Coe v Commonwealth [1979] HCA 68; (1979) 53 ALJR 403; (1979) 24 ALR 118 (5 April 1979)

HIGH COURT OF AUSTRALIA

COE v. THE COMMONWEALTH OF AUSTRALIA and THE GOVERNMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND
[1979] HCA 68; (1979) 53 ALJR 403, (1979) 24 ALR 118
Number of pages - 24
High Court Practice - International Law

HIGH COURT OF AUSTRALIA
GIBBS(1), JACOBS(2), MURPHY(3) AND AICKIN(4) JJ

High Court Practice - Amendment of pleadings - Application for leave to amend statement of claim - Extensive amendments sought to be made - Plaintiff suing on behalf of aboriginal community and nation of Australia in respect of alleged dispossession of territory by Captain Cook (1770), Captain Phillip (1788), and others - Alleged existence of aboriginal national with exclusive sovereignty over Australia before European settlement - Such sovereignty allegedly continuing - Allegation that Australia was acquired by conquest by British Crown - Impermissible challenge to validity of acts of State - Absence of particulars as to lands and legislation subject of allegations and claims of invalidity - Other legally objectionable allegations or claims contained or involved in proposed amendments - Absence of precise identification of cause or causes of action relied upon - Whether if the amended statement of claim had been delivered without leave, it would have been struck out - Constitution (Cth), ss. 51 pl. (xxxi), 116, 122, High Court Rules, O20 r29, O26 r18, and .29 r1.

International Law - Acquisition of sovereignty over territory by the method of occupation - Requirement of a valid occupation that the territory concerned be terra nullius - Whether Australia was terra nullius at date of foundation of British colonies in Australian territory.

HEARING
SYDNEY, 24 October 1978
5:4:1979

ORDER

Appeal dismissed with costs.

DECISION

GIBBS J This is an appeal from a judgment of Mason J dismissing the appellant's application for leave to amend his statement of claim. The appellant, described in the statement of claim as "Paul Thomas Coe ... an Aboriginal" issued out of this Court a writ against the Commonwealth of Australia (the first defendant) and the Government of the United Kingdom of Great Britain and Northern Ireland (the second defendant). The writ was accompanied by a statement of claim. The first defendant entered an appearance and later applied to have the statement of claim struck out. The appellant then made application for leave to file and serve an amended statement of claim. It was this application which was dismissed by Mason J. The amended statement of claim which the appellant sought leave to file and serve was as follows:

"1A. The Plaintiff sues on behalf of the Aboriginal community and nation of Australia and for the benefit of that community which is a community or more than seven persons.

1B. The Plaintiff is a member of the Wiradjeri Tribe and has authority from this and from other tribes and the whole aboriginal community and nation to bring this action.

1. The Plaintiff is a member of and a descendant of the aboriginal people of Australia and is a member of the aboriginal nation.

2A. On or about a day in April 1770 Captain James Cook RN. at Kurnell wrongfully proclaimed sovereignty and dominion over the east cost 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.

3A. On or about the 26th day of January, 1788 Captain Arthur Phillip, RN. wrongfully claimed possession and occupation for the said King George III on behalf of what is now the second named 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 first named Defendant at the Commonwealth Offices, Sydney, Commonwealth Bank Building, Martin Place, Sydney.

3B. 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 as more fully set out in 8A hereof.

3C. The first named Defendant came into existence in or about the year 1900 claiming sovereignty over what is now known as the continent of Australia contrary to the rights, privileges, interests, claims and entitlements of the aboriginal people both individually and in tribes and the aboriginal community and nation. The first named defendant thus became the successor in title in Australia to rights and interests of the aforesaid George III.

3D. The second named Defendant is the successor in title in the United Kingdom to the rights and interests of the aforesaid King George III.

4A. From time immemorial prior to 1770 the aboriginal nation had enjoyed exclusive sovereignty over the whole of the continent now known as Australia.

5A. 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.

6A. 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.

7A. 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 proprietory (sic) possessory and usufructuary rights in no way derogated from the sovereignty of the said aboriginal nation.

(also 21A) 8A. The proclamations by Captain James Cook, Captain Arthur Phillip and others and the settlement which followed the said proclamations and each of them wrongfully treated the continent now known as Australia as terra nullius whereas it was occupied by the sovereign aboriginal nation as set out in paragraphs 5A, 6A and 7A hereof.

11A. The aboriginal people being as aforesaid a nation from time immemorial to the present day were and are entitled to the quiet enjoyment of their rights,

privileges, interests, claims and entitlements in relation to lands in the continent now known as Australia and were entitled not to be dispossessed thereof without bilateral treaty, lawful compensation and/or lawful international intervention.

12A. On and after the 26th day of January, 1788 when Captain Arthur Phillip RN. landed at Sydney Cove the said Captain Phillip and others including the servants and agents of the first and second named Defendants and persons claiming through and under the first and second named Defendants unlawfully dispossessed certain of the aboriginal people from their lands and have prevented certain members of the aboriginal community from entering into possession of their lands and from hunting and fishing and enjoyment of usufructuary rights in respect of the said lands and have thereby destroyed the culture of the Plaintiff and the aboriginal people, their religion, customs, language and their way of life that they would have otherwise enjoyed.

