Chapter Six

The High Court in Mabo

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I want to consider this afternoon not the effect and implications of the decision in Mabo (1), but certain aspects of the handling of the case in the High Court. The more one studies the case the more remarkable these will appear. Also worthy of remark is the way members of the judiciary have handled the matter since.

A. Why was What was Said and is Perceived to Have been Decided in Relation to the Australian Mainland, Said and Decided in that Case?

1. The Paradox

An observer examining Mabo would see a position broadly as follows:

Mabo as a piece of litigation concerned a claim by individual persons to specific parcels of land on each of three islands in Torres Strait. When those claims were seen as being doomed to fail it was turned into a claim that native title existed in relation to those islands.

There was before the Court in Mabo no claim or issue concerning land on the mainland of Australia. (Without wishing to offend, I use that expression throughout as including Tasmania.)

The Murray Islands are tiny. The largest of them is less than three kilometres long, and their total area is nine square kilometres. (By way of comparison, the parkland constituting the Albert Park reserve in Melbourne is some 2.5 square kilometres.) The islands have at all relevant times been inhabited by a people who seem to be called the Meriam (2) people. The Meriam people are of Melanesian race (as in New Guinea). In 1879, when Queensland annexed the islands, the Meriam people lived in established villages, cultivated the land, had a system of individual and perhaps family ownership of specific parcels of land, and had their own native court administering disputes as to land.

The Australian Aborigines are not of Melanesian race, and their culture and customs are very different from those of people of the Melanesian race. At the relevant dates 1788 and 1825 and 1829 there were several hundred tribes of them, living nomadic lives on a mainland of some 2,967,895 sq. miles, or some 7,622,183 sq. km. They did not live in established villages, they did not cultivate the land, they did not have a system of individual or family ownership of specified parcels of land, and it follows that they had no court administering such a system.

There was placed before the High Court evidence as to the facts concerning the Meriam people and the Murray Islands.

There was placed before the Court no evidence whatsoever concerning mainland Australia; no evidence whatsoever as to Australian Aboriginal culture and ways.

There were before the Court the Meriam Island plaintiffs, and the defendant the State of Queensland, for the Murray Islands are part of Queensland. The original co-defendant, the Commonwealth of Australia was represented in Mabo No. 1 but was dismissed from the action prior to Mabo No. 2, on the basis I presume that no issue in the case concerned it.

There were before the Court no Australian Aborigines whatsoever, and no person or company holding freehold or leasehold title of any kind, ordinary or pastoral or mining, on mainland Australia; nor any other individual person or company to do with mainland Australia.

With no mainland issue, with no evidence as to the mainland, with no parties concerned with any mainland issue, without argument as to any mainland issue, the High Court proceeded to destroy

what Deane and Gaudron JJ. described (175 C.L.R. at p. 120) as "a basis of the real property law of this country for more than a hundred and fifty years".
The observer might wonder whether this kind of thing commonly happens in litigation.

2. The General Practice of the High Court as to the determination of Constitutional Issues

In former days, including days now gone when international reputation saw the High Court as the finest appellate court in the English-speaking world, the well-established high policy and practice of the High Court was to deal with constitutional issues as sparingly as possible. If a case could be decided on the facts, that is how it was decided. If it could be decided by determining an issue of general law, or interpreting a statute, that is how it was decided. Only if the case could not otherwise be determined, would the Court deal with a constitutional issue. And it would confine that issue to the compass essential to determine the case.

All of this is one element of what is called "judicial restraint". A wise judge will be consciously aware that his basic function is to decide cases, and in doing so to say orally or in writing whatever is necessary to the proper discharge of that function and the development of the law in the manner of the common law. He will be reluctant to say anything that is not necessary. (More than one judge has recently found the unwisdom of expressing some relevant statement about a particular woman as an irrelevant statement about women generally.)

A wise judge interpreting a constitution will be particularly watchful. A judge interpreting a constitution makes decisions in areas involving political disputation, where passions may run high. His decisions can affect the interplay of government and citizen; may decide what governments can and cannot do.

A wise judge will be aware that he will see the ramifications of a problem and the implications of pondered solutions more clearly when an actual problem has arisen and been argued out in front of him, than if he writes an essay on problems not yet before him. He will moreover be consciously aware that his role is to decide actual disputes by the exercise of judicial power; will be aware that he did not attain his position by election, and that he has no mandate from the Australian people to play any other part than that of a judge in the great issues of the day. If he does wish to play some other part he will step down from his court and pursue some other role in public life, as Dr. Evatt did in 1940 and Sir Ninian Stephen did in 1982. While he stays on the Court he will not behave as if he had a constitutional or civic or social agenda to achieve. Like a good bootmaker, a good judge will stick to his last.

It is worth documenting the policy the High Court has traditionally followed. The practice of deciding the constitutional issue only if the Court cannot otherwise dispose of the case has been something more often taken for granted than formally laid down. The young barrister learns it briskly enough the first time he tries to get the Court to do anything else. That it has been the general practice is not to be doubted. Indeed a judge will frequently put the constitutional point aside if he himself can dispose of the case on other grounds, even if his brethren find it necessary to address it. The judgment of Gavan Duffy C.J. in Huddert Parker Ltd. v The Commonwealth (1931) 44 C.L.R. 492 provides a typical illustration :

"I need not deal with the constitutional question raised in this case. It is enough for me to say that the Regulations which are attacked are, in my opinion, inconsistent with Part III of the Transport Workers Act 1928-1929."

The associated practice of deciding the narrowest practicable constitutional issue, of not engaging in generalisations applying in circumstances wider than those of the case concerned, has been found wise in many courts of ultimate appeal. It was firmly established in the Privy Council. No lawyer ever had greater experience in the Privy Council, as barrister and judge, than Lord Haldane. With the possible exception of Sir Roundell Palmer (later Lord Selborne), Mr RB

Haldane, QC had the largest Privy Council practice any barrister ever had. While Lord Chancellor from 1912 to 1915, and again in 1924, he made a point of presiding personally in every appeal from the Dominions. From 1912 to 1927 he probably sat on more such appeals than any Law Lord of his day. The judgment he prepared for the Privy Council in John Deere Plow Company Ltd. v Wharton (1915) A.C. 330 contained his carefully considered statement on the whole matter. The issue in that case arose from a particular feature of the Canadian Constitution. But the statement is more general. Its intrinsic importance, and its relevance to the continuing Mabo situation, and its inherent wisdom, justify setting it out at length:

"The structure of ss. 91 and 92, and the degree to which the connotation of the expressions used overlaps, render it, in their Lordships' opinion, unwise on this or any other occasion to attempt exhaustive definitions of the meaning and scope of these expressions. Such definitions, in the case of language used under the conditions in which a constitution such as that under consideration was framed, must almost certainly miscarry. It is in many cases only by confining decisions to concrete questions which have actually arisen in circumstances the whole of which are before the tribunal that injustice to future suitors can be avoided. Their Lordships adhere to what was said by Sir Montague Smith in delivering the judgment of the Judicial Committee in Citizens Insurance Co. v Parsons 7 App. Cas. 96 at p. 109 to the effect that in discharging the difficult duty of arriving at a reasonable and practical construction of the language of the sections, so as to reconcile the respective powers they contain and give effect to them all, it is the wise course to decide each case which arises without entering more largely upon an interpretation of the statute than is necessary for the decision of the particular question in hand. The wisdom of adhering to this rule appears to their Lordships to be of especial importance when putting a construction on the scope of the words "civil rights" in particular cases. An abstract logical definition of their scope is not only, having regard to the context of ss. 91 and 92 of the Act, impracticable, but is certain, if attempted, to cause embarrassment and possible injustice in future cases. It must be borne in mind in construing the two sections that matters which in a special aspect and for a particular purpose may fall within one of them may in a different aspect and for a different purpose fall within the other. In such cases the nature and scope of the legislative attempt of the Dominion or the Province, as the case may be, have to be examined with reference to the actual facts if it is to be possible to determine under which set of powers it falls in substance and in reality. This may not be difficult to determine in actual and concrete cases. But it may well be impossible to give abstract answers to general questions as to the meaning of the words, or to lay down any interpretation based on their literal scope apart from their context."(1915) A.C. at pp. 338- 339 (my italics).

