

**Hal Wootten Lecture 2022
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University of New South Wales

Faculty of Law and Justice

"A nudge in the right direction; some landmark cases and the development of the law. "¹

**The Hon Susan Kiefel AC
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It is a privilege to be invited to give the annual Hal Wootten Lecture. It is my regret that the pandemic prevented me from doing so before his death last year.

John Halden Wootten AC QC was many things: a solicitor; a barrister; a Queen's Counsel; foundation President of the Aboriginal Legal Service; a Judge of the Supreme Court of New South Wales; Chairman of the New South Wales Law Reform Commission. In his "retirement" he served in various capacities, including as President of the Australian Conservation Foundation, as a Commissioner to the Royal Commission into Aboriginal Deaths in Custody, and as Deputy President of the Native Title Tribunal.

More relevant to this Lecture is his enduring legacy as founder of the University of New South Wales' Faculty of Law, of which he was Foundation Chair and Dean.

It is evident from his biography that Hal Wootten believed that all persons, lawyers in particular, can and should endeavour to live worthwhile

lives. This is reflected in what he said about his "little nudge" philosophy, the subject of today's Lecture.

This philosophy was introduced in 2008, when Hal Wootten himself delivered a lecture as part of this series. He said that every person has opportunities to give the world a "little nudge" in the right direction.² Hal Wootten explained:

*"In 1944, when I was still at an impressionable age, Lord Wavell published an anthology of verses entitled "Other Men's Flowers". I too have gained much comfort, insight and help in expressing my thoughts by appropriating other men's flowers. For me one unwitting florist was Lord Diplock, who remarked that a judge seldom has the opportunity to say, like Lord Mansfield, 'The air of England is too free for any slave to breathe, let the [slave] go free', but every now and then there is the opportunity to give a little nudge that sends the law along the direction it ought to go."*³

He further expanded on this philosophy in 2012, when he remarked:

*"Each of us has countless opportunities every day to give the world little nudges in the right direction, and the cumulative effect of our little nudges, and those of all the other little nudgers, is a major effect on the direction the world takes."*⁴

My talk today focuses on two landmark decisions: *Donoghue v Stevenson*⁵ and *Mabo v Queensland (No 2)*⁶. These were undoubtedly significant decisions in the development and understanding of the common law, yet the subject with which they dealt had been the subject of previous judicial decisions or discussion resulting in changes of socio-political thinking and executive and legislative action. When consideration is given to these factors it may be thought that these landmark decisions were in fact influenced by them. That, in fact, the earlier cases and events provided more

than a "little nudge" in the right direction. They had a major effect on the direction the common law took.

Donoghue v Stevenson

Donoghue v Stevenson is of course a landmark decision in tort law. It stated the principle of when and to whom a duty of care is owed and provided the foundation for the modern law of negligence. The facts of the case are well known. Mrs Donoghue's friend purchased a ginger beer which came in a brown opaque glass bottle. After Mrs Donoghue had consumed most of its contents, she discovered the remains of a decomposed snail in the bottle. She sued the manufacturer of the ginger beer for the illness and shock she suffered.

There was no contract between Mrs Donoghue and the manufacturer upon which she could sue. Stevenson argued that no cause of action was disclosed. The Scottish appeals court, applying its earlier decision in *Mullen v AG Barr & Co Ltd*,⁷ agreed. In *Mullen*, the Court had dismissed a claim also brought against a ginger beer manufacturer on behalf of some children who had been made ill by drinking a bottle of ginger beer which contained the decaying body of a mouse.

Mrs Donoghue appealed to the House of Lords. On 26 March 1932, a majority (Lords Atkin, Thankerton and Macmillan) held that a manufacturer who sells goods in a form which shows that they intend the goods to reach the ultimate consumer in the form in which they left, with no reasonable possibility of intermediate examination and with the knowledge that the absence of reasonable care in the preparation of the product will result in an injury to the consumer's life or property, owes a duty to the consumer to take that reasonable care.⁸

Lord Atkin's speech famously states the "neighbour principle". The person to whom the duty is owed is a person who is "so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions that are called in question".⁹

Prior to *Donoghue v Stevenson*, there was a general rule that the manufacturer owed no duty of care to third parties. But there were limited exceptions to that rule. The first was the case of fraud, where the vendor knowingly sold a defective item that was dangerous, such as a lamp that exploded on being lit.¹⁰ The second was where the article sold was dangerous per se, such as poison, and the vendor did not warn of its inherently dangerous nature.¹¹ The third and more relevant exception was the rule in *George v Skivington*,¹² but it was controversial.