13A. As and from the date of Federation on or about the year 1900 the first named Defendant has purported to exercise sovereignty over the continent of Australia. From the same date the first named Defendant has had the obligation not to prohibit the free exercise of any religion but yet the said first named Defendant has from that date enacted legislation which has deprived the Plaintiff and the aboriginal community and nation of his and its rights, privileges, interests, claims and entitlements in part and in whole from time to time including his and its rights to freely practice his and its religion to his and its hurt, degradation and humiliation.

14A. Since the wrongful proclamations aforesaid the first named Defendant has legislated to permit by its servants, agents and licensees without the consent of the aboriginal community and nation to plunder the territory of the continent of Australia of its minerals and oil resources so that the complete destruction of certain fuels and minerals being part of lands of religious significance to the said aboriginal nation is imminent.

15A. The first named Defendant by its servants and agents has legislated to permit the mining and export from the continent of Australia of that mineral known as uranium part of lands of religious significance from time immemorial to the said aboriginal nation such mining and export being contrary to the rights, privileges, interests, claims and entitlements including religious entitlement of the

aboriginal community and nation.
16A. In 1972 the first named Defendant and the second named Defendant recognised the sovereignty of the aboriginal people and nation by recognising the aboriginal embassy established on that land immediately in front of Parliament House Canberra and subsequently elsewhere always under the flag of the aboriginal nation.
16B. In 1975 the Senate, The Upper House of Parliament of Australia passed a resolution accepting the fact that the Plaintiff and the Plaintiff's ancestors, and the aboriginal community, were in possession of the entire continent of Australia prior to 1788 and urging the first named Defendant to introduce legislation to compensate the Plaintiff and the aboriginal community and nation. The first named Defendant has not challenged this resolution and it may be taken as its admission.
2. And the Plaintiff claims:

(i) A declaration that all lands and waterways within the continent of Australia presently occupied traversed and/or used by the aboriginal people for the purposes of habitation, hunting, food gathering, fishing, tribal ceremonial or religious usage and/or tribal burial are and shall remain at the absolute command of the aboriginal people free from interference at the suit of the Defendants or either of them or any person or corporation claiming thereunder whether under colour of law or otherwise.
(ii) A declaration that all legislation of the first named Defendant allowing permitting or facilitating the transfer of land or mining is invalid in so far as it interferes with the religious rights of the Plaintiff and the aboriginal community and nation.
(iii) An injunction restraining the first named Defendant from authorising any mining or other activity which interferes with the proprietory (sic) and/or possessory rights and/or religious rights of the aboriginal people unless and until internationally recognised arrangements are made for the transfer of such rights as may be necessary for such mining.
(iv) An order against the first named and second named Defendants for compensation to be made to the aboriginal people and nation and to such individuals and tribes as have been deprived of their proprietory and/or possessory and other rights in land and religious rights and for compensation for interference with their culture, religion,

customs, language and way of life which they would have otherwise enjoyed.
(v) Costs.
(vi)Such further or other order as the Court thinks fit.

3. As a further or alternative Statement of Claim the Plaintiff further says:

20A. The Plaintiff repeats each of the allegations made in paragraphs 1A, 1B and 1 hereof.
(or 8X)21A. In 1770 Captain James Cook in 1788 Captain Arthur Phillip and others made claims in respect of the territory now known as Australia on behalf of King George III and his heirs and successors. These claims established in the continent now known as Australia the laws, customs, benefits and usages of the Common Law.
(or 4X) and (5X) (6X & 7X) 22A. The Plaintiff repeats each of the allegations made in paragraphs 3C, 3D, 4A, 5A, 6A and 7A.
8X (1), 9X, 10X, 11X. The Common Law established by the proclamations set out in paragraph 21A hereof entitled the Plaintiff and the aboriginal people to the continuation of the proprietary and/or possessory and other rights which they had prior to 1770 unless these are taken away by bilateral treaty, lawful compensation and/or lawful international intervention.
12X. On and after the 26th day of January, 1788 when Captain Arthur Phillip landed at Sydney Cove the said Captain Phillip and others including the servants and agents of the first and second named Defendants and persons claiming through and under them unlawfully and contrary to the common law dispossessed certain of the aboriginal people of certain of their rights, privileges, interests, claims and entitlements in respect of their lands. The Plaintiff and certain of the aboriginal people have therefore lost the benefits of their common law rights in the said lands and have suffered in their culture, religion, customs, language and way of life.
14X. Since the proclamations aforesaid the first named Defendant has legislated to allow and permit the plundering of the territory of the continent of Australia of its minerals and oil resources so that the complete destruction of certain fuels and Minerals being part of lands of religious significance to the said aboriginal people and nation is imminent.
15X. The first named Defendant by its servants and agents

has legislated to permit the mining and export of that mineral known as uranium part of lands of religious significance from time immemorial to the said aboriginal nation contrary to the rights, privileges, interests, claims and entitlements including religious entitlements of the said aboriginal people and aboriginal community and nation.
13X. As and from the date of Federation on or about the year 1900 the first named Defendant has purported to exercise sovereignty over the continent of Australia. From the same date the first named Defendant has had the obligation not to prohibit the free exercise of any religion but yet the said first named Defendant has legislated to deprive the Plaintiff and the aboriginal community and nation of his and its rights, privileges, interests, claims and entitlements in part and in whole from time to time including his and its rights to freely practice his and its religion to his and its hurt, degradation and humiliation.