The same approach has traditionally been taken in the High Court. I mentioned above the case of Huddert Parker Ltd. v The Commonwealth, where Gavan Duffy C.J. refrained from dealing with the constitutional point because he himself could decide the case on narrower grounds. Other judges disagreed as to the narrow point, and for them, it was necessary to decide the constitutional point. The particular point concerned the "trade and commerce" power which s. 51 (i) of the Constitution gives to the Commonwealth, but Sir Owen Dixon stated more generally the principle of deciding no more than was necessary:

"The difficulties which have been experienced in the United States in obtaining a satisfactory criterion by which may be determined the operation and application in such matters of the trade and commerce power, so indefinitely expressed, affords an additional reason for pursuing the course recommended in John Deere Plow Co. v Wharton by Viscount Haldane L.C., of confining decisions upon questions of constitutional interpretation to concrete questions and avoiding general definitions of expressions occurring in the Constitution. In dealing with the trade and commerce power, it is peculiarly desirable to consider each case which arises without entering

more largely upon the interpretation of the Constitution than is necessary for the decision of the particular case." 44 C.L.R. at p. 514 (my italics).

I am not aware of the Court having announced any intention of behaving otherwise than in accordance with this established practice.

3. The Common Law and New Colonies

Mabo involved the proposition that certain rights existing under the pre-existing society survived the annexation of the Murray Islands as a colony. That made it necessary to determine the laws applying in the islands after that acquisition. In Calvin's Case (1608) 7 Co. Rep. 2a, 77 E.R. 377, 2 St. Tr. 559, the court held that the means by which England might acquire new possessions fell into two categories. The first was descent to the monarch, and the second was conquest, a category seen fairly flexibly. The court held that in both cases the Crown was entitled to rule the new possession without regard to the requirements of English law, and free from interference by Parliament. The case was pretty much a put-up job, instigated by the new King James I (King James VI of Scotland), who had recently acquired the throne of England by descent, and with a court containing judges anxious to meet the royal wishes(3)(4).

While people's vision was confined to Europe as for hundreds of years the vision of Europeans had been that approach was realistic enough, especially as conquest was seen as flexible. Europe was settled throughout, and all parts of it fell under one or another system of government, whether nation or principality or duchy or free city or whatever else. No other situation existed. Accordingly it was true enough to say that only if the monarch of one country inherited another, or as a result of conquest, could one country acquire territory of another.

But the world was changing. Three developments in particular were at work. The first was the coming of the Age of Discovery. In 1486 Bartholomew Diaz of Portugal sailed around the Cape of Good Hope into the Indian Ocean. After him Christopher Columbus and Vasco da Gama and the Cabots and Ferdinand Magellan and Francis Drake and Martin Frobisher and Quiros and Abel Tasman led a host of other seamen in opening up lands hitherto unknown. In some places they found villages and towns and established systems of life and government, just as in Europe. But in other places things were very different. In some of them principally smallish islands there were no inhabitants at all. Others contained nomadic tribes, who settled nowhere but might pass over any part of large areas of land.

The second development was the increasingly sharp distinction drawn between monarch and country. When in 1720 the Elector of Hanover inherited the throne of England as George I, that was seen to concern the monarch, not the country. No one talked in terms of England having acquired Hanover, or of Hanover having acquired England. George I did not expect to govern England in the manner he governed Hanover, and the English Parliament recognised that it had no power to pass laws for Hanover. Nor had the Prime Minister any role in advising George I as to the conduct of Hanoverian affairs. England and Hanover remained utterly distinct countries, which happened to have the same monarch. Monarch and country were different. In like manner it was beginning to be perceived that overseas possessions acquired under treaties came through the activities of the country, acting through government, and not through the monarch as such.

With all this there was an increasing emphasis on the laws of England and the rights of Englishmen. When King James I declared it treason to say that he was bound by the law, Coke famously replied "Bracton saith, quod Rex non debet esse sub homine, sed sub Deo et lege": "The king ought not to be under man, but under God and the law." When men felt that James's son threatened those laws and those rights, they chopped off his head. It will not surprise that men willing to do this were beginning to think and to talk in terms of their "right" to enjoy the laws of England, rather than to suffer the royal whim, not only inside England but in England's colonies.

Third, and though discovery long continued and indeed still continues, the Age of Discovery was succeeded by the Age of Foreign Settlement. English settlers settled Roanoke Island off North Carolina in 1585, and though that settlement failed the 1607 settlement at Jamestown in Virginia proved permanent. Settlements followed in Newfoundland and Canada and the West Indies and South Africa and elsewhere throughout the world. Such settlements demonstrated as the case might be the peaceful settlement of totally unoccupied territory, or the somewhat more forceful settlement of land from which nomadic tribes retreated on the settlers' arrival: what were called at first "plantations".

Along with these plantations came questions as to the laws applying in them. Steadily the notion grew that settlement of land outside England constituted a separate manner of acquisition, with its own rules. The notion went back a long way. In Calvin's Case itself it had been raised by Sir Francis Bacon, Counsel for Calvin. The widely-read Bacon had pointed out that in these matters the scholars of other countries were beginning to turn to the Roman Law. The Romans too had built an empire in a world large areas of which were unoccupied or but lightly occupied, and their law had treated acquisition by occupancy of land belonging to no one as a different case from that of acquisition by conquest.

In Calvin's Case the judges let that ball go through to the keeper. In Craw v Ramsay (1670) Vaughan 274, 124 E.R. 1072, the court noted the possibility that colonies acquired by "plantation" of unoccupied territory should be treated differently from those acquired by conquest. In 1693 the House of Lords listened to an argument that English subjects who settled in uninhabited lands had the common law as their birthright. The argument was unsuccessful on the day, as the football commentators say, but the tide was running that way. In 1720 the Legal Adviser to the Board of Trade expressed his opinion that in "plantations" which had been "settled" in that manner, "the common law of England is the common law of the plantations".

"Let an Englishman go where he will, he carries so much of law and liberty with him, as the nature of things will bear."(5)

In 1720 a Memorandum published by the Privy Council said:

"...if there be a new and uninhabited country found out by English subjects, as the law is the birthright of every subject, so wherever they go, they carry their laws with them, and therefore such new found country is to be governed by the laws of England."

That was to be contrasted with the position in case of conquest:

"Where the King of England conquers a country, it is a different consideration: for there the conqueror by saving the lives of the conquered, gains a right and property in such people; in consequence of which he may impose upon them what law he pleases." (1722) 2 Peere Williams, B. & C. 247.

That even in that latter case things were not meant to be totally arbitrary was shown by the rider:

"... until laws [are] given by the conquering prince, the laws and customs of the conquered country shall hold place."

Clearly it suited the ordinary settler for the colony to be seen as a "settled" colony, for he would thus gain the right to live under not such rules as the Crown chose, but under such of the common law and the statute law of England as were appropriate to the condition of that colony.

In the period from Calvin's Case in 1608 to the mid-18th Century, the common law in this area showed steady development. Faced with cases of acquisition by cession under treaty, it first treated cession under treaty as falling within the flexible category of conquest, and then treated cession as a separate new category alongside conquest. It recognised acquisition of "plantations" by "settlement" as another new category. And it dropped acquisition by descent from its normal statement of the rules.

By mid-18th Century the common law was usually expressed in terms of three cases of acquisition, namely conquest, cession, and right of occupancy of lands "by finding them desart and uncultivated, and peopling from the mother country": Blackstone, Commentaries on the Laws of England (1st edn., 1765) vol. I p. 104. This last was the acquisition "by settlement".

Three points should be noticed. The first is a general one. It is that the common law was not saying that colonies could only be acquired in those three ways. Common law could not say that, for common law did not govern the acquisition of colonies; did not say which colonies had been acquired. Acquisition of colonies, and the binding statement as to which colonies had been acquired, were at all times a matter for the Crown.

"It still lies within the prerogative power of the Crown to extend its sovereignty and jurisdiction to areas of land or sea over which it has not previously claimed or exercised sovereignty or jurisdiction. For such extension the authority of Parliament is not required." Post Office v Estuary Radio Ltd. (1968) 2 Q.B. 740 Diplock L.J.at p. 753, a passage cited with approval by Gibbs C.J. in New South Wales v The Commonwealth (1975) 135 C.L.R. 337 at p. 388 and (with Aickin and Wilson JJ. concurring) in Wacando v The Commonwealth (l981) 148 C.L.R. 1 at p. 11.

