UNTIL RECENTLY TERRA NULLIUS was an obscure legal term known only to a few experts. Over the last few years however, it has become the focal point for an intense national debate about property and sovereignty, law and morality; about the past, the present and the future. But while the term was little known in the community at large the idea of a land without owners dominated Australian legal thinking from the earliest years of settlement until the recent Mabo judgement. Up until then terra nullius had played a central role in determining the legal, political and constitutional relations between the European settlers and their descendants and the indigenous people of Australia. It is deeply implicated in Australia’s current quest for a new identity and destiny in a post-colonial, post-Cold War world. While the legacy of terra nullius survives the country will remain shackled to its colonial past.

In the case of Mabo v Queensland, no. 2, the judges had to choose between arguments put by the Murray Islander Eddie Mabo and his associates on one hand and the Queensland Government on the other. Queensland advanced the case for terra nullius arguing that when, in 1879, in the name of the Queen the colonial government annexed the Murray Islands it gained both sovereignty and the ownership of all the property, that from that moment forward the Islanders were only in occupation of their land with permission of the
government, that in point of law they could have been driven into the sea at any time. The state’s case was summarised by Justice Dawson who remarked that ‘if the traditional land rights claimed by the plaintiffs ever existed, they were extinguished from the moment of annexation’.1

The six other judges came down on the side of Mabo determining that the Murray Islanders were entitled, as against the whole world, to possession, occupation, use and enjoyment of their traditional land. The Islanders had owned their land before 1879; they had not been dispossessed by the claim of sovereignty; nothing the Queensland Government had done between 1879 and 1992 had extinguished their native title. In rejecting the Queensland case Justice Brennan observed that: ‘The fiction by which the rights and interests of 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.’2

In fact, the theory that the indigenous inhabitants of a ‘settled’ colony had no proprietary interest in the land depended on ‘a discriminatory denigration of indigenous inhabitants, their social organization and customs’.3 Brennan believed that ‘an unjust and discriminatory doctrine’ of that kind could no longer be accepted.4

The principles enunciated in relation to Murray Island applied to the rest of Australia, Justice Toohey observing:

Before proceeding further, one more point should be noted. While this case concerns the Meriam people, the legal issues fall to be determined according to fundamental principles of common law and colonial constitutional law applicable throughout Australia. The Meriam people are in culturally significant ways different from the Aboriginal peoples of Australia, who in turn differ from each other. But, as will be seen, no basic distinction need be made, for the purposes of determining what interests exist in ancestral lands of indigenous peoples of Australia, between the Meriam people and those who occupied and occupy the Australian mainland. The relevant principles are the same.5

The principles in question were that as a result of annexation the common law flowed into Australia and the Aborigines and Torres Strait Islanders became British subjects. The law recognised and embraced their native title although the Crown exercised what was called the radical title or eminent domain, which allowed it to extinguish the indigenous interest. The Aborigines did not lose their native title at the moment of annexation but in a piecemeal fashion over a long period. Those communities still living on Crown land and maintaining their cultural traditions were likely to still possess it.

But while the court demolished the concept of terra nullius in respect of property, it preserved it in relation to sovereignty. The plaintiffs did not question the legality of the annexation but the court affirmed it just the same. Justices Deane and Gaudron observed that ‘it must be accepted in this Court’ that the whole of the territory designated in Governor Phillip’s commission was, from the formal declaration of annexation on 7 February 1788 ‘validly established as a settled British Colony’.6 Referring to Murray Island their colleague Justice Dawson remarked that:

The annexation of the Murray Islands is not now questioned. It was an act of state by which the Crown in right of the Colony of Queensland exerted sovereignty. Whatever the justification for the acquisition of territory by this means (and the sentiments of the nineteenth century by no means coincide with current thought), there can be no doubt that it was, and remains, legally effective.7

The Court followed established law in considering the question of sovereignty arguing that the Crown, while acting outside Britain itself and on the international stage, exercised prerogative powers which were beyond the reach of domestic—or municipal courts—as they are termed. This had been settled legal doctrine for a long time; British courts paying homage to the all powerful sovereign of English constitutional theory. In 1906 the King’s Bench declared that the extension of territory was:

essentially an exercise of sovereign power, and hence cannot be challenged, controlled, or interfered with by municipal
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courts. Its sanction is not that of law, but that of sovereign power, and, whatever it be, municipal courts must accept it, as it is, without question.\(^8\)

In a case in 1927 the courts determined that even the proper extent of territorial sovereignty was a matter which the courts could not question. In fact, any definite statement 'from the proper representative of the Crown as to the territory of the Crown must be treated as conclusive. A conflict is not to be contemplated between the courts and the executive on such a matter'.\(^9\)