4. And the Plaintiff claims:

(i) A declaration that all lands and waterways within the Commonwealth of Australia presently occupied traversed and/or used by the aboriginal people for the purposes of habitation, hunting, food gathering, fishing, tribal ceremonial or religious usage and/or tribal burial are and shall remain at the absolute command of the aboriginal people free from interference at the suit of the Defendants or either of them or any person or corporation claiming thereunder whether under colour of law or otherwise.
(ii) A declaration that all legislation of the first named Defendant allowing permitting or facilitating the transfer of land or mining is invalid in so far as it interferes with the religious rights of the Plaintiff and the aboriginal community and nation.
(iii) An injunction restraining the first named Defendant from authorising any mining or other activity which interferes with the proprietary and/or possessory rights and/or religious rights of the aboriginal people unless and until internationally recognised arrangements are made for the transfer of such rights as may be necessary for such mining.
(iv) An order against the first named and second named Defendants for compensation to be made to the aboriginal people and nation and to such individuals and tribes as have been deprived of their proprietary and/or possessory and

other rights in land and religious rights and for compensation for interference with their culture, religion, customs, language and way of life which they would have otherwise enjoyed.
(v) Costs.
(vi) Such further or other order as the Court thinks fit.

5. As a further or alternative Statement of Claim the Plaintiff further says:

1M. The Plaintiff repeats each of the allegations made in paragraphs 1A, 1B and 1 hereof.
2-3M. In 1770 Captain James Cook, in 1788 Captain Arthur Phillip and others made proclamations amounting to claims of conquest of what is now known as the continent of Australia on behalf of King George III and his heirs and successors.
4M, 5M, 6M & 7M. The Plaintiff repeats each of the allegations made in paragraphs 3C, 3D, 4A, 5A, 6A and 7A.
8M. On conquest the radical title in the land vested in King George III but subject to the rights of occupancy and proprietory (sic) and/or possessory rights of the aboriginal people and nation.
9M. After the conquest aforesaid the aboriginal people and nation retained their rights, privileges, interests, claims and entitlements in respect of their lands unless and until these are taken away by specific act of prerogative. No such specific act of prerogative was ever exercised.
12M. On and after the 26th day of January, 1788 when Captain Arthur Phillip landed at Sydney Cove the said Captain Phillip and others including the servants and agents of the first and second named Defendants and persons claiming through and under the first and second named Defendants unlawfully and contrary to the common law dispossessed certain of the aboriginal people of certain of their rights, privileges, interests, claims and entitlements in respect of their lands. The Plaintiff and certain of the aboriginal people have therefore lost the benefits of their common law rights in the said lands and have suffered in their culture, religion, customs, language and way of life.
14M. Since the claims of conquest aforesaid the first named Defendant has legislated to allow and permit the plundering of the territory of the continent of Australia of its minerals and oil resources so that the complete destruction of certain fuels and minerals being part of lands of religious significance belonging to the said aboriginal people

and nation is imminent.
15M. The first named Defendant has legislated to permit the mining and export of that mineral known as uranium belonging to and being part of lands of religious significance from time immemorial to the said aboriginal nation contrary to the rights, privileges, interests, claims and entitlements including religious entitlement of the said aboriginal people and aboriginal community and nation.
13M. As and from the date of Federation on or about the year 1900 the first named Defendant has purported to exercise sovereignty over the continent of Australia. From the same date the first named Defendant has had the obligation not to prohibit the free exercise of any religion but yet the said first named Defendant has legislated from that date to deprive the Plaintiff and the aboriginal community and nation to his and its rights, privileges, interests, claims and entitlements in part and in whole from time to time including his and its rights to freely practice his and its religion to his and its hurt, degradation and humiliation.

6. And the Plaintiff claims:

(i) A declaration that all lands and waterways within the continent of Australia presently occupied traversed and/or used by the aboriginal people for the purposes of habitation, hunting, food gathering, fishing, tribal ceremonial or religious usage and/or tribal burial are and shall remain at the absolute command of the aboriginal people free from interference at the suit of the Defendants or either of them or any person or corporation claiming thereunder whether under colour of law or otherwise.
(ii) A declaration that all legislation of the first named Defendant allowing permitting or facilitating the transfer of land or mining is invalid in so far as it interferes with the religious rights of the Plaintiff and the aboriginal community and nation.
(iii) An injunction restraining the first named Defendant from authorising any mining or other activity which interferes with the proprietory (sic) and/or possessory rights and/or religious rights of the aboriginal people unless and until internationally recognised arrangements are made for the transfer of such rights as may be necessary for such mining.
(iv) An order against the first named and second named Defendants for compensation to be made to the aboriginal

people and nation and to such individuals and tribes as have been deprived of their proprietory (sic) and/or possessory and other rights in land and religious rights and for compensation for interference with their culture, religion, customs, language and way of life which they would have otherwise enjoyed.
(v) Costs.
(vi) Such further or other order as the Court thinks fit.
23A. On November 2nd, 1976 members of the aboriginal nation including the Plaintiff planted their national flag on the beach at Dover, England, in the presence of witnesses and natives of the territory of the second named Defendant and proclaimed sovereignty on behalf of the aboriginal nation over all of the territory of the second named Defendant, namely the United Kingdom of Great Britain and Northern Ireland. On the 9th day of April, 1977 the aboriginal nation confirmed this sovereignty over its lands, country and territory known as the Commonwealth of Australia by planting its flag in the presence of witnesses at Kurnell.

7. And the Plaintiff claims:

(i) A declaration as to the lawfulness of the proclamations and other acts set forth in paragraph 23 hereof.
(ii) Costs.
(iii) Such further or other order as the Court thinks fit."