Government told the courts what places England ruled. Common law governed the results of acquisition, and it was for that purpose that common law made its classification of the various modes of acquisition.

The second point is to do with "settled" colonies. It is that the word "desart" had a much wider meaning than it does today. When Etherege wrote in The Man of Mode (1676), "What e'er you say, I know all beyond High-Park's (6) a desart to you", he had no vision of an uninhabited sandy Sahara Desert beginning somewhere along Kensington High Street. What he was saying was that to Sir Fopling Flutter everything beyond Hyde Park was rude, waste, and uncultivated.

In Act III scene 3 of The Winter's Tale Shakespeare has Antigonus say :

"Our ship hath touch'd upon
The deserts of Bohemia."

He means no more than the sea-shore. In his Dictionary of the English Language (6th ed., 1785) Johnson defined the adjective "desert" as "Wild; waste; solitary, uninhabited; uncultivated; untilled", and the noun as "A wilderness; solitude; waste country; uninhabited place", and it is clearly enough in that wider sense that those authors and Blackstone used the word.

Third, and again in relation to settled colonies. Outside the Antarctic, a few quite small ultra-arid desert areas, and especially in past days numerous small islands, in few parts of the world is or has there been a permanent total absence of all human presence. The great bulk of the land surface, even where there has been no fixed settlement, has been part of an area over which, however rarely or lightly, one nomadic people or another has pursued its life. If being from time to time passed over by nomadic tribes disqualified an area from being settled, plantations would have been few indeed.

But nomadic people have no settlements to protect, and if intruders came they would frequently withdraw to other parts of their nomadic realm, rather than challenging their presence. Their departure would leave behind neither buildings nor cultivation nor other sign of ownership or achievement.

The issue was the acquisition of land by occupancy; by "peopling" the land; by "settlement". Fundamental to that was the cultivation of land, for cultivation ties those who sow to being still there to reap, and it is cultivation above all else which leads to land becoming "settled". The rule developed that the fact that land was known to fall within a possibly enormous area over which there roamed a nomadic people, who did not cultivate the land, did not remain, did not build, in short did not settle the land, was not inconsistent with the acquisition of it by people who did

cultivate, did remain, and did build: people who did "settle". This had support in international law. In his Law of Nations (1758) Vattel argued that failure to cultivate land meant failure to take lawful possession of the land, so leaving the land available for acquisition by settlement by those who later on did settle and cultivate it.

Need I say that this did not mean that for legal purposes the country was uninhabited, as if one said that for legal purposes brown was green. Terra nullius is not the Latin for "No one lives in this country". It never did mean that a stretch of country had no inhabitants. It meant that the soil was the property of no one, either because there was no one there at all, or more normally because the people who might from time to time pass over it or hunt on it had no concept of individual ownership of it. It was the soil, not the country there was no "country" yet which was not "occupied"; was not "settled". Nothing turned on the reason for that, but the usual one was that the nomadic and hunting life of those who were from time to time present had never created a need for such a concept.

As to the results of acquisition, common law maintained the distinction between colonies acquired by conquest or cession on the one hand and those acquired by settlement on the other. Blackstone said of the first two cases:

"But in conquered or ceded countries, that have already laws of their own, the king may indeed alter and change those laws; but, till he does actually change them, the antient laws of the country remain, unless such as are against the law of God, as in the case of an infidel country." Commentaries, Book I, Introduction sect. IV, vol. I p. 105.

The case of the "unoccupied" country was different.

"For it is held that if an uninhabited country be discovered and planted by English subjects, all the English laws are immediately there in force. For as the law is the birthright of every subject, so wherever they go they carry their laws with them." ibid. pp. 104 - 105.

There had triumphed the attractive argument which in 1693 Sir Bartholomew Shower had put to the House of Lords without success, in Dutton v Howell (1693) Shower P.C. 24 at p. 32:

" ... the Common Law must be supposed their Rule, as was their Birthright, and 'tis the test, and so to be presumed their Choice; and not only that, but even obligatory, 'tis so."

4. The Facts Before the Court in Mabo

I said a little as to the facts earlier, but it is convenient to cover the whole ground here. The Murray Islands lie at the eastern end of Torres Strait. They are closer to New Guinea than to Australia, and (with a courteous indication that they are part of Australia) they appear in The Times Atlas of the World on the map of New Guinea, not that of Australia. They consist of three immediately adjacent islands. The largest is Murray Island (Mer), which is oval shaped, some 2.8 km. long by 1.6 km. wide, and has an area of 4.6 sq. km. A channel 900 m. wide separates it from the other and smaller islands, Dauar and Waier. These two islands together have an area of about 4.5 sq. km. Altogether then the Murray Islands total some 9 square kilometres.

The Murray Islands were annexed in 1879 by the Governor of Queensland, acting under the authority of Imperial Letters Patent and an Act of the Queensland legislature. They became part of Queensland on 1 August, 1879 and so they remain.

It was not disputed that the Murray Islands had been occupied by the Meriam people since time immemorial. The Meriam people are not by race Australian Aborigines. They are Melanesian people (probably originally from New Guinea), and they have a Melanesian culture. The evidence showed that since time immemorial the Meriam people had lived in permanent groups of huts on the foreshore immediately behind the beach, the different groups of huts being organised in named villages. The evidence was that at the time of annexation gardening "was of the most profound importance". There was some gardening within the villages, but the main

garden land was located a little distance inland from the villages. All garden land was identified with a named village and the relevant individual.(7) Moynihan J. reported:

"Gardening was important not only from the point of view of subsistence but to provide produce for consumption or exchange during the various rituals associated with different aspects of community life. Marriage and adoption involved the provision or exchange of considerable quantity of produce. Surplus produce was also required for the rituals associated with the various cults at least to sustain those who engaged in them and in connexion with the various activities associated with death.

"Prestige depended on gardening prowess both in terms of the production of a sufficient surplus for the social purposes such as those to which I have referred and to be manifest in the show gardens and the cultivation of yams to a huge size. Considerable ritual was associated with gardening and gardening techniques were passed on and preserved by these rituals. Boys in particular worked with their fathers and by observations and imitations reinforced by the rituals and other aspects of the social fabric gardening practices were passed on." 175 C.L.R. at p. 188.

The evidence was that "The natives are very tenacious of their ownership of the land, and the island is divided into small properties which have been handed down from father to son from generation to generation." There was no concept of public or general ownership. All was individual or family group. Shortly prior to the 1879 annexation the Meriam people had, at the suggestion of a visiting Queensland official, appointed a headman, or Mamoose. The institution continued after annexation, and the Mamoose's functions included those of a magistrate. At the time of annexation, in his Island Court he determined disputes as to land, applying a mix of rules containing an element of recognition of individual rights and power plus an element of a search for social harmony.

Deane and Gaudron JJ. summed up the position:

"It suffices, for the purposes of this judgment, to say that the Meriam people lived in an organized community which recognized individual and family rights of possession, occupation and exploitation of identified areas of land."

"It is true ... that it is impossible to identify any precise system of title, any precise rules of inheritance or any precise methods of alienation. Nonetheless, there was undoubtedly a local native system under which the established familial or individual rights of occupation and use were of a kind which far exceed the minimum requirements necessary to found a presumptive common law native title." 175 C.L.R. at pp. 115 - 116.

Their Honours recognised in terms that the facts were unusual:

"The entitlement to occupation and use differed from what has come to be recognized as the ordinary position in settled British Colonies in that, under the traditional law and custom of the Murray Islanders, there was a consistent focus upon the entitlement of the individual or family as distinct from the community as a whole or some larger section of it." 175 C.L.R. at p. 175.

The Contrast with Australia

There was no evidence before the Court as to mainland Australia, for there was no issue concerning the mainland. But it is obvious as a matter of general knowledge that the conditions and life on the small islands were as different from conditions and life on the enormous Australian mainland as they could easily be. In his Triumph of the Nomads (1st edn., 1976) Blainey compares the standard of living of the Australian Aborigine in say 1800 favourably enough as against that of the great mass of Europeans: see pp. 225-228. The people of the Murray Islands probably had a standard of living at least as good. But there was a large contrast between the two. On the mainland the race was different; there were no villages, let alone towns; the life was nomadic, lived over vast distances. In particular, the life did not include gardening or any kind of cultivation.