These principles were re-affirmed in Australia by the High Court in the so-called Sea and Submerged Sea Case in 1975, Justice Gibbs arguing that the acquisition of territory by a sovereign state for the first time was 'an act of state which cannot be challenged, controlled or interfered with by the Courts of that State'.\(^10\)

It would, then, have been futile for Mabo and his associates to question the claim of sovereignty over their island in 1879. Justice Brennan explained that the law was such that it precluded any contest between the executive and judicial branches of government as to whether a territory was or was not within the 'Queen's Domain'. These issues were 'not justiciable in the municipal courts'.\(^11\)

Such a doctrine may well make life easier for the judiciary. It makes it very hard however, for anyone questioning the legality of the British annexation of Australia, an issue raised most notably in the case Coe v the Commonwealth in 1979. Paul Coe sought to sue the Commonwealth of Australia on behalf of the 'Aboriginal community and nation of Australia'.\(^12\) He presented the court with a long and detailed statement of claim which included the following points:

- From time immemorial prior to 1770 the aboriginal nation had enjoyed exclusive sovereignty over the whole of the continent now known as Australia.
- The aboriginal people have had from time immemorial a complex social, religious, cultural and legal system under which individuals and tribes had proprietary and/or possessory rights, privileges, interests, claims and entitlements to particular areas of land subject to usufructuary rights in other aboriginal people. Some of the aboriginal people still exercise these rights.
- Clans, tribes and groups of aboriginal people travelled widely over the said continent now known as Australia developing a system of interlocking rights and responsibilities making contact with other tribes and larger groups of aboriginal people thus forming a sovereign aboriginal nation.
- The whole of the said continent now known as Australia was held by the said aboriginal nation from time immemorial for the use and benefit of all members of the said nation and particular proprietary [sic] possessory and usufructuary rights in no way separated from the sovereignty of the said aboriginal nation.\(^13\)

Having provided an account of traditional Australia Coe then turned his attention to the British:

- On or about a day in April 1770 Captain James Cook R.N. at Kurnell wrongfully proclaimed sovereignty and dominion over the east coast of the continent now known as Australia for and on behalf of King George III for and on behalf of what is now the secondnamed Defendant.
- On or about the 26th day of January, 1788 Captain Arthur Phillip, R.N. wrongfully claimed possession and occupation for the said King George III on behalf of what is now the secondnamed Defendant of that area of land extending from Cape York to the southern coast of Tasmania and embracing all the land inland from the Pacific Ocean to the west as far as the 135th longitude including that area of land now occupied by the firstnamed Defendant at the Commonwealth Offices, Sydney, Commonwealth Bank Building, Martin Place, Sydney.
- The claims of Captain Cook, Captain Phillip and others on behalf of King George III and his heirs and successors were contrary to the rights, privileges, interests, claims and entitlements of the aboriginal people both individually and in tribes and of the aboriginal community and nation ...\(^14\)
Coe’s claims were decisively rejected. Justice Jacobs determined that the questions at issue were not matters of domestic laws but of the ‘law of nations’. Indeed they were not ‘cognisable in a court exercising jurisdiction under that sovereignty which is sought to be challenged’. Justice Gibbs was both more expansive and more dismissive. He argued that if Coe’s statement of claim intended to suggest either that the legal foundation of the Commonwealth is insecure, or that the powers of the Parliament are more limited than is provided in the Constitution, or that there is an aboriginal nation which has sovereignty over Australia, it cannot be supported. In fact, we were told in argument, it is intended to claim that there is an aboriginal nation which has sovereignty over its own people, notwithstanding that they remain citizens of the Commonwealth; in other words, it is sought to treat the aboriginal people of Australia as a domestic dependent nation, to use the expression which Marshall C.J. applied to the Cherokee Nation of Indians: Cherokee Nation v. State of Georgia (1831). However, the history of the relationships between the white settlers and the aboriginal peoples has not been the same in Australia and in the United States, and it is not possible to say, as was said by Marshall C.J. of the Cherokee Nation, that the aboriginal people of Australia are organized as a ‘distinct political society separated from others’, or that they have been uniformly treated as a state. The judgments in that case therefore provide no assistance in determining the position in Australia. The aboriginal people are subject to the laws of the Commonwealth and of the States or Territories in which they respectively reside. They have no legislative, executive or judicial organs by which sovereignty might be exercised. If such organs existed, they would have no powers, except such as the laws of the Commonwealth or of a State or Territory, might confer upon them. The contention that there is in Australia an aboriginal nation exercising sovereignty, even of a limited kind is quite impossible in law to maintain.\footnote{The Coe family attempted to establish their case a second time in 1993, arguing that the Wiradjuri people were a ‘sovereign nation of people’ or were alternatively a ‘domestic dependant nation’ which was entitled to self-government and full rights over their traditional lands.}