8. The amended statement of claim almost entirely replaces the original statement of claim; only par 1 remains the same. It was signed by the plaintiff's solicitor, and experienced counsel appeared in this Court to argue the appeal. Counsel did not attempt to support the inclusion of par 16A but did strive to justify the rest of the statement of claim, including even par. 23A.

9. To read the amended statement of claim is enough to reveal its deficiencies. It is repetitious, confused and obscure and in some respects inconsistent within itself. It fails to give essential particulars, either of the lands in question or of the legislation impugned. Even the numbering of its paragraphs is marked by eccentricity. What is more serious, it contains allegations and claims that are quite absurd and so clearly vexatious as to amount to an abuse of the process of the Court: for the moment it is enough to refer to par. 23A and to the claim that the plaintiff and other members of the aboriginal nation lawfully proclaimed sovereignty on behalf of the aboriginal nation over the United Kingdom and later confirmed this sovereignty over Australia. No

judge could in the proper exercise of his discretion permit the amendment of a pleading to put it in such a shape.

10. However the Solicitor-General for the Commonwealth very fairly conceded that the matter might be treated as though an application had been made to strike out a statement of claim which had been duly delivered, and for that reason I shall consider whether some parts of the amended statement of claim should be allowed to stand notwithstanding that other parts are objectionable. The first question will be whether it discloses a reasonable cause of action (O26, r18); if so, it will not be struck out merely because the appellant's case seems weak, or unlikely to succeed. The second question, which in the present case is associated with the first, is whether any matter in the pleading may tend to prejudice, embarrass or delay the fair trial of the action (O20, r. 29); allegations that are wholly irrelevant, and yet raise issues that may involve expense, delay and trouble, would come within this description.

11. I have set out the amended statement of claim in full, and therefore need not discuss its contents paragraph by paragraph. I would, however, endeavour to summarize the effect of its allegations, although having regard to the nature of the pleading this task is not altogether easy. The following appear to be the main facts and circumstances asserted as the foundation of the appellant's claims:

(a) There is an aboriginal nation which, before European settlement, enjoyed exclusive sovereignty over the whole of Australia, and which still has sovereignty: see pars. 1A, 1B, 1, 4A, 6A, 7A, 11A, 16A, 16B and 23A.
(b) Captain Cook wrongly proclaimed sovereignty and dominion over the east coast of Australia, and Captain Phillip wrongly claimed possession and occupation thereof, on behalf of His Majesty King George III, and the defendants are the successors in title, in Australia and the United Kingdom respectively, of that monarch; the Commonwealth now claims, and "has purported to exercise" sovereignty over Australia: see pars. 2A, 3A, 3B, 3C, 3D, 8A, 13A, 13X, 13M.
(c) Before European settlement, individual members, and tribes, of the aboriginal people had proprietary and possessory rights in land, subject to usufructuary rights in others, but the whole of Australia was held by the aboriginal nation for the benefit of all its members: see pars. 3B, 5A, 7A, 8A.
(d) Australia was acquired by the British Crown by conquest, after which the aboriginal people and nation retained their rights in respect of their lands: pars. 2-3M,

8M, 9M.
(e) The Commonwealth has enacted legislation which interfered with the free exercise of the religion of the plaintiff and of the aboriginal community and nation, inter alia, by allowing parts of lands of religious significance to be mined and by permitting the mining and export of uranium: see pars. 13A, 14A, 15A, 13X, 14X, 15X, 13M, 14M, 15M.
(f) The plaintiff and the aboriginal people are entitled at common law to the proprietary and possessory rights which they had prior to 1770, unless those rights were taken away by "bilateral treaty, lawful compensation and/or lawful international intervention": see pars. 11A, 21A, 8X (1), 9X, 10X, 11X.
(g) Since 1788 certain of the aboriginal people have been unlawfully dispossessed of their lands by Captain Phillip and other persons including servants and agents of the defendants: pars. 12A, 12X, 12M.

12. It is clear that the allegations whose effect I have briefly stated in pars. (a) and (b) above could not form the basis of any cause of action. The annexation of the east coast of Australia by Captain Cook in 1770, and the subsequent acts by which the whole of the Australian continent became part of the dominions of the Crown, were acts of state whose validity cannot be challenged: see New South Wales v. The Commonwealth [1975] HCA 58; (1975), 135 CLR 337, at p 388, and cases there cited. If the amended statement of claim intends 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 CJ applied to the Cherokee Nation of Indians: Cherokee Nation v. State of Georgia [1831] USSC 6; (1831), 5 Pet 1, at p 17. However the history of the relationships between the white settlers and the aboriginal people has not be the same in Australia and in the United States, and it is not possible to say, as was said by Marshall CJ, at p. 16, of the Cherokee Nation, that the aboriginal people of Australia are organised 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.

13. The allegations summarised in par. (d) above also do not raise an issue fit for consideration. It is fundamentally to our legal system that the Australian colonies became British possessions by settlement and not by conquest. It is hardly necessary to say that the question is not how the manner in which Australia became a British possession might appropriately be described. For the purpose of deciding whether the common law was introduced into a newly acquired territory, a distinction was drawn between a colony acquired by conquest or cession, in which there was an established system of law of European type, and a colony acquired by settlement in a territory which, by European standards, had no civilised inhabitants or settled law. Australia has always been regarded as belonging to the latter class: see Cooper v. Stuart (1889), 14 App Cas 286, at p 291.