"New Guinea had gardens and pigs, and several islands in Torres Strait grew vegetables in neat gardens, but the new way of life did not apparently penetrate Australia." ibid. at p. 230.
Gardening came very close to Australia:
"The invasion of domesticated plants and animals came close to Australia. From the coast of south-east New Guinea it began to cross the stepping stones in Torres Strait. ... Gardening was not pursued in any part of aboriginal Australia, but curiously it took root on islands in Torres Strait. ... The islands at the eastern end of the strait had the prolific gardens. The Murray Islands, lying where the shallow waters of Torres Strait met the deep water of the Coral Sea, possessed volcanic soil, ample rains and dense vegetation. Much of the vegetation on the five square miles of the main islands was periodically cleared for the gardens, and the island a century ago supported 800 to 1,000 people. Most of the meals came from the tiny gardens. ... Gardens were also cultivated on islands which were so close to Australia that they could be clearly seen from the high ground near Cape York...." ibid. at pp. 236-237.
But the final jump was never made:
"There is a touch of drama about the way in which the world-wide advance of herds and gardens halted within sight of a strip of northern Australian coast. Two different ways of making a living stood side by side: economic systems which were as different as communism and capitalism. Moreover they co-existed in relative harmony for perhaps as long as several thousand years. Why the domestication of plants and animals did not affect Australia is one of the baffling questions in prehistory: and no sure answer may emerge." ibid. at p.237.
Nor, one may safely enough assert without enlarging on the matter, was there on the mainland any concept of individual or family ownership of particular parcels of land.
5. The Case Made for the Plaintiffs
Given the state of the law, the critical importance of the issue whether the islands were "settled" prior to their acquisition, and the critical importance to that question of both permanent settlement based on cultivation and a system of law to do with land ownership, it is not surprising that the argument for the plaintiff stressed the organised ownership and use of land on the Murray Islands. The report of the argument for the plaintiffs says:
"On the judge's findings there was a community in occupation of all the Islands, and within that community there was a society functioning within which individuals were treated as owners of their respective parcels of land. Each had an interest in his parcel. The position is analogous to that where colonization takes place and the Crown annexes territory where there are private owners holding under a pre-existing system." 175 C.L.R. at p. 8.
It was argued that the cases to do with the position on the mainland were inapplicable, for in the Murray Islands the soil (not merely the country) was occupied.
"The (mainland) cases proceed on the basis that the land was unoccupied, so that the Crown took an absolute rather than an ultimate title. They are inapplicable to a case such as the present where the evidence is that the Islands were occupied and where a real society flourished. Where land is unoccupied in fact or in fiction, the Crown's ownership is not merely an ultimate or radical title but is absolute or real ownership. The whole of the land is waste land, and waste lands legislation applies. That is not the case with occupied land." 175 C.L.R. at p. 9.
The case made, then, was that on the evidence before the Court the position in the Murray Islands was very different from that assumed by the cases to do with mainland Australia, and that within the established principles of the common law, ownership of the type claimed could be held to exist on the Murray Islands without one word being said as to the position under the quite different facts on the mainland.
6. The Response

One might have expected the judgments to discuss the significance of the facts to do with the Murray Islands, as found by Moynihan J, and as stressed by Counsel for the plaintiffs. The claim made for them could have been discussed without mention of the mainland at all. And if somewhat unnecessarily and dangerously the Court were going to say anything as to the legal position on the mainland, one might have expected recognition that such sources as were properly available to the Court (there was no actual evidence before the Court as to the facts on the mainland) showed that on the mainland there was a quite different factual situation. One might have expected discussion of the significance of the differences. Nothing of either sort occurs.

The Judgment of Brennan J. (8)

An explanation is intended to be given in a very curious passage in the judgment of Brennan J, 175 C.L.R. at pp. 25-26. It is first said, that the argument for Queensland was cast in terms applying to all colonial territories "settled" by British subjects. Counsel for the Meriam people would have said that the easy answer to that was that the Murray Islands had not been acquired by settlement, and could not have been so acquired, because they were already settled. Brennan J. says nothing as to that, saying instead:

"Assuming that the Murray Islands were acquired as a "settled" colony (for sovereignty was not acquired by the Crown either by conquest or by cession) the validity of the propositions in the defendant's chain of argument cannot be determined by reference to circumstances unique to the Murray Islands; they are advanced as general propositions of law applicable to all settled colonies." 175 C.L.R. at p. 26.

After that Brennan J. hardly discusses the facts as to the Murray Islands again.

The logic of the first part of that paragraph is less than impressive. Remembering that the evidence showed the existence on the Murray Islands of an organised system of land ownership and cultivation, which was inconsistent with acquisition by settlement, Brennan J. might with equally good or bad logic have said:

"Assuming that the Murray Islands were acquired by cession (for sovereignty was not acquired by settlement or conquest)",

or again

"Assuming that the Murray Islands were acquired by conquest (for sovereignty was not acquired by settlement or cession)".

The position is a plain nonsense. There is of course no basis whatsoever for saying that if the case is not within A or B it must be within C, unless you first posit that every case must fall within one of the three. The common law did not say that there were only three ways to acquire colonies. It could not say that, for as seen earlier it was government, not courts, which said which colonies had been acquired. Common law was concerned with the results of acquisition, and it was for that purpose that it sorted into categories the cases of acquisition which had been brought to its notice.

Faced with a case where government had found a mode of acquisition which did not fall within the perceived boundaries of any of the three categories recognised to date, the common law would not have said it had no answer. It is a principle of the common law that it always has an answer. A good common law judge in form and seeing the ball well would have found easy enough the task of dealing with the matter. He might extend the boundaries of one of the already recognised categories, if that seemed appropriate; or he might recognise a fourth category, with rules established by analogy from the categories already established. That is precisely what the common law had done in this very area in the 17th and 18th Centuries, when it first extended the category of "conquest" to include cases of acquisition by cession, then recognised cession as a separate category, and recognised acquisition by settlement as another category.

Any fair analysis would have found the position on the Murray Islands very much closer to both conquest and cession than to settlement. This was the age of blackbirding. The evidence was that the Murray Islands had been raided by blackbirders, its women seized, and its people murdered: see per Brennan J, 175 C.L.R. at p. 19. It passes belief that the Meriam people had not become well acquainted with the efficacy of cannon and musket.
In September, 1879 Captain Pennefather "mustered the natives" on the beach and told them "that they would be held amenable to British law now the island was annexed" (Brennan J, 175 C.L.R. at p. 21). It appears that the natives accepted the annexation and what they understood of its implications. The good common law judge might perfectly sensibly see their conduct as a politic surrender to overwhelming force, treat it as just as much a case of conquest as if they had thrown a few unavailing spears and been cut down by a volley of musketry, and hold the case to fall within the existing boundaries of conquest. Or he might with perfect propriety extend those boundaries to include the case of peaceful surrender to overwhelming force.
Alternatively, and remembering the hard lessons the Meriam people had no doubt learned at the hands of the blackbirders, the judge might analyse the events as resembling a request/consent of the Meriam people, acting directly rather than through a government, for the good and powerful Queen to take control and protect them against the wickedness of the outside world. On that basis he might see the case as one of cession, whether within the existing category or an extension. Or he might recognise a fourth category of peaceful surrender or direct invitation without conquest or treaty, with rules similar to those attaching to those closely related categories.
Any of those several analyses would have been far closer to reality than Brennan J's course of passing by without mention the quite critical facts of cultivation and land ownership, and proceeding on the basis that it was proper to categorise the acquisition of Murray Island as a case of acquisition by "settlement", just like the mainland.
There is indeed a further point. It is one thing to say that land was available for acquisition by settlement. It is another thing to treat it as having actually been acquired by settlement. That surely demands actual settlement; an actual "peopling" of the land. The simple and undisputed fact is that England did not "people" the Murray Islands. How then could it have acquired the Murray Islands by settlement? The point escapes attention by Brennan J. or any other member of the majority.
At p. 40 Brennan J. approaches the matter from another direction. At pp. 38 - 40 Brennan J. has noted the words "without settled inhabitants or settled law" in Cooper v Stuart (1889) 14 App. Cas. 286 at p. 291 (a phrase which is of course true in the sense which the word "settled" bears in this area), and has set against it the finding of Blackburn J, in Milirrpum v Nabalco Pty. Ltd. (1971) 17 F.L.R. 141 at p. 267 that there was "a stable order of society" and a "government of laws and not of men" (which is in no wise inconsistent with what was said in Cooper v Stuart). He concludes:
"The theory that the indigenous inhabitants of a `settled' colony had no proprietary interest in the land thus depended on a discriminatory denigration of indigenous inhabitants, their social organization and customs. As the basis of the theory is false in fact and unacceptable in our society, there is a choice of legal principle to be made in the present case. This Court can either apply the existing authorities and proceed to inquire whether the Meriam people are higher `in the scale of social organization' than the Australian Aborigines whose claims were `utterly disregarded' by the existing authorities or the Court can overrule the existing authorities, discarding the distinction between inhabited colonies that were terra nullius and those which were not." 175 C.L.R. at p. 40.
This is heady stuff indeed. I have a number of comments:

(i) It is simply not true that the theory that the indigenous inhabitants of a "settled" colony had no proprietary interest in the land depended on a discriminatory denigration of the inhabitants, their social organization and customs. All that is true is that the availability of land for acquisition by settlement depended on the view that those persons who from time to time were or might have been present on the land prior to acquisition were nomadic peoples who did not "settle" the land (and who almost automatically had no concept of individual ownership of land, and therefore claimed and had no proprietary interest in land in the area concerned). To say that is in no way a "discriminatory [or any other kind of] denigration" of them, unless it be automatically a "denigration" of a native race to say that its life style is nomadic, or that its culture did not include the concept of individual ownership of land. Until now I had not thought that it was.
(ii) I do not understand what the word "discriminatory" is doing in Brennan J.'s sentence. What would a non-discriminatory denigration be? Does the word "discriminatory" have any operation in the sentence other than making the "denigration" sound worse?
(iii) If the theory that the indigenous inhabitants had no proprietary interest in the land rested on a view of the indigenous inhabitants and their social organisations and customs which was not discriminatory and was not a denigration but was in fact wrong, would that invalidate the theory? Is the essential vice of the view taken that it was false, or that it is unfashionable?
(iv) It is not clear what separate effect is to be given to the latter part of the phrase "false in fact and unacceptable in our society". Does being "unacceptable in our society" involve a separate judgment from truth ? Say that it were held that the statement was true in fact. Would it still be "unacceptable in our society"? If so, by what criteria does the High Court decide what truths are and what truths are not acceptable in our society? Who asked it to do that? What is the source of those criteria? Where does the High Court find them? Where may the good citizen find them, so that he can plan his legal arrangements?
(v) It may be that at this point in his reasoning Brennan J. has already decided that the "basis of the theory" is indeed a discriminatory denigration. If so he has decided that issue in favour of Aborigines generally without there being before the Court any evidence whatsoever as to Aborigines generally, and without hearing argument from any person affected by that decision.
(vi) If at this point Brennan J. has not already decided that point, he now proposes to go on and do so without evidence and without the presence of or argument from any interested party at all.
(vii) Whatever be the position as to all that, it is simply not true that to apply the existing authorities as sought by the plaintiffs would have been to embark on an inquiry "whether the Meriam people are higher `in the scale of social organization' than the Australian Aborigines whose claims were `utterly disregarded' by the existing authorities". The inquiry would have been whether the evidence showed that the Meriam people had a social structure and concepts of ownership such as to make an acquisition of the islands of which they were in permanent occupation not capable of being an acquisition by settlement within the applicable common law principles. There would have been no comparison whatever with mainland Aborigines or their social organization or whatever else.
(viii) Has any other plaintiff, anywhere, ever been told that a court cannot decide a claim he has properly brought to the court, because to do so would involve deciding whether he was higher in the scale of social organization than certain other people?
(ix) Say that after considering the mainland position Brennan J. had decided that practical dictates of common sense required the Court to stand by the position existing on the mainland for a hundred and fifty years. Would he have said that the Meriam claim must also fail, because to determine it would be to inquire whether the Meriam people were higher up the scale of social organization than Aborigines on the mainland? Or would he in those circumstances have recognised that justice compelled him to determine the Meriam claim that the Meriam position

was different from that on the mainland, notwithstanding any implication as to position in the scale of social organization? If not, when are we to be told which claims can no longer be considered in Australian courts because to consider them is to involve a comparison as to comparative positions on the scale of social organization? If Brennan J. would determine the claim in those circumstances, why should the court not determine it immediately, in circumstances where it had not decided what the mainland position would be?

(x) If Brennan J. had felt discomfort as to a contrast between an assumed successful result in relation to the Murray Islands and what might be the position under the different facts on the mainland, could not the position have been met by a statement that the position on the mainland might need consideration, but that must await determination in a case concerned with and properly organised in respect of the mainland?

Rejecting such courses for no stated reason, the course adopted was to proceed to overrule long-decided cases, in the total absence of argument from interested persons, and a total absence of evidence as to Aborigines generally. This was for some reason seen as preferable to deciding the necessary case, as presented, and putting mainland questions aside for consideration, with full evidence and parties and argument, when they arose.

I find it difficult to imagine any earlier High Court proceeding in this way.

I turn to an earlier associated passage from Brennan J's judgment. Here it seems to be said that any differences as to the facts on the mainland would be irrelevant. The passage reads:

"Nor can the circumstances which might be thought to differentiate the Murray Islands from other parts of Australia be invoked as an acceptable ground for distinguishing the entitlement of the Meriam people from the entitlement of other indigenous inhabitants to the use and enjoyment of their traditional lands. As we shall see, such a ground of distinction discriminates on the basis of race or ethnic origin for it denies the capacity of some categories of indigenous inhabitants to have any rights or interests in land." 175 C.L.R. at p. 26 (my italics).

Personally I find that the scariest passage in the whole of the Mabo judgments.

The passage is not quite as clear as one would wish so important a passage to be. The first sentence says, clearly enough, that circumstances "which might be thought to differentiate the Murray Islands from other parts of Australia" cannot be invoked as an "acceptable" (here's that word again) "ground for distinguishing the entitlement of the Meriam people from the entitlement of other indigenous inhabitants to the use and enjoyment of their traditional lands." Well might the Meriam people inquire, "Who invited other indigenous inhabitants to our party?"

The Meriam case claimed nothing, asserted nothing, set out to prove nothing, and argued nothing as to the position on the mainland or as to the rights of other indigenous inhabitants. All it said was, "The cases cited by Queensland are not about people like us." Where then did Brennan J. get his starting point? It is hard to believe that when a plaintiff asserts that on the law as it stands the facts he proves about himself entitle him to a particular result, and the defendant raises no allegation as to discrimination, the court is to look around and inquire whether the facts about him are different from those about other people.

Then the unclear part of the passage follows: "such a ground of distinction discriminates on the basis of race or ethnic origin for it denies the capacity of some categories of indigenous inhabitants to have any rights or interests in land." It is not clear whether the alleged discrimination is founded merely on the assumed fact that there are "some categories of indigenous inhabitants" (if "some categories" constitutes a race) who cannot assert about themselves facts such as the Meriam people assert about themselves, or on that plus the further assumption that the reason why those indigenous inhabitants cannot assert those facts about themselves flows from a lack of capacity to have produced those facts.

Founded on the first assumption only, the proposition would surely be nonsensical. If one tribe chooses to develop in one way and another tribe in another, is each and every distinction founded on facts which are true of one tribe but not the other to fall foul of the Racial Discrimination Act 1975? Even where a difference in the facts does indeed flow from a difference in capacity, is it not carrying the idea of "discrimination" to absurd lengths, to say that the difference in the facts must automatically be ignored? If (as is likely) another runner beats me over a hundred yards, is it discriminatory to award him the race, because the reason that he ran faster than me was the difference in our capacities to run fast? If the men's 100 metres race at the Olympic Games is habitually won by someone of negro race, as it in fact is, is the race to be seen as discriminating against whites? Where Brennan J. is getting to in the area of discrimination is a matter of deep concern.

Deane and Gaudron JJ.

Deane and Gaudron JJ. said in partial explanation:

"The issues raised by this case directly concern the entitlement, under the law of Queensland, of the Meriam people to their homelands in the Murray Islands. Those issues must, however, be addressed in their wider context of the common law of Australia. Their resolution requires a consideration of some fundamental questions relating to the rights, past and present, of Australian Aborigines in relation to lands on which they traditionally lived or live." 175 C.L.R. at p. 77 (my italics).