George v Skivington was an 1869 decision of the Court of Exchequer concerning hair wash. Mrs George used a hair wash, which her husband had purchased from Mr Skivington, who was also its manufacturer, and was injured. Mr and Mrs George sued (Mrs George could not as a married woman sue in her own name). The Court unanimously held that the Georges had a cause of action. There was a "duty to use ordinary care in compounding the wash for the hair".¹³ That is to say the case was distinguished from earlier cases because Mr Skivington was sued in his capacity as a chemist and manufacturer rather than as a vendor. In the words of one member of the Court, "[t]he action [was], in effect, against a tradesman for negligence and unskilfulness in his business".¹⁴

Although the decision was the subject of unfavourable commentary in subsequent cases,¹⁵ there were some judges who took another view. In *Heaven v Pender*,¹⁶ in an 1883 decision of the Queen's Bench, a worker at a

dock was injured in a fall from staging around a ship which was supplied and constructed by the dock owner. The fall was caused by a defect in the staging. At first instance there was held to be no duty owed to the worker, but this was reversed by the Court of Appeal.

Bowen and Cotton LJ held that the duty arose from the invitation or inducement of a dock owner to persons like the plaintiff to use the dock and its appliances.¹⁷ They did not explicitly overrule *George v Skivington* but confined it to its facts.¹⁸ Brett MR (later Lord Esher) took the opportunity to draw upon that decision to formulate a wider principle of negligence. It was in these terms:

*"[W]henver one person is by circumstances placed in such a position with regard to another that everyone of ordinary sense who did think would at once recognise that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger of injury to the person or property of the other, a duty arises to use ordinary skill and avoid such danger."*¹⁹

In the 1893 decision of *Le Lievre v Gould*,²⁰ the now Lord Esher further expanded upon his decision in *Heaven v Pender* stating:

*"That case established that, under certain circumstances, one man may owe a duty to another, even though there is no contract between them. If one man is near to another, or is near to the property of another, a duty lies upon him not to do that which may cause a personal injury to that other, or may injure his property."*²¹

In *Donoghue v Stevenson*, Lord Atkin cited each of *George v Skivington*, and Lord Esher's dicta in *Heaven v Pender* and in *Le Lievre v Gould*, in support of his wider formulation.²²

Lord Atkin also benefited from a decision of Cardozo J, then a member of the New York Court of Appeals prior to his appointment as a Justice of the US Supreme Court. In *MacPherson v Buick Motor Co*,²³ the

plaintiff was injured when one of the wheels of the car he was driving collapsed due to a defect in the wheel which could have been discovered by inspection. The plaintiff sued Buick as the manufacturer of the vehicle. It denied liability on the basis that the plaintiff had purchased the car from a dealer and therefore it owed no duty to the plaintiff. The position was similar to that prevailing in England.

Cardozo J, writing for the majority, held the defendant had a duty of care to the plaintiff and in doing so expressly approved Lord Esher's dictum in *Heaven v Pender*.²⁴ His Honour said that if a thing is made negligently, is likely to place life and limb in peril, and will be used without further test or inspection, then the manufacturer of it is under a duty to make it carefully.²⁵

The two other Law Lords in the majority in *Donoghue v Stevenson* – Lords Thankerton and Macmillan – were also influenced by a previous judgment. It may be recalled that, in the 1929 decision of *Mullen v AG Barr & Co Ltd*,²⁶ the Court held, on materially the same facts as *Donoghue v Stevenson*, that there was no duty owed to the plaintiffs. In that case, Lord Hunter dissented and referred to Lord Esher's dictum in *Heaven v Pender* as forming a "useful guide".²⁷ Both Lords Thankerton and Macmillan referred to Lord Hunter's dissent with approval and expressly overruled the majority in *Mullen*.²⁸

The express references by Lord Atkin and the others in the majority in *Donoghue v Stevenson* invited the inference that the earlier decisions provided more than a "little nudge" in the direction of a statement of a duty of care. But they did not clearly articulate to whom the duty was owed and Lord Atkin realised that, left unanswered, it would bedevil the common law.