Dependant nation which was entitled to self-government and full rights over their traditional lands. Justice Mason was as dismissive as his brother judges had been fourteen years before. There was no sovereignty ‘adverse to the Crown’ residing in the Aboriginal people of Australia, nor was there a limited kind of sovereignty ‘embraced in the notion that they are “a domestic dependant nation” entitled to self government’.\footnote{The history of the relationships between the white settlers and the aboriginal peoples has not been the same in Australia and in the United States, and it is not possible to say, as was said by Marshall C.J. of the Cherokee Nation, that the aboriginal people of Australia are organized as a ‘distinct political society separated from others’, or that they have been uniformly treated as a state. The judgments in that case therefore provide no assistance in determining the position in Australia. The aboriginal people are subject to the laws of the Commonwealth and of the States or Territories in which they respectively reside. They have no legislative, executive or judicial organs by which sovereignty might be exercised. If such organs existed, they would have no powers, except such as the laws of the Commonwealth or of a State or Territory, might confer upon them. The contention that there is in Australia an aboriginal nation exercising sovereignty, even of a limited kind is quite impossible in law to maintain.}

Claims of Aboriginal sovereignty have been made in a number of criminal cases. In R. v Wedge in 1976 it was argued by the defendant that the New South Wales courts had no jurisdiction because ‘the Aboriginal people were and still are a sovereign people, and as such are not subject to English law’. It was an argument with little appeal to Justice Rath who felt he was bound by precedent laid down in the nineteenth-century cases R. v Murrell in the Supreme Court of New South Wales in 1836 and Cooper v Stuart in the Privy Council in 1889. In R. v Murrell Justice Burton asserted that: although it might be granted that on the first taking possession of the Colony, the Aborigines were entitled to be recognized as free and independent, yet they were not in such a position with regard to strength to be considered free and independent tribes. They had no sovereignty.

Burton’s arguments, Rath believed, were ‘as valid today as they were when judgement was given on 19/2/1836’. Rath saw himself as working within an old legal tradition which had been settled for 140 years, one which totally disregarded Aboriginal customary law. As Lord Watson declared in Cooper v Stuart in 1889, in cases where a colony had been established by settlement ‘there was only one sovereign, namely the King of England, and only one law, namely English law’. A similar decision was handed down by the High Court at the end of 1994 in the case of Walker v NSW. The plaintiff Dennis Walker appealed against a charge he was facing on the grounds that the Australian parliaments lacked the power to legislate in a manner affecting Aboriginal people without their request and consent. Chief Justice Mason dismissed the proposition that ‘sovereignty resided in the Aboriginal people’. The Parliament of New South Wales had power to make laws for
the ‘peace, welfare and good government of New South Wales in all cases whatsoever’. The proposition that those laws could not apply ‘to particular inhabitants or particular conduct occurring within the State must be rejected’. 24

In the Mabo decision the High Court judges told the legal story of Australia in a new way. According to the old story, when the British arrived in New South Wales the Crown became both the sovereign authority and the actual proprietor of the land, over the eastern half of the continent and over the remainder as a result of succeeding claims of sovereignty in 1824, 1829 and 1879. The post-Mabo story is different. The claim of sovereignty only delivered the radical tide of the land, the incoming common law recognising the native title of indigenous people who retained a legal interest in their homelands until they were formally extinguished by government. The new story overturns the judgement of Chief Justice Stephen in the important case of Attorney-General v Brown in 1847 that the Crown was the absolute owner of the land because there was ‘no other proprietor of such lands’.25 Justice Brennan argued that:

The proposition that, when the Crown assumed sovereignty over an Australian colony, it became the universal and absolute beneficial owner of all the land therein, invites critical examination. If the conclusion at which Stephen C.J. arrived in Attorney-General v. Brown be right, the interests of indigenous inhabitants in colonial land were extinguished so soon as British subjects settled in a colony, though the indigenous inhabitants had neither ceded their lands to the Crown nor suffered them to be taken as the spoils of conquest. According to the cases, the common law itself took from indigenous inhabitants any right to occupy their traditional land, exposed them to deprivation of the religious, cultural and economic sustenance which the land provides, vested the land effectively in the control of the Imperial authorities without any right to compensation and made the indigenous inhabitants intruders in their own homes and mendicants for a place to live. Judged by any civilized standards, such a law is unjust and its claim to be part of the common law to be applied in contemporary Australia must be questioned.26

The old story had the advantage of simplicity and consistency. Either Aboriginal sovereignty and property rights didn’t exist prior to the arrival of the First Fleet or they disappeared all together in one apocalyptic moment on 7 February 1788 when New South Wales was formally annexed. The common law came into a legal desert—one that had either always been there or, alternatively, had just been created, depending on which version of the story is followed.