Why that was so their Honours did not say. I deal below with related matters in their Honours' judgment.

B. The Absence of Interested Parties

It is of course not the practice for there to be represented before any court every person likely to be affected when the decision operates as a precedent for other cases. Life is too short for that, and courtrooms too small. The right of representation is limited in the main to those directly interested in the actual proceeding. But the court will be astute to ensure that there are represented before it parties with an interest either way on each of the issues which the court has to decide. Here the Court set out, in the just-quoted words of Deane and Gaudron JJ, on "a consideration of some fundamental questions relating to the rights, past and present, of Australian Aborigines in relation to lands on which they traditionally lived or live". Not often before, if at all, has the High Court or, I would think, any other common law court set out on "a consideration of the rights, past and present" of a group of persons, without there being represented in the court any one of those persons or any one of many classes of person whose own rights, past and present, were likely to be affected by the decision on the rights concerned.

It is of course true that because they were not parties, no Aborigine or property-owner on the mainland is technically bound by what was said and in that sense decided. The reality may be taken to be represented by the words of Deane and Gaudron JJ. The majority meant to decide these issues, and it did so in the absence of the interested persons.

It will be seen that the lack of representation applied to Aborigines as well as to others. It might be thought that in the result the Aborigines did not need to be represented. But in fact certain Aborigines have been very critical of Mabo. On 26 January,1993 Mr Gary Foley said on the Breakfast Show on radio 3CR:

"I mean, Jesus Christ, that is as laughable and as idiotic a proposition as what terra nullius was. So, you know, I have got no faith in the Mabo decision. I think it is a heap of shit.

"In fact the Mabo decision needs to be fought as vigorously as what terra nullius was. I mean, Mabo is the terra nullius of these days. I mean, you know, it is as idiotic a proposition as what terra nullius was.

"I mean, I just find the basic proposition of Mabo insulting. To say to people who you have rounded up, kicked off their land, brutalised, massacred large numbers of them, whacked in concentration camps for a hundred years, done everything you can to destroy their language and culture and custom, steal their children from them, stick them in little white homes and then turn them into domestics and sex slaves and things like that and then you turn around 200 years later and you say, you people can't prove that you have had an ongoing link with your land, so therefore any rights that you had were extinguished 200 years ago. That is a load of garbage."

That criticism might strike one of the majority six as somewhat outspoken, perhaps unfair, perhaps even ungrateful. The fact remains that explicit in each of the majority judgments is a considered denial to many Aborigines 90 per cent of them, I think I have read in the press of rights and potential benefits held to be available to a minority of Aborigines. That denial was made by six members of the High Court of Australia without one word having been said in the court on behalf of the excluded Aborigines. Whether there was much or little to say, is something one never knows till opportunity is given to say it. There is a doctrine requiring that an interested party be heard. It is called "natural justice".

Although as just stated the issue is not technically closed, the High Court has never (I believe) overturned as needing fundamental rethinking a doctrine it has overturned the legal world in stating just months before. Mabo has already caused great uncertainty and harm in the mining and pastoral and financial communities, within Australia and internationally. A restatement of a basic part of the recently stated doctrine would cause deep concern in those communities, and damage to the public's already tarnished perception of the High Court. In all likelihood the Aborigines excluded by this part of the Mabo doctrine will remain excluded, though unheard at any effective time. Mr. Foley's criticism illustrates vividly just one aspect of the wisdom of past High Courts in deciding as narrow a constitutional issue as possible, so that before something is decided it has been argued first by interested parties; and the unwisdom of what was done here.

C. Evidence and Language

I have been asked by a great historian where the High Court got its "facts" as to the Australian mainland. The particular point he had in mind was the entire absence of recognition that the great slayer of Aborigines has been disease, something he had thought accepted by historians of all schools. But the general point is much wider. The inquiry throws into high relief three particular passages in the judgment of Deane and Gaudron JJ. The whole matter is worth attention.

At p. 104 Deane and Gaudron JJ. speak of:

"the conflagration of oppression and conflict which was, over the (nineteenth) century, to spread across the continent to dispossess, degrade and devastate the Aboriginal peoples and leave a national legacy of unutterable shame."

At p. 109 the following passage appears:

"The acts and events by which the (dispossession of the Aboriginal peoples of most of their traditional lands) was carried into practical effect constitute the darkest aspect of the history of this nation. The nation as a whole must remain diminished unless and until there is an acknowledgment of, and retreat from, those past injustices."

Courts get their facts from two main sources. The first is the evidence of one kind and another actually put before the court. The other is via the doctrine of "judicial notice". The court takes judicial notice of facts so notorious that to require evidence would be to waste time and money. The court needs no evidence for the proposition that in mainstream Australian society Christmas is celebrated on 25th December, or that Parliament House is in Spring Street. The court will also take judicial notice of facts which the court does not itself know (though judges with more pride than sense sometimes speak in terms of "reminding" themselves) but which meet the requirement of being capable of "immediate accurate demonstration by resort to readily accessible sources of

indisputable accuracy". Morgan: Some Problems of Proof under the Anglo-American System of Litigation p. 61. The court will consult works of unimpeachable reference to ascertain such things as the precise meaning of a word, the date of a well-known historical event, or the times of the tides.

The doctrine and its limits were indicated by Dixon J. in The Australian Communist Party v The Commonwealth (1951) 83 C.L.R. 1 at p. 196:

"Just as courts may use the general facts of history as ascertained or ascertainable from the accepted writings of serious historians ... and employ the common knowledge of educated men upon many matters and for verifications refer to standard works of literature and the like ..., so we may rely upon a knowledge of the general nature and development of the accepted tenets or doctrines of communism as a political philosophy ascertained or verified, not from the polemics of the subject, but from serious studies and inquiries and historical narratives. We may take into account the course of open and notorious international events of a public nature. And with respect to our own country, matters of common knowledge and experience are open to us ... . But we are not entitled to inform ourselves of and take into our consideration particular features of the Constitution of the Union of Socialist Soviet Republics."

Two things follow. The first is that one cannot use this head of judicial notice as the basis of findings of fact in areas of controversy. Findings in controversial areas require actual evidence. Judicial notice will justify a judge in looking up a book and taking judicial notice that the Battle of Waterloo took place in 1815. (A better judge would have known it.) The doctrine will not justify him making a finding that the plays we attribute to Shakespeare were written by Bacon. Nor does the position become any different if the judge reads all the sources on a controversial matter and forms his own view on the matter. That is not taking judicial notice, but acting on the judge's personal view on a matter as to which no evidence is before the court.

The second is that when a judge does rely on this aspect of judicial notice, one will expect him to cite the "sources of indisputable accuracy" upon which he has relied. The particular importance of this is that otherwise no foundation for the court's findings will be known to the parties or to the public.

Judgments of other courts are not in themselves evidence, but one can easily imagine findings in such a judgment becoming accepted as a scholarly and authoritative statement of which judicial notice is capable of being taken.

Where cases are instituted in the High Court it has become usual to remit the finding of facts to another court more accustomed to seeing witnesses. That practice was followed in Mabo, the High Court remitting to the Supreme Court of Queensland on 27 February, 1986 for hearing and determination all issues of fact raised by the pleadings. The task fell to Moynihan J, who delivered his determination on 16 November, 1989. All the evidence and findings concerned the Murray Islands. None concerned the Australian mainland. So none of Deane and Gaudron JJ's "facts" as to the mainland came from that source.

The validity of the first two passages cited above from the judgment of Deane and Gaudron JJ. must as I see it rest on the doctrine of judicial notice. I know of no other basis upon which a court can introduce, as facts justifying a decision inter partes, facts not put before the court by evidence.

In my view the statements of Deane and Gaudron JJ. fail utterly to meet the requirements for being established by judicial notice. Neither statement seems to me capable of "immediate accurate demonstration by resort to readily accessible sources of indisputable accuracy". On the contrary, both are highly controversial and much controverted. They are the very kind of findings which cannot be made on the basis of judicial notice.