And so he supplied an answer which matched, in its breadth, the duty of care which had earlier been spoken of.

Mabo v Queensland (No 2)

The "little nudges" in the direction of the recognition of native title and the decision in *Mabo (No 2)* are different. History reveals that an approach similar to that in *Mabo (No 2)* was taken in an early decision of a single judge of the New South Wales Supreme Court to which I will shortly turn, but that the development of the common law was rendered impossible by later decisions, including one of the Privy Council. But in the decades preceding *Mabo (No 2)* there was an apparent preparedness to make necessary findings of fact concerning the existence of the laws of Aboriginal people and to entertain legal questions about whether the common law would recognise their interests in lands with which they were associated.

Mabo (No 2) was a landmark case because it challenged two existing doctrines or assumptions of the common law: (1) that the acquisition of sovereignty vested in the Crown absolute beneficial ownership of all land; and (2) that Aboriginal and Torres Strait Islander people had no legal or proprietary interests in the land prior to colonisation because of the doctrine of *terra nullius*.

It is well known that the High Court in *Mabo (No 2)*, by a majority of six, rejected the argument that Australia was *terra nullius* at the time of British acquisition of sovereignty and held that the Crown acquired radical title but not absolute beneficial ownership over all land in Australia from that time. As a result, interests in land held by Australia's indigenous people prior to colonisation were recognised at common law in the form of native title.

It is also well known that the doctrine of *terra nullius* was derived from the principles summarised by Blackstone as to the reception of the common law in a colony and the acquisition of sovereignty.²⁹ It turned on the distinction between a settled colony and a conquered colony. According to Blackstone, if a country is uninhabited and settled all English laws come into force.³⁰ But in conquered or ceded countries, which have laws of their own, those laws remain until the King changes them. Whether the inhabitants of a country had their own laws was therefore important to any property rights which they might assert. Australia was for a long time after settlement regarded as uninhabited and therefore *terra nullius*.

In *Mabo (No 2)*, Brennan J described *terra nullius* as a fiction dependent on a discriminatory policy justification. He said that "[t]he 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".³¹ The reference to customs extends to laws. He described the basis of the theory as "false in fact and unacceptable in our society".³² As a result, there was a choice of legal principle for the Court to make. Brennan J explained:

*"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."*³³

His Honour directed, in effect, that what he called "the preferable rule" draws no distinction between the indigenous inhabitants of a settled colony with the indigenous inhabitants of a conquered colony in respect of their rights and interests in land.³⁴ A "mere change in sovereignty" does not extinguish native title to land.³⁵

The underpinnings of *terra nullius* did not go unremarked in early decisions of colonial courts. In *R v Murrell*,³⁶ in 1836, it was argued that the colony of New South Wales did not fall into either of Blackstone's categories because the Aboriginal people in question had recognisable laws and customs.³⁷ The Court rejected the argument holding, in effect, that although strictly speaking Australia was not uninhabited at settlement, the social systems and governance of Indigenous people were not recognised by British law. This was sufficient to bring it within *terra nullius*.

In 1841, in *R v Bonjon*,³⁸ a very different approach was taken. Willis J, of the Supreme Court of New South Wales sitting in Melbourne, did not agree with *Murrell* and did not regard himself as bound by it. He undertook an extensive historical and legal examination of other jurisdictions such as New Zealand and the United States. Willis J rejected the proposition that either of Blackstone's categories applied to Australia for it was neither unoccupied nor was gained by conquest or ceded under treaty.³⁹ He found that Aboriginal peoples had "laws and usages of their own"⁴⁰ and quoted with approval from the 1837 Aborigines Report of the British Select Committee relating to the various British colonies which recognised that native inhabitants have an "incontrovertible right to their own soil".⁴¹ He compared the rights of Aboriginal indigenous people with native people of other colonies.

It has been suggested that *Bonjon* is analogous, if not equivalent, to the *Mabo* decision but "reached 150 years earlier by an irascible judge in the bush town of Melbourne".⁴² Nevertheless, it was not followed. In *Cooper v Stewart*,⁴³ in 1889, the Privy Council described New South Wales as a colony which consisted of a tract of territory "practically unoccupied".⁴⁴ And in *Attorney-General (NSW) v Brown*⁴⁵ the "waste lands" of the Colony were held to belong to the Crown.⁴⁶ But as Deane and Gaudron JJ were later to

observe in *Mabo (No 2)*, the comments in these cases did not go to the heart of the issues in *Mabo (No 2)* and were mere obiter dicta.⁴⁷

The nudge that *Bonjon* gave the law may have stalled, but a shift in judicial attitudes would be discernible in the 20th century.

