy of the liberal, Anglo-Australian rule of law framework. The balance of social power in Australian society was shifted somewhat with the recognition of native title under the common law, but this was the price that was paid in order to re-legitimate the existing social hierarchy. It was only because, in Brennan J's words, it was not "necessary to the structure of our legal system to refuse recognition to the rights and interests in land of the indigenous inhabitants",[201] that the High Court recognised native title. As he explained:

> 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 ... it would be impossible for the common law to recognise such rights and interests if the basic doctrines of the common law are inconsistent with their recognition.[202]

Mabo signified great change, but only within the formal legal structure which, through the very act of legal change, was re-legitimated. As Paul Coe bitterly commented, the High Court in rejecting *terra nullius* "threw away a name but retained the substance".[203] *Mabo* expressly reiterated the inviolate nature of Australian sovereignty and the legality of the white-Australian nation state. Accordingly *Mabo* also re-legitimated the political economy and moral foundation of Australian society and nationhood:

> By assuming the power to affirm the continuing force of indigenous law in a severely restricted context, and by incorporating this law into the framework of Australia common law, the High Court affirmed its jurisdiction and authority over indigenous laws.[204]

Had the rejection of *terra nullius* been taken to its logical conclusion, white settlement in Australia would have been held to be unlawful and "the High Court would [have rejected] the principle on which its own authority rests",[205] but such a conclusion was patently untenable. Thus, what had been an attack on "law" was appropriated and turned into just another instance of the operation of liberal rights discourse. Although the doctrine of *terra nullius* may have been rejected, the existing super-structure of power-relations in Australia was dramatically re-affirmed. What had been a discursive crisis for the rule of law in Australia culminated in its triumph with the leading judge in *Mabo* reaffirming both the supremacy of the rule of law and its innate goodness:

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200 Department of the Parliamentary Library Information and Retrieval System, "The Background and Implications of Mabo" *Sunday* program, Channel 9, Sunday 4 July 1993 at 2.
201 Above n4 at 34.
202 Id at 29, 31.
203 Above n117 at 143.
204 Hughes and Pitty in above n182 above at 14.
205 Id at 15.

> The peace and order of Australian society is built on the legal system. It can be modified to bring it into conformity with contemporary notions of justice and human rights, but it cannot be destroyed.[206]

Truth and power were again at one.

5. *Conclusions*

The future of "*terra nullius*" may be as vexed as its past. One consequence of the High Court's emphasis on *terra nullius* in *Mabo*, is that some sort of "doctrine of *terra nullius*" is now, negatively at least, part of the common law of Australia. The courts of this country will in future have to deal with a "straw" concept with High Court precedent behind it.[207] Another consequence is that, because of the rhetorical rejection of *terra nullius* by the High Court, the phrase has been injected with new discursive force as the post-*Mabo* debates have concentrated around its rejection.

The purpose of this article has not been to attack the High Court's judgment in *Mabo* in any respect, or to attempt to diminish the progressive step within the existing rule of law framework that the recognition of native title under the Australian common law genuinely represents. Rather the intention has merely been to review one aspect of the decision critically, to consider the nuances and ambiguities of the "rejection of *terra nullius*", and to advance a hypothesis to explain them.

The conclusions that have been reached may be stated baldly. First, in *Mabo* the High Court corrected the Australian common law by recognising the existence of the common law doctrine of native title, but in order to accomplish this there had been no need to "reject" any "doctrine of *terra nullius*". Second, by doing something like "rejecting" a "doctrine of *terra nullius*" in *Mabo*, the High Court resolved a long-term discursive crisis in Australian legal discourse in which the law had been seen to be inequitable and unjust because it no longer conformed to the relevant "truths" in Australian society. Thus, the "rejection of *terra nullius*" provided a rhetorical explanation for why Aboriginal land rights had historically not been recognised; it re-legitimated the rule of law in Australia; it allowed the Australian judicial system to once again appear to reflect the relevant "truths" in Australian society; and it realigned truth and power to reinforce the legitimacy of the white Australian nation. If the "rejection of *terra nullius*" as such marked a judicial revolution at all, it was a stage-managed one: things were changed in order for things to remain the same.[208]

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206 Above n4 at 19.

207 For some suggestions as to how the "rejection of *terra nullius*" could turn out to be of some importance see Kirby, M, "The Australian Use of International Human Rights Norms from Bangalore to Balliol" (1992) 18 *C L Bull* 1306. See also the preambles to *(ACT) Native Title Act 1994*, the *(Cth) Native Title Act* 1994, the *(NSW) Native Title Act* 1994, and the *(Qld) Native Title Act*. The "rejection of *terra nullius*" has already been used before the Courts to argue that the Australian criminal law no longer binds traditional Aboriginal communities. See *R v Sullivan* (unreported, New South Wales Supreme Court, Simpson J, 4 July 1994): discussed in the *West Australian* 5 July 1994 at 30.

208 This quote in context is drawn from the Italian novel *Il Gattopardo*, by G T di Lampedusa [English translation; di Lampedusa, G T, *The Leopard* (1960)]. The novel dealt with the events of the Italian *Risorgimento* and argued the broad historical thesis that the Italian unification had been managed from above in order to prevent real social reform. In the book Tancredi remarks to Don Fabrizio his uncle who is the Prince of Salina, "if we want things to stay as they are, things will have to change".