In their private capacities it is surely the privilege of Deane and Gaudron JJ. to undertake whatever research they choose on these issues, and to come to whatever honest views, just or unjust, partial or impartial, might follow. In their private capacities they surely have the right to voice such views as they will, at school Speech Days or anywhere else appropriate for public utterance by judges. But when they function as judges and deliver findings of fact in the High Court, they operate under the constraints of legal doctrine. I cannot avoid the view that they made findings which had no basis in evidence properly before them.

I would add two particular comments on those statements. The p. 104 passage speaks of:

"the conflagration of oppression and conflict which was, over the (nineteenth) century, to spread across the continent to dispossess, degrade and devastate the Aboriginal peoples and leave a national legacy of unutterable shame."

I could well understand it being said, and rightly said though it would probably be no business of the High Court to say it that the condition and position and prospects of the Aboriginal people in our present society were unacceptable and that the nation ought to try to do something about them: including thinking about the problem before throwing money at it, for I cannot avoid the view that the unthinking expenditure of many billions of dollars in the last generation has made the condition and position and prospects of Aborigines steadily worse. But the phrase "national legacy of unutterable shame" seems to suggest that the whole nation is to be unutterably ashamed.

I take the existence of a "national legacy of unutterable shame" to reflect an acknowledgment of moral turpitude in whoever did whatever they did, and an acceptance by all the nation of some kind of personal responsibility for what they did. For myself as merely one citizen, I am sure that some people behaved with moral turpitude, and that some did not. I know that government official after official was instructed to and did endeavour to protect Aborigines. To go no further than this city, the reason that Governor Bourke sent Police Magistrate Stewart to visit and report on the forbidden and unlawful settlement here at Bearbrass in 1836, was that there had been reports of violence to Aborigines.

I do not know enough to draw up a balance sheet of moral turpitude or otherwise across people largely unknown, black and white, throughout the whole continent, during a century of Australia's history. As for acceptance of personal responsibility, I have enough trouble bearing, and properly bearing, personal responsibility for what I myself have done. I am perfectly willing to bear in addition my responsibility as a citizen to help bring about whatever is proper in this age to repair ills now existing. I have no intention of adding to my troubles by accepting personal responsibility for the acts of others, or of marching through the world trying to repair past ills to people now dead.

Let me say this about that. The mediaeval church held it against all Jews, that Christ had been crucified by Jews a millennium earlier. I had thought that attitude was now regarded as misplaced and unjust; that later Jews did not bear a burden of guilt for what was done far earlier, by others. I read again and again that we must not blame present-day Germans for what Hitler did in the war, nor blame present-day Japanese for what Japan did in the war. That all sounds fair enough. One wonders whether Deane and Gaudron JJ. would say that Germany bears a national legacy of unutterable shame, for the Holocaust. Or Japan, for Pearl Harbour and many subsequent atrocities. If not, it seems somewhat perverse to find a national legacy of unutterable shame for what (they say) was done in Australia earlier still.

I remind you of the second passage:

"The acts and events by which the (dispossession of the Aboriginal peoples of most of their traditional lands) was carried into practical effect constitute the darkest aspect of the history of

this nation. The nation as a whole must remain diminished unless and until there is an acknowledgment of, and retreat from, those past injustices."

Mutatis mutandis, the comments just made apply again. I am willing to do whatever can be done to cure present ills, to give people hope and opportunity for the future. All that I can understand. I do not know how to retreat from a past injustice. If someone was unjustly killed in 1820, he is dead. What does it mean, to retreat from that? "Talk cant if you will", said Samuel Johnson, "But clear your mind of cant."

The third passage, at p. 120, contains what lawyers might call a confession and avoidance. It sets out to explain and justify the first two:

" ... we are conscious that, in those parts of the judgment which deal with the dispossession of Australian Aboriginals, we have used language and expressed conclusions which some may think to be unusually emotive for a judgment in this Court. We have not done that in order to trespass into the area of assessment or attribution of moral guilt. As we have endeavoured to make clear, the reason which has led us to describe, and express conclusions about, the dispossession of Australian Aboriginals is that the full facts of that dispossession are of critical importance to the assessment of the legitimacy of the propositions that the continent was unoccupied for legal purposes and that the unqualified legal and beneficial ownership of all lands of the Continent vested in the Crown. It is their association with the dispossession that, in our view, precludes those two propositions from acquiring the legitimacy which their acceptance as a basis of the real property law of this country for more than a hundred and fifty years would otherwise impart."

I add its concluding part:

" ... 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 and the fact that our own research has been largely directed to sources which they had already identified."

I have several comments.

(i) Unless I have been misled all these years when I thought I was reading judgments of the High Court, I can feel no doubt that the language of Deane and Gaudron JJ. in fact is unusually emotive for a judgment of the High Court. That is a simple matter of comparison, not calling for fine judgment. Many adjectives have over the years passed through my mind as I have read judgments of the High Court, but "emotive" has not often been one of them. I should be surprised if their Honours disagreed as to the unusual emotion of this one. I think they are intending to say that some may find the language too emotive, whereas they would justify it.

(ii) In fact the judgment does not give us "the full facts of that dispossession" which are said to be "of critical importance to the assessment of the legitimacy of the propositions that the continent was unoccupied for legal purposes and that the unqualified legal and beneficial ownership of all the lands of the continent vested in the Crown." It is far from doing that. Nor does the judgment say where the undisputed evidence as to all those facts is to be found.

(iii) The statement "that the continent was unoccupied for legal purposes" is a gravely distorted version of the doctrine that where the land concerned was not settled (in fixed habitation and settlements), settlement of the land would make the case one of acquisition by settlement.

(iv) Passing that point by, it is not easy to see how the validity of the proposition "that the continent was unoccupied for legal purposes" (a proposition which of its nature had to be true or false in 1788) could be shown to be false (or true) by events taking place over the following hundred years. What, one wonders, was the position in 1789?

(v) If the later shameful legacy referred to by Deane and Gaudron JJ. shows the proposition to have been untrue, would opposite events, namely universal kindness to Aborigines at all times, have shown the proposition to have been true? If not, what is showing what?

(vi) It is apparent from the final passage that Deane and Gaudron JJ. have read unnamed sources, and undertaken research in unnamed places. Beyond fair argument the areas in which they did this were areas of controversy. Without recording the facts as they have found them to be, they move to their moral judgments and conclusions based on the unstated facts. That is far indeed beyond what the doctrine of judicial notice justifies.

Deane and Gaudron JJ. stress the importance of all this, by saying that it is the association of the proposition with the subsequent dispossession which justifies their deciding to overturn what has been "a basis of the real property law of this country for more than a hundred and fifty years". If I understand this properly, the passage is an astonishing one. People of 1992, people not alive in the 19th Century, people in many cases who migrated to Australia following ill-treatment elsewhere, are to lose a basis of the real property law under which they lived, not even because of some proved and uncontrovertible balance of national shame flowing from evidence before the court, but from a judgment of national shame arrived at otherwise than from such evidence.

D. The Chief Justice

Mason CJ and McHugh J concurred in the judgment of Brennan J. A Chief Justice is first and foremost a judge, and in ordinary circumstances there is nothing to stop him, any more than anyone else, concurring in a judgment of one of the other judges. But when a great case is involved, one does look to the Chief Justice, first of all for a narration of the procedural history of the case (which would have been very helpful in this case) and the issues and the materials, and second for an ordered and considered analysis and treatment of the matter in words which are his. His views in this latter part of the judgment may not be the ones which prevail. There is no embarrassment if they do not. Sir Owen Dixon made the observation that a judge's influence on his fellows does not depend upon where he sits. But one does hope to find in a judgment of a Chief Justice a firm and steady foundation on which the possibly more personal and idiosyncratic judgments of other judges may stand, and on the basis of which they may make more sense than otherwise.

Especially is all this so in seminal cases where the law is changing direction. Whatever the High Court thought the implications of Mabo might be, whatever it thought the reception of the decision would be, it must have recognised a likelihood of honourable people being concerned at its content. It was a situation in which one might have expected a Chief Justice, like any other leader, to show the way. It is a lasting pity that the judgments which were delivered were not preceded by and seen in the context of a sober statement of the kind one at least hopes for, and on the whole expects, from Chief Justices on such an occasion.

E. Judicial Behaviour Since Mabo

Since Mabo, Mr Justice Einfeld of the Federal Court has attached the dignity of his position as a judge of that court to criticisms of people who take views contrary to his.