Milirrpum v Nabalco Pty Ltd,⁴⁸ which came to be known as the *Gove Land Rights Case*, was the first claim for customary land rights in Australia. It was decided in 1971. In it the Yolngu people sought to challenge a mineral lease granted by the Commonwealth on the basis that they had exclusive title to the land. Blackburn J, in the Supreme Court of the Northern Territory, considered that he was bound by precedent, such as *Cooper v Stewart*, to hold that the Yolngu system could not be recognised by the common law. But his Honour made findings of fact that the Yolngu had a "subtle and elaborate system [of societal rules and customs] highly adapted to the country in which the people led their lives".⁴⁹ He said "[i]f ever a system could be called a 'government of laws, and not of men' it is that shown in the evidence before me".⁵⁰

The *Gove Land Rights Case* shows that the courts were prepared to make factual findings that there existed, prior to settlement, indigenous systems of rules and customs. But the Court was unable to grant legal recognition of them. Two later cases in the High Court suggested there might be a willingness to reconsider the larger, legal, question. But before turning to them it does well to recall other steps which were taken towards the grant of rights to Aboriginal people to land. They are likely to have provided some context in which the later cases, culminating in *Mabo (No 2)*, came to be decided.

Whilst the plaintiffs in the *Gove Land Rights Case* were unsuccessful, the case set in motion steps to address what Blackburn J had described as "ipso facto a deprivation" of the Aboriginal people by the occupation of land by white men.⁵¹

A week after the judgment, Prime Minister McMahon announced the creation of the Ministerial Committee on Aboriginal Affairs,⁵² but its recommendations were not taken up. The inaction was criticised and gave rise, amongst other actions, to a most enduring protest: the establishment of the Aboriginal Tent Embassy.⁵³ Aboriginal land rights then became a central pillar of the Australian Labour Party's election campaign in 1972.⁵⁴

Following election, Prime Minister Whitlam announced a judicial inquiry as the first move towards the legal recognition of Aboriginal rights in land.⁵⁵ It was to focus on the Commonwealth-controlled Northern Territory and became known as the Woodward Royal Commission after Justice Edward Woodward, who had been counsel in the *Gove Land Rights Case*, and who was appointed to lead the inquiry. As the Prime Minister's press statement made clear, the inquiry was "not concerned with *whether* rights in land should be granted since the government has already decided that they shall. His task is simply to advise *how* they shall be granted".⁵⁶

It may be of interest to observe that Gerard Brennan QC was counsel for the Northern Land Council before the Woodward Royal Commission. He later said that this experience gave him some appreciation of the complexities of land title arising under the common law when he came to write the lead judgment in *Mabo (No 2)*.⁵⁷

The Woodward Commission issued two reports, the second of which contained specific drafting instructions for a statute.⁵⁸ The *Aboriginal*

Land (Northern Territory) Bill 1975 (Cth), introduced by the Whitlam Government, largely adopted the recommendations of the Commission including those concerning the making of claims to land and the regulation of mining rights. But when the Whitlam Government was dismissed, the Bill lapsed.

The *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) was passed in 1976 with bipartisan support after being introduced by the Fraser Government. It provided for a process of determination as to the traditional Aboriginal owners of an area of land. By April 1998, 51 claims had been the subject of completed inquiries.⁵⁹

Other States followed the example set by the Commonwealth, including by the transfer of large Aboriginal reserves.⁶⁰

Returning to the courts, in 1979, in *Coe v Commonwealth*,⁶¹ the appellant argued before the High Court that the acquisition of sovereignty over the east coast of Australia was properly characterised as acquisition by conquest and asked the Court to find the existence of an Aboriginal nation which had exclusive sovereignty over Australia prior to European settlement. The matter came before the Court on appeal from a decision of Mason J refusing leave to the appellant to amend his Statement of Claim on the grounds that the proposed amendments failed to give sufficient particulars and made allegations which were absurd, vexatious and legally untenable.