14. As to the allegations summarised in par. (e) above, a law of the Commonwealth is invalid if it prohibits the free exercise of any religion: s. 116. Whether a law expropriating, or permitting mining upon, land of religious significance can be said to prohibit the free exercise of any religion is a question that might be regarded as arguable, although, if the law attacked was made under s. 122 of the Constitution, the further question would arise whether the powers given by that section are restricted by s. 116. However such questions cannot be decided hypothetically or in the abstract. The amended statement of claim does not reveal the situation of the lands, the legislative provisions which affect them, or the persons or groups whose free exercise of religion is said to be prohibited.

15. The allegations summarised in pars. (c) and (f) above 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. (1971) 17 FLR 141. That would be an arguable question if properly raised. However, the assertions made are perfectly general; no particular land is identified, unless, indeed, the land on which the Commonwealth Offices in Sydney are situated as intended to be part of the lands in question (see par. 3A). Whether the claims are intended to refer to lands which have been alienated, and to lands which have been specifically dealt with by statute, and to lands in States as well as in Territories, is not made clear, but it appears that they are so intended. Moreover, it is plainly erroneous to state as a matter of law that the holders of proprietary or possessory rights could not be dispossessed without bilateral treaty, lawful compensation or lawful international intervention.

16. The allegations mentioned in par. (g) above may be intended to do no more than state a conclusion flowing from the other allegations made. If, however, they are intended to assert acts of trespass they do not indicate by whom (except by Governor Phillip) or how long ago or where or in what circumstances those acts occurred.

17. It will have been seen that the greater part of the amended statement of claim discloses no cause of action, and is embarrassing, but that some of the allegations hint at the existence of questions that might be regarded as arguable. If the amended statement of claim was defective only in failing to give particulars, that would not be a ground for striking it out, but rather for ordering particulars to be furnished. In argument counsel for the appellant suggested that it would be impossible to give particulars of all the lands in respect of which claims are made, but it should not be difficult to select particulars areas of land a the subject of a test case if that is desired. However, the defects of the amended statement of claim go beyond a mere lack of particulars. I have discussed the allegations made in the body of the amended statement of claim, but the claims themselves remain to be considered; they, too, are defective.

18. I shall refer first to the claims that are thrice repeated in identical terms. Claim (i) appears to assert, not that the aboriginal people have lawful right or title to lands which they presently occupy, traverse or use, but that such lands are beyond the reach of the law. Such a claim would be unarguable. Claim (ii) is for a declaration that certain unidentified legislation is invalid. Clearly such a claim is defective. Claim (iii) is bad, not only because of its vagueness and imprecision, but also because no allegation in the amended statement of claim would support a conclusion in law that the making of "internationally recognised arrangements" is a condition precedent to the validity of the grant of mining rights by the Commonwealth. Claim (iv) is a claim for compensation. No facts have been pleaded which would support such a claim. If it is based on a statute, the statute has not been identified. If it is suggested that any of the lands in question were acquired by the Commonwealth other than on just terms, it must be remembered that it has been held that the power conferred by s. 122 is not limited by s. 51 pl. (xxxi): Teori Tau v. The Commonwealth [1969] HCA 62; ; (1969), 119 CLR 564. However the amended statement of claim does not disclose whether, when or by what authority any of the lands in question were acquired.

19. The further claims made at the end of the fourth part of the statement of claim require no discussion - the claim for declaration as to the lawfulness of the proclamations and other acts set forth in par. 23A is absurd and vexatious, as I have already said.

20. For these reasons, it is clear that if the amended statement of claim had been delivered without leave, the proper course would have been to strike it out. The order of Mason J was plainly right. Indeed, it is somewhat surprising that this appeal was brought, since the defects in the statement of claim are so clearly manifest, and the order dismissing the application for leave to amend did not preclude the appellant from delivering another statement of claim.

21. The question what rights the aboriginal people of this country have, or ought to have, in the lands of Australia is one which has become a matter of heated controversy. If there are serious legal questions to be decided as to the existence or nature of such rights, no doubt the sooner they are decided the better, but the resolution of such questions by the courts will not be assisted by imprecise, emotional or intemperate claims. In this, as in any other litigation, the claimants will be best served if their claims are put before the court dispassionately, lucidly and proper form.

22. I must however add that nothing that I have just said is intended to suggest that the present action is properly constituted as to parties. In the first place, there is the question whether the appellant has any standing to sue for the relief which he seeks. That involves the questions whether there is a body of persons properly described as "the aboriginal community and nation of Australia" and if so whether rights and interests in lands in particular parts of Australia vest in or ensure for the benefit of that "community and nation" and whether the appellant is entitled to sue on its behalf. I have already indicated that there is no aboriginal nation, if by that expression is meant a people organised as a separate State or exercising any degree of sovereignty. Secondly it is gravely doubtful whether the second defendant is a legal person capable of being sued, and if so whether it could be impleaded in an action such as this. In any case it is difficult to see how the second defendant could be regarded as a proper party. Thirdly, depending on where the lands claimed are situated and what persons claim title adverse to the aboriginal claimants, it may be necessary to join other defendants. These matters do not arise on this application, but if further proceedings are brought they will require grave consideration.