"Australia is in danger of being engulfed in hatred, racism and division because of mischievous self-seekers spreading false information about Aboriginal land claims."

"Corporate nobodies and people who should know better are deliberately stirring hatred and racism by misrepresentation in the guise of prosperity and a sound economy."

"Australia is reaching another low in intolerance, racism, self-interest and self-indulgence." (9)

A person who talks like this publicly should not do so unless he is happy for others to reply in kind. Will Mr Justice Einfeld and his court be happy if this happens? Can a mining executive, if he feels just as angry as Mr Justice Einfeld and is willing to be just as discourteous, talk of

"judicial nobodies"? Or will someone start muttering about contempt of court? That really would seem unfair, but one can never be sure that everyone agrees. It seems worth suggesting that people who bring the title of judge to their participation in controversial affairs would do well to abide by ordinary standards of civility and courtesy.
The judge is further reported as follows:
"Mr Justice Einfeld said ... Mr Justice Brennan was one of Australia's most distinguished sons, who had made a greater contribution to the nation's progress and quality of life than any mining executive could emulate."
I imagine that Mr Justice Brennan is just as embarrassed by this kind of public utterance as most people would be. No doubt it is flattering to find one's contribution to the progress of the nation compared with those of Bowes Kelly, and WL Baillieu, and WS Robinson, and Essington Lewis, and Sir Ian McLennan. The time for such comparisons is not yet. If it ever does arise, the matter will not be judged by Mr Justice Einfeld. The Chief Justice has also broken new ground, in commenting for publication on a recent and controversial decision of the Court, both here and abroad. An interview initially agreed to for the purpose of discussing a different matter was extended to include an interview on Mabo. The interview was published in The Australian Lawyer for July, 1993. A few days before highlights of the interview were published in the press. The account I saw (10) ignored the principal part of the interview, and dealt solely with the Mabo appendix to it.
At a conference held at Cambridge University on 12 July, 1993 the Chief Justice took the matter abroad. He talked of "the most sustained and abusive (criticism) I can recall in my career as a lawyer". He identified the groups from which this came, namely "interest groups such as the mining and pastoral industries and to a lesser extent politicians". He spoke of "the concerted campaign run by the mining interests supported by the pastoral interest to discredit our decision".
In the days before Mr Keating became Prime Minister, there was a firmly entrenched tradition that a Prime Minister or other Minister travelling abroad did not make public comment on current happenings at home. I cannot recall any occasion on which one has even thought in terms of a Chief Justice of the High Court of Australia making such criticisms of Australians while in another country, and one cannot but regret that the pressures of Mabo led to that taking place on this occasion.
Conclusion
It will be obvious that I do not think the High Court served itself well in handling Mabo the way it did. I have no doubt that the High Court has wounded itself in recent years, and has done so again in Mabo. I first sighted the High Court as a student, in March 1948, when it was hearing the Banking Case: Bank of N.S.W. v The Commonwealth (1948) 76 C.L.R. 1. That was a great case, involving a matter of great political and social controversy. Just three years later came the Communist Party Case: Australian Communist Party v The Commonwealth (1951) 83 C.L.R. 1. That was a great case, involving a matter of great political and social controversy. When the Court's decisions came, each matter was seen as at an end. The decisions were accepted as if brought down from Mt Sinai on tablets. The Court carried the high respect and esteem of the great mass of Australians, of all shades and classes. This flowed, I have no doubt, from men's perception, their correct perception, that the judges strove to confine themselves to judging, and to doing so in judicial manner, in judicial language, and with judicial restraint.
The position today seems very different. Even before Mabo I was both astonished and fearful for the future, when hearing the terms in which ordinary Australians were talking of a court which so few years earlier carried the esteem of the great mass of Australians. Indeed I myself spoke here last year of judges seeming to have things they wanted to say, instead of being content to say only what they needed to say. They may not have things they want to say, but like Caesar's

wife, High Court judges should be above suspicion. They are losing the war if people think such things true, or suspect that they might be.
Mabo has taken the matter far further. It is not merely the calls for the result in Mabo to be reversed by constitutional amendment (as, I presume, by an amendment providing that all title to land on the mainland of Australia shall flow from grant by the established government of the State or territory concerned, and not otherwise). In the Cambridge conference, the Chief Justice said that the campaign by the mining and pastoral interests had the purpose :
"of discrediting the decision and ... persuading the government to in effect repeal it and, if need be, even to initiate the constitutional processes that would result in an amendment of the Constitution." (my italics).
The suggestion seems to be that there would be something vaguely improper about that, or at least unsporting, as if querying the umpire's decision.
Seeking to reach a different result in that way would in fact be neither new nor discourteous. The same Constitution which puts the interpretation of the Constitution with the High Court puts the ultimate power over the content of the Constitution fairly and squarely where it belongs, with the people of Australia. Few people had more respect for the High Court than Sir Robert Menzies, but the great man did not hesitate to seek by constitutional amendment to reverse the result of the Communist Party Case.
Deane and Gaudron JJ. have said in terms that the content of the law of property in Australia should be altered forever because of their view, arrived at by their joint research among unspecified material referred to by unspecified writers, of the rights and wrongs of what they call the dispossession of the Aborigines in the nineteenth Century. It would not surprise if the Australian people, if asked, said that it shouldn't.
But discussion now goes beyond that. One is asked in unexpected places questions as to why the High Court has such power. The political agenda has been extended to asking
whether the High Court should have such power. These are novel questions. They have not arisen because the Court is handling delicate and controversial matters. The Court has always done that. What is perceived to have changed is the manner of the Court's handling of such matters. Whatever the ultimate answers turn out to be, years hence, the handling of the Mabo case will not have helped the defenders of the Court.

Endnotes

1. The one piece of litigation gave rise to two hearings in the High Court and two reported decisions of the High Court: Mabo & Ors. v The State of Queensland & Anor. (1988) 166 C.L.R. 186, and Mabo & Ors v The State of Queensland (No. 2) (1992) 175 C.L.R. 1. I call the case as a whole simply Mabo. Where it is necessary to distinguish I call the two decisions Mabo No. 1 and Mabo No. 2.
2. At the time of Mabo No. 1 they were the Miriam people; in Mabo No. 2 they are the Meriam people. The Court does not mention the switch, let alone explain it. Hopefully it is safe to stick with the Court's second version.
3. Smith, Cases and Materials on the Development of Legal Institutions (1965) p. 467.
4. Scholars will recognise and other readers should be informed of my heavy debt to Castles, An Australian Legal History (Law Book Co., 1982) in this area.
5. Chalmers (ed.), Opinions of Eminent Lawyers on various points of English Jurisprudence chiefly concerning the Colonies, Fisheries and Commerces of Great Britain, p. 206.
6. High-Park is of course Hyde Park. In 1954 I was told by an English gentlewoman who was a nice observer of these things that in the early years of the Century her grandmother habitually

pronounced the name as if there were no "d". Her brother was a judge, so what she said must be true.
7. The analogy with garden allotments in many crowded English cities is an obvious one.
8. Brennan J's judgment was concurred in by Mason CJ and McHugh J.
9. The Age, 5 July, 1993.
10. The Age, 2 July, 1993.

Appendix I

The Background of Calvin's Case

The case grew out of the acquisition by James VI of Scotland (b. 1557) of the throne of England, on the death of Queen Elizabeth in 1603. The King's claim to the English throne was a claim by descent; indeed a claim by two descents. His mother was Mary Queen of Scots (b. 1542), daughter of James V of Scotland (b. 1512), son of James IV of Scotland and Margaret Tudor, eldest daughter of King Henry VII of England. His father was Henry Stuart, Lord Darnley, son of the Countess of Lennox, daughter of Margaret Tudor by her second husband, the Earl of Angus. This double lineal descent from an English King was matched by no other possible claimant, and King James ascended the throne of England unopposed.
It might be thought that the accession of James VI of Scotland as James I of England represented an acquisition by Scotland rather than an acquisition by England. Reality was around the other way, and Calvin's Case discussed acquisitions by England, not acquisitions of England. The unattractive but shrewd Henry VII had foreseen at the time of his daughter's marriage, in 1502, how matters would turn out a hundred years later. To the comment that if the marriage should lead to a Scottish King succeeding to the throne of England then "Scotland will annex England", he replied "No, in such a case England would annex Scotland, for the greater always draws to it the less."