The appeal was dismissed by a majority. But, in dismissing the appeal, Gibbs CJ suggested that if the allegations had instead raised a separate claim as to the subsistence of particular interests in the land, the Court may well have allowed such an amendment. His Honour said:

*"The allegations ... may have been intended to raise a claim that the aboriginal people had rights and interests in land which were recognised by the common law and are still subsisting. In other words it may have been desired to attack the correctness of the decision of Blackburn J in Milirrpum v Nabalco Pty. Ltd. That would be an arguable question if properly raised."*⁶²

In 1985, in *Gerhardy v Brown*,⁶³ the High Court held that a South Australian law prohibiting any person who was not a Pitjantjatjara person from entering the lands of the Pitjantjatjara without permission was not invalid on the basis that it conflicted with the *Racial Discrimination Act 1975* (Cth). Deane J, in obiter, indicated that the common law denial of native title ought to be revisited. His Honour said:

*"[T]he generally accepted view remains that the common law is ignorant of any communal native title or other legal claim of the Aboriginal clans or peoples even to ancestral tribal lands on which they still live: see Milirrpum v Nabalco Pty Ltd. If that view of the law be correct, and I do not suggest that it is not, the common law of this land has still not reached the stage of retreat from injustice which the law of Illinois and Virginia had reached in 1823 when Marshall CJ, in Johnson v McIntosh, accepted that, subject to the assertion of ultimate dominion (including the power to convey title by grant) by the State, the 'original inhabitants' should be recognized as having 'a legal as well as just claim' to retain the occupancy of their traditional lands."*⁶⁴

Coe and *Gerhardy* were little nudges, indicating that the High Court was amenable to potentially reviewing the existing state of the law prior to *Mabo (No 2)*.

Conclusion

The early decision of Willis J in *Bonjon* was at the least a "little nudge" in the direction of native title. All that was needed was other judges of like mind to provide the cumulative effect of which Hal Wootten spoke - a change of world view and a development of the common law. Blackburn J

went as far as he could in nudging the issue towards a different legal outcome. Changes in socio-political viewpoints by the 1970s were sufficient that legislation allowing for claims by the traditional owners of Aboriginal land was passed by the Commonwealth. These pointed the way to native title, but the old common law view of *terra nullius* continued to stand in the way and was not squarely raised and dealt with until *Mabo (No 2)*.

Identifying the influences on the majority in the House of Lords in *Donoghue v Stevenson* is more straight forward. Clearly they benefitted from earlier decisions.

But regardless of the clarity and extent of the influence, I think it may be said that the law or the course that the law might take had been nudged in the right direction. Hal Wootten's philosophy was that judicial decisions can be the culmination of many "little nudges" along the way. This is how the common law is to be understood to sometimes move forward.

¹ My thanks to Jonathan Tjandra and Rebecca Lucas, the former and current Legal Research Officers at the High Court of Australia, for their assistance.

² Wootten, "Living in the Law" (Hal Wootten Lecture, University of New South Wales, 2008).

³ Wootten, "Living in the Law" (Hal Wootten Lecture, University of New South Wales, 2008).

⁴ Wootten, "Response to Lecture delivered by Sir Gerard Brennan" (Hal Wootten Lecture, University of New South Wales, 2012).

⁵ [1932] AC 562.

⁶ (1992) 175 CLR 1.

⁷ [1929] SC 461.

⁸ *Donoghue v Stevenson* [1932] AC 562 at 599 per Lord Atkin. See also 603 per Lord Thankerton and 620 per Lord Macmillan.

⁹ *Donoghue v Stevenson* [1932] AC 562 at 580.

¹⁰ See, for example, *Langridge v Levy* (1837) 2 M & W 519; 150 ER 863; *Levy v Langridge* (1838) M & W 337; 150 ER 1458.

¹¹ See, for example, *Thomas v Winchester* (1852) 6 NY 397; *Dominion Natural Gas Co Ltd v Collins* [1909] AC 640.

¹² *George v Skivington* (1869) LR 5 Ex 1.

¹³ *George v Skivington* (1869) LR 5 Ex 1 at 3.