23. The appeal must be dismissed.

JACOBS J The writ of summons and statement of claim in this action were filed on 18th July, 1977. On 2nd September, 1977 a summons was taken out by the Commonwealth for an order that the statement of claim be struck out. On 23rd September, 1977, the appellant plaintiff applied by summons for leave to amend the statement of claim. This summons was heard before the summons that the statement of claim be struck out. The application for leave to amend was refused by Mason J and from his decision this appeal is now brought.

2. As matters now stand there is upon the file a statement of claim in a form which the plaintiff by his application for leave to amend has indicated that he does not wish to pursue. But, unless the proceedings themselves are vexatious, the plaintiff on the striking out of the statement of claim would then in the ordinary court have been granted leave to re-plead. If and when he did so, the Commonwealth could then have applied to strike out the amended statement of claim. The court which has been followed has in effect reached that stage. In these circumstances the Commonwealth agrees that the present application should be treated in the same way as if it were an application to strike out the amended statement of claim. This is not without significance. A court has a discretion whether or not amendments should be allowed and, if the statement of claim as a whole is not in proper form, leave to amend in that particular form may be refused. On the other hands if a statement of claim already filed is sufficient to raise a substantial question which ought to be judicially determined then prima facie it should not be wholly struck out. If a substantial question is disclosed the pleading cannot be struck out under O26, r18 (1) on the ground that it does not disclose a reasonable cause of action. The last mentioned rule is not a substitute for proceedings by way of demurrer even though as a matter of convenience the court, if it has heard fully argument on a distinct question of law, may pronounce upon it as though the proceedings were a demurrer. The present case is certainly not such a case. Nor generally should the whole of a pleading be struck out under O20 r29, which provides for the striking out of any matter which is unnecessary or scandalous or which may tend to prejudice, embarrass or delay the fair trial of the action. That rule only permits the striking out of the whole of a statement of claim when objectionable matter is so closely intertwined with other matter that the pleading as a whole may tend to embarrass the fair trial of the action. The whole pleading may then be struck out even though a cause of action might be able to be spelled out of the pleading as a whole. See Turner v. Bulletin Newspaper Co. Pty. Ltd.[1974] HCA 25; (1974) 131 CLR 69 Menzies J at p 88. It appears to me that the real question in the present case is whether the proposed amended statement of claim falls into the latter category.

3. The proposed amended statement of claim seeks to raise a number of issues which can be regarded separately. The first part is apparently intended to dispute the validity of the British Crown's and now the Commonwealth of Australia's claim to sovereignty over the continent of Australia in the face of sovereignty alleged to be possessed by the Aboriginal nation. Paragraphs 2A and 3A are in much the same form as the original statement of claim but the word "wrongfully" has been added, thus disputing the validity of the Crown's proclamations of sovereignty and sovereign possession. These are not matters of municipal law but of the law of nations and are not cognisable in a court exercising jurisdiction under that sovereignty which is sought to be challenged. As such, they are embarrassing and cannot be allowed. I would therefore strike out of the proposed amendments the word "wrongfully" where

it appears in pars. 2A and 3A. I would also strike out (or, strictly, refuse to allow) par. 3B. Paragraph 3C suffers from the same defect and so far as it states the coming into existence of the Commonwealth of Australia it is unnecessary; and the same is true of par. 3D. Paragraph 8A appears also to be directed to the question whether under the law of nations Australia was terra nullius in 1770 and 1788. Further, it seeks to impugn the proclamations taking possession of New South Wales on behalf of the British Crown. This is not permissible in a municipal court. Paragraphs 13A and 14A suffer in the same way. Paragraphs 15A, 16A and 16B are also directed to a claim of international sovereignty and cannot be allowed. The same is true of pars. 11A and 12A in their context. Thus what I have called the first branch of the proposed statement of claim cannot be allowed because generally it is formulated as a claim based on a sovereignty adverse to the Crown.

4. I now go back to pars. 5A, 6A and 7A. If these paragraphs simply formed part of the first branch of the statement of claim, the claim to a sovereignty adverse to the British Crown and now the Commonwealth, they also could not be allowed. However, they are repeated by reference in par. 22A which is placed in what may be described as the second formulation of the claim; and to this I now turn. It commences with par. 20A which repeats the allegations made in pars. 1A, 1B and 1. The numbering in the proposed amendments has gone awry but I shall retain the existing numbering even though a requirement of leave to amend would be that the appellant renumber the paragraphs.

"1A. The Plaintiff sues on behalf of the Aboriginal community and nation of Australia and for the benefit of that community which is a community of more than seven persons.
1B. The plaintiff is a member of the Wiradjeri Tribe and has authority from this and from other tribes and the whole aboriginal community and nation to bring this action.
1. The plaintiff is a member of and a descendant of the aboriginal people of Australia and is a member of the aboriginal nation.
21A. In 1770 Captain James Cook in 1788 Captain Arthur Phillip and others made claims in respect of the territory now known as Australia on behalf of King George III and his heirs and successors. These claims established in the continent now known as Australia the laws, customs, benefits and usages of the Common Law."

5. Next par. 22A repeats each of the allegations made in pars. 3C, 3D, 4A, 5A, 6A and 7A. Pars. 3C and 3D are either impermissible or unnecessary, as I have earlier stated, so there remain pars. 4A, 5A, 6A and 7A, as follows:

"4A. From time immemorial prior to 1770 the aboriginal nation had enjoyed exclusive sovereignty over the whole of the continent now known as Australia.
5A. 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, interest, 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.
6A. 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.
7A. 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 possessory and usufructuary rights in no way derogated from the sovereignty of the said aboriginal nation."