The new story is more complicated. The Aborigines didn’t lose their land rights in 1788 but they were stripped of their right to manage their own affairs and to live according to their own laws. The law in relation to sovereignty remains as defined by Lord Watson in 1889 as Justice Rath explained in R. v Wedge in 1976:

As Lord Watson said, in the case of a colony founded by settlement, the law of England . . . becomes from the outset the law of the Colony, and is administered by its tribunals. . . . The law of England is the only law which those tribunals then recognize and apply. Thus it seems evident that, as New South Wales, in legal theory was founded by settlement, there was only one sovereign, namely the King of England, and only one law, namely English law.27

Law points in one direction, logic in the other. If, as the High Court determined, indigenous land rights and land law survived the arrival of the British why didn’t other aspects of the local law? If property rights continued until they were extinguished in a clear and plain manner why didn’t other elements of Aboriginal law, custom and politics? If interest in land ran on into the colonial period and beyond why didn’t the right of internal self-government? If the doctrine of continuity, as it is called, operated in one case why didn’t it work more generally?
If there were many Aboriginal nations exercising sovereignty and enforcing laws and custom before 1788 how did they lose their authority; and when? How did sovereignty which had existed for thousands of years simply disappear without military conquest or cession by means of treaties? Nineteenth-century jurists had a ready answer to these questions. Australia, they reasoned, was a place without settled inhabitants or settled law before 1788. Justice Burton argued in 1836 that the Aborigines 'had not attained at first settlement to such a position in point of numbers and civilization, and to such a form or Government and laws, as to be entitled to be recognized as so many sovereign states governed by laws of their own'.

Do contemporary jurists still see traditional Australia in this light? The question was closely considered by Justice Blackburn in *Milerras v Nabalco* in 1971. He referred to a discussion in the Privy Council in 1921 in the case *In re Southern Rhodesia* which referred to the problem of evaluating the 'rights of aboriginal tribes'. Some tribes, their lordships declared, were 'so low in the scale of social organization that their usages and conceptions of rights and duties' could not be reconciled with 'the institutions and legal ideas of civilized society'. Such a gulf, they declared, could not be bridged.

After hearing voluminous evidence about traditional Aboriginal society Blackburn was very clearly of opinion, upon the evidence, that the social rules and customs of the plaintiffs cannot possibly be dismissed as lying on the other side of an unbridgeable gulf. The evidence shows a subtle and elaborate system highly adapted to the country in which the people led their lives, which provided a stable order of society and was remarkably free from the vagaries of personal whim or influence. If ever a system could be called 'a government of laws, and not of men', it is that show in the evidence before me.

What is shown by the evidence is, in my opinion, that the system of law was recognized as obligatory upon them by the members of a community which, in principle, is definable, in that it is the community of aboriginals which made ritual and economic use of the subject land.
them to fully inform its jurisprudence. The judges have used them to overturn part of the legacy of Cooper v Stuart but not all of it. While they have rejected the assertion that there was no land law or tenure prior to settlement they have clung to the idea that there was no sovereignty, to the assertion that Australia, prior to 1788, was a land without settled inhabitants or settled law. In terms of law and political authority the Aborigines apparently still dwell on the far side of the Privy Council’s great gulf between civilisation and savagery.

Justice Brennan was fully aware that at the very heart of the settled colony doctrine, which he helped re-affirm in Mabo, was the assessment that the indigenous people concerned were ‘taken to be without laws, without a sovereign, and primitive in their social organization’. The central logic of the doctrine was that there was ‘no recognized sovereign else the territory could have been acquired only by conquest or cession’.

Is it possible to reject one half of the legacy of Cooper v Stuart relating to property and preserve the other one respecting sovereignty when both embody attitudes and beliefs considered unacceptable and unsupportable at the end of the twentieth century? Justice Brennan wrote: ‘Whatever the justification advanced in earlier days for refusing to recognize the rights and interests in land of the indigenous inhabitants of settled colonies, an unjust and discriminatory doctrine of that kind can no longer be accepted.’