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- 14 *George v Skivington* (1869) LR 5 Ex 1 at 4 per Baron Pigott.
- 15 *Mullen v AG Barr & Co Ltd* [1929] SC 461 at 469-470 per Lord Justice-Clerk, 471 per Lord Ormidale.
- 16 (1883) 11 QBD 503 (CA).
- 17 (1883) 11 QBD 503 (CA) at 515.
- 18 (1883) 11 QBD 503 (CA) at 516-517.
- 19 (1883) 11 QBD 503 (CA) at 509.
- 20 [1893] 1 QB 491.
- 21 *Le Lievre v Gould* [1893] 1 QB 491 at 497.
- 22 *Donoghue v Stevenson* [1932] AC 562 at 580-582, 584.
- 23 217 NY 382 (1916).
- 24 217 NY 382 (1916) at 389.
- 25 *MacPherson v Buick Motor Co*, 217 NY 382 (1916) at 389.
- 26 [1929] SC 461.
- 27 [1929] SC 461 at 476.
- 28 *Donoghue v Stevenson* [1932] AC 562 at 604-605 per Lord Thankerton, 606-607, 609, 614 per Lord Macmillan.
- 29 *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 34-36, citing Blackstone, *Commentaries on the Laws of England*, bk 1, ch 4, 105-106.
- 30 Blackstone, *Commentaries on the Laws of England*, bk 1, ch 4, 105.
- 31 *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 40.
- 32 *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 40.
- 33 *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 40.
- 34 *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 57.
- 35 *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 57.
- 36 (1836) 1 Legge 72.
- 37 *Sydney Gazette*, 23 February 1836 at 3.
- 38 [1841] NSWSupC 92.
- 39 [1841] NSWSupC 92.
- 40 [1841] NSWSupC 92.
- 41 *Report of the Parliamentary Select Committee on Aboriginal Tribes, (British Settlements)* (1837) at 4.
- 42 Kercher, *An Unruly Child: A History of Law in Australia* (1995) at 11.
- 43 (1889) 14 App Cas 286.
- 44 (1889) 14 App Cas 286 at 291.
- 45 (1847) 1 Legge 312 at 316.
- 46 (1992) 175 CLR 1 at 104.
- 47 (1992) 175 CLR 1 at 104.
- 48 (1971) 17 FLR 141.
- 49 *Milirpum v Nabalco Pty Ltd* (1971) 17 FLR 141 at 267.

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- 50 *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141 at 267.
- 51 *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141 at 256.
- 52 McMahon, "Ministerial Committee on Aboriginal Affairs" (Statement by the Prime Minister, PM No 51/1971, 6 May 1971).
- 53 Carlson and Coe, "A short history of the Aboriginal Tent Embassy – an indelible reminder of unceded sovereignty", *The Conversation* (13 January 2022). See also Solomon, "Aboriginal land rights rejected", *The Canberra Times* (22 October 1971).
- 54 Whitlam, *Election Campaign Speech* (Blacktown, NSW, 13 November 1972).
- 55 Whitlam, "Aboriginal Land Rights" (Press Statement, No. 21, 15 December 1972).
- 56 Whitlam, "Aboriginal Land Rights" (Press Statement, No. 21, 15 December 1972) (emphasis added).
- 57 Sir Gerard Brennan interviewed by Fiona Wheeler and Michael Coper in the History of the High Court of Australia Oral History Project (25 October 2007).
- 58 *Aboriginal Land Rights Commission* (Second Report, April 1974) at Appendix D.
- 59 Reeves, *Building on Land Rights for the Next Generation: Report of the Review of the Aboriginal Land Rights (Northern Territory) Act 1976*, 2nd ed (1998) at Appendix I.
- 60 See, for example, *Pitjantjatjara Land Rights Act 1981* (SA); *Maralinga Land Rights Act 1984* (SA); *Aboriginal Land (Lake Condah and Framlingham Forest) Act 1987* (Cth); *Aboriginal Land Rights Act 1983* (NSW), *Aboriginal Land Act 1991* (Qld); *Torres Strait Islander Land Act 1991* (Qld) and *Aboriginal Lands Act 1995* (Tas).
- 61 (1979) 53 ALJR 403.
- 62 *Coe v Commonwealth* (1979) 53 ALJR 403 at 408 (citations omitted).
- 63 (1985) 159 CLR 70.
- 64 *Gerhardy v Brown* (1985) 159 CLR 70 at 149.