6. Then come paragraphs numbered 8X-11X onwards. Whey they are so numbered is not at all clear but they are as follows:

"8X-11X. The Common Law established by the proclamations set out in paragraph 21A hereof entitled the Plaintiff and the aboriginal people to the continuation of the proprietary and/or possessory and other rights which they had prior to 1770 unless these are taken away by bilateral treaty, lawful compensation and/or lawful international intervention.
12X. On and after the 26th day of January, 1788 when Captain Arthur Phillip landed at Sydney Cove the said Captain Phillip and others including the servants and agents of the first and second named Defendants and persons claiming through and under them unlawfully and contrary to the common law dispossessed certain of the aboriginal people of certain of their rights, privileges, interests, claims and entitlements in respect of their lands. The Plaintiff and certain of the aboriginal people have therefore lost the benefits of their common law rights in the said lands and have suffered in their culture, religion, customs, language and way of life."

7. There then follow three paragraphs numbered 14X, 15X and 13X in that order and I shall refer to them presently.

8. The second branch of the statement of claim them concludes with the relief sought in respect of that part. It first claims a declaration in the following terms:

"A declaration that all lands and waterways within the Commonwealth of Australia presently occupied traversed and/or used by the aboriginal people for the purposes of habitation, hunting, food gathering, fishing, tribal ceremonial or religious usage and/or tribal burial are and shall remain at the absolute command of the aboriginal people free from interference at the suit of the Defendants or either of them of any person or corporation claiming thereunder whether under colour of law or otherwise."

9. This declaration may not be in the precise form which would or could be granted but a statement of claim will not be struck out because the declarations and other relief sought are defective.

10. It has been submitted on behalf of the Commonwealth that this second branch of the proposed statement of claim is also a claim to a sovereignty vested in the aboriginal nation adverse to the sovereignty of the Commonwealth. But that cannot be correct in view of the allegation in par. 21A that the claims of Cook and Phillip on behalf of the British Crown established in Australia the laws customs benefits and usages of the common law. Then in par. 11X it is alleged that the proclamations set out in par. 21A entitled the plaintiff and the aboriginal people to the continuation of the proprietary and/or possessory and other rights which they had prior to 1770 unless taken away by bilateral treaty, lawful compensation and/or lawful international intervention. The substance of this allegation is that the common law entitled the aboriginal people to the continuation of "the proprietary and/or possessory rights" which they had prior to 1770. The reference to the manner in which the rights may be lost is not the substance of the matter alleged. Paragraph 12X then alleges that (inter alios) servants and agents of the Commonwealth have unlawfully and contrary to the common law dispossessed certain of the aboriginal people of certain of their rights privileges interests claims and entitlements in respect of their lands. The presence in the Statement of Claim of these allegations is not consistent with the Commonwealth's contention that the whole Statement of Claim is based on a denial of the sovereignty of the British, and now the Australian, Crown.

11. The second submission on behalf of the Commonwealth is that the lands the subject of the claim are not identified. I do not think that this objection is a

valid one in view of the particular nature of the claim which is made. The object of these paragraphs in the Statement of Claim is to have determined by this Court the question whether the aboriginals had, and now have, any rights under the Australian Crown and the common law principles applicable to any of the lands in those parts of Australia which are Commonwealth territory. It is public knowledge that there are large tracts of land in the Northern Territory which have never been alienated by grant from the Crown, and it is public knowledge that in those tracts of land there are aboriginal people in considerable numbers. It seems to me that the matters stated in those paragraphs of the Statement of Claim which I have set out above are sufficient to raise for consideration the kinds of question which were dealt with by Blackburn J in Milirrpum v. Nabalco Pty. Ltd. (1971) 17 FLR 141. I wish on an application of this kind carefully to avoid any discussion or consideration of the problem of aboriginal land rights and I only say that the problem is one which is difficult and complex and the subject of no small body of authority in relation to colonies or former colonies of the British Crown. Much of that authority is referred to by Blackburn J in the Milirrpum Case. See also articles upon the subject in the Federal Law Review (1972) Vol 5, pp. 85-114 and (1974) Vol. 6, pp. 150-177, and in the Alberta Law Review (1973), Vol. 11, pp. 189-237.

12. The allegations in the proposed amendments do not raise the questions in the neatest way that it could be done; and the paragraphs appear among other allegations which cannot be allowed. But it is at this point that the Commonwealth's concession that the matter should be dealt with as an application to strike out the whole statement of claim has particular significance. If the application were to be treated simply as one for leave to amend, the Court in its discretion might require that the amendments be framed with a greater precision and particularity before the leave would be given. However, there is no discretion to strike out the whole of a statement of claim if it discloses a cause of action in the sense that it states matters which raise a question which ought to be determined. I have earlier stated the exception where all the allegations are so closely intertwined that the pleading as a whole is embarrassing. That is not this case. The paragraphs with which I have been dealing are separate paragraphs which can be allowed to stand without any embarrassment.

13. However, I do not think that pars. 14X, 15X and 13X ought to be allowed. It may be that they are intended to challenge the validity of some Commonwealth legislation upon the ground that it infringes the prohibition in s. 116 of the Constitution but the paragraphs do not make it clear that this is their sole purpose and they do not specify the legislation which is challenged. For those reasons they should be characterised as embarrassing in the sense that the Commonwealth is left in doubt on the precise allegations to which it should plead.