It was unacceptable for international as well as domestic reasons. Terra nullius was out of step with international standards of human rights, on the one hand, and with fundamental values of common law on the other, because it entrenched a discriminatory rule based on ‘the supposed position’ of indigenous people on a ‘scale of social organization’.

In rejecting terra nullius as applied to property rights, Justice Brennan referred with approval to the comments made by his colleague Justice Deane in a case heard in 1985 to the effect that Australian law at the time had still not reached the ‘stage of retreat from injustice’ which American jurisprudence attained in the great judgement of Chief Justice John Marshall in Johnson v McIntosh in 1823 which provided the classic definition of native title. It could be said that after Mabo the High Court finally marched Australia up to 1823 but has gone no further. It has not reached the point attained by Marshall’s Supreme Court in 1831 when, in The Cherokee Nation v Georgia, the Indians were defined as domestic dependent nations which retained significant rights of internal self-governments because their sovereignty had been curtailed but not obliterated by the imposition of the overarching sovereignty of the US Federal Government. If the American analogy was to be pursued further, Australian law sits uneasily somewhere between 1823 and 1831. Logic provides momentum towards 1831, tradition holds it back.

The High Court’s decision to recognise prior rights of property but not sovereignty lines Australian law up with the international lawyers writing at the high noon of imperialism. In 1904 John Westlake wrote in his study International Law: ‘Because a native tribe is unable to supply a government suited to white men, and therefore cannot be credited with sovereignty it does not follow that it is not to be credited with rights of a simpler kind. Property is within the range of native intelligence, and at the moment when white sovereignty is acquired property may be held by natives or by whites to whom they have transferred it.’

Justice Brennan appreciated the problem inherent in the proposition that the interests of Aborigines in colonial land were extinguished as soon as the British arrived given that they had neither ‘ceded their lands to the Crown nor suffered them to be taken as the spoils of conquest’. The way around that difficulty was to determine that Aboriginal interests were not immediately extinguished and in some places have survived to the present day.

That doesn’t resolve the question of sovereignty however. It becomes increasingly difficult to sustain the view that the Aborigines were traditionally without sovereignty. Neither our anthropological knowledge nor our contemporary values allow that position to be held indefinitely. This brings us to a fundamental problem at the heart of Australian jurisprudence. The doctrine of the settled colony only works if there literally
was no sovereignty—no recognisable political or legal organisation at all—before 1788. And that proposition can only survive if underpinned by nineteenth-century ideas about 'primitive' people. If the opposite course is taken and prior Aboriginal sovereignty is recognised it is very difficult to explain how and when it disappeared without conquest or cession. It beggars belief to suggest that it disappeared over half a continent on that one day, 7 February 1788, when Britain formally annexed eastern Australia.

Two barriers stand in the way of a resolution of that jurisprudential tangle—and in the way of further advance along the road from injustice. One is frankly declared in Mabo, the other is implicit and unspoken. Australian courts regard as settled law the doctrine enunciated in the English courts about the inability to question the exercise of prerogative power when it comes to the extension of sovereignty. If the British Crown claimed sovereignty over various parts of Australia in 1788, 1824, 1829 and 1879 all the court can do is record that fact. They were acts of state which by their very nature could not be challenged, controlled or interfered with by Australian courts. It may be a view which is sound in law but it will not necessarily commend itself to the wider community. Questions of critical national importance are declared off-limits. The court feels obliged to turn aside from the challenge of reconciling our law and our history, the Aborigines and the descendants of the settlers.

The second reason appears to be the view that any questioning of the settled colony doctrine would seriously 'fracture the skeleton or principle which gives the body of our law its shape and internal consistency'. Justice Brennan explained: '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.'

In Mabo the High Court determined that law in relation to Aboriginal land rights must be brought into line with contemporary standards of justice and that it was possible to do so without undermining the legal system. If the two objectives had been incompatible then justice would have given way to stability. Justice Brennan argued: 'However 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.'

Application of the doctrine of continuity to Aboriginal sovereignty—even to the extent of recognising a right to some form of self-government—would, in the view of the court, lead to unacceptable trauma. What then should be done about injustice if it is ingrained in the bones of the system, if the skeleton itself is impregnated with values which come down to us from the era of European imperialism and white racism? Do diseased bones have to be saved from surgery at all costs?

For 200 years Australian law was secured to the rock of terrae nullius. One pinioned arm represented property, the other sovereignty. With great courage the High Court recognised native title in the Mabo judgement and released one arm from its shackles. The other remains as firmly secured as ever and seems destined to remain there for some time but in the long run the situation will prove unstable. What is more, the resulting legal pose will become increasingly uncomfortable as time passes.