14. I go now to the third part of the proposed statement of claim. This is in parallel with the second part. Whereas the second part is based upon the assumption that New South Wales was a settled colony of the Crown, the third part is based upon the allegation that the colony was conquered territory. I do not think that paragraphs in this alternative form ought to be struck out. The view has generally been taken that the Australian colonies were settled colonies; but, although that view was expressed in Cooper v. Stuart, (1889) 14 AC. 286 and in Council of the Municipality of Randwick v. Rutledge [1959] HCA 63; (1959), 102 CLR 54, there is no actual decision of this Court or of the Privy Council to that effect. The plaintiff should be entitled to rely on he alternative arguments when it comes to be determined whether the aboriginal inhabitants of Australia had and have any rights in land. I would strike out the reference to pars. 3C and 3D in par. 4M but otherwise I would allow pars. 1M, 2-3M, 4-7M, 8M, 9M and 12M. I would not allow pars. 14M, 15M, and 13M for the same reasons as I would not allow pars. 14X, 15X and 13X.

15. Finally there is par. 23A. It cannot be allowed and I do not think that it was seriously pressed. I would allow the appeal and in lieu of wholly refusing leave to amend I would grant leave to amend the Statement of Claim by adding pars. 1A, 1B, 2A and 3A (omitting the word "wrongfully" in each of these paragraphs), 21A, 4A, 5A, 6A, 7A, 8X-11X, 12X, 1M, 2-3M, 4-7M (omitting the reference to pars. 3C and 3D), 8M, 9M, and 12M.

MURPHY J The appellant has issued a writ against the Commonwealth of Australia and the Government of the United Kingdom of Great Britain and Northern Ireland, together with a statement of claim. The Commonwealth appeared and applied to have the statement struck out. The appellant applied for leave to file and serve an amended statement of claim before Mason J who dismissed the application.

2. The difficulties in framing a claim for aboriginal land rights or compensation for their loss should not be underestimated. However, the amended statement of claim exhibits a degree of irresponsibility rarely found in a statement intended to be seriously entertained by a court. For example, it includes a claim by the plaintiff on behalf of the aboriginal nation, persisted with on this appeal, to the whole of the territory of the United Kingdom. It is one thing for a person to present a document on his own behalf which is partly frivolous or irresponsible and generally badly drawn; it is another when he claims to represent others. There is a duty on anyone who claims to represent others to see that any claim is presented efficiently and responsibly.

3. As put by both parties before Mason J, the application was for his Honour's leave to file the amended claim. If it remained that way, his Honour's decision declining to give leave in respect of this document should not be disturbed. It was a correct exercise of discretion to decline to give leave to file such a

document in view of the contents to which I have referred. On this appeal, the question arose whether leave was necessary. However, the parties have agreed that it should be dealt with on the basis that no question of leave should be considered; that the amended statement should be treated as if it were an original statement of claim; and that the application be dealt with as if it were an application to strike out a statement of claim. For the reasons given by Jacobs J, this puts a different complexion on the case. The question then is, notwithstanding the objectionable parts, whether any of the amended statement should be allowed to stand.

4. The wide language used in parts of the statement embraces claims which, if separated out and stated clearly, could be heard and determined. The claim to rights over land or compensation for loss of such rights is capable of being formulated and presented in an intelligible way.

5. Several obstacles to success were mentioned during argument: one was Blackburn J's judgment in Milirrpum v. Nabalco Pty Ltd (1971), 17 FLR 141 which is not binding on this Court. It has been subjected to reasoned criticism (see John Hookey, "The Gove Land Rights Case: A Judicial Dispensation for the taking of Aboriginal Lands in Australia?" (1972), 5 Fed L Rev 85). Another was Cooper v. Stuart (1883), 14 AC 286. In that case, the Privy Council stated that the colony of New South Wales was not acquired by conquest, but was "practically unoccupied, without settled inhabitants or settled law at the time it was peacefully annexed to the British dominions" (at p. 291). That view is not binding on us (see Viro v. The Queen [1978] HCA 9; (1978), 52 ALJR. 418)."Occupation" was originally a legal means of peaceably acquiring sovereignty over territory otherwise than by secession or conquest. It was a cardinal condition of a valid "occupation" that the territory should be terra nullius - a territory belonging to no-one - at the time of the act alleged to constitute the occupation. "Territory inhabited by tribes or peoples having a social and political organisation cannot be of the nature terra nullius" (see Prof. J. G. Starke, International Law (8th ed. 1977), at p. 185, and generally). The extent to which the international law of occupation is incorporated in Australian municipal law is a question which would arise for determination in the proceedings.

6. The plaintiff claims that the fact is that Australia was at (or during) the time of its acquisition inhabited by the aboriginal people who had a complex social, religious, cultural and legal system and that their lands were acquired by the British Crown by conquest. There is a wealth of historical material to support the claim that the aboriginal people had occupied Australia for many thousands of years; that although they were nomadic, the various tribal groups were attached to defined areas of land over which they passed and stayed from time to time in an established pattern; that they had a complex social and political organisation; that their laws were settled and of great antiquity (for

example, see D.C. Biernoff, Land and law in Eastern Arnhem Land: Traditional Models for Social and Political Organisation (1975).

7. Independent tribes, travelling over a territory or stopping in certain places, may exercise a de facto authority which prevents the territory being "terra nullius" (see Advisory Opinion on Western Sahara, ICJ Reports 1975, 12, in particular the declaration of Judge Gros at p. 75). There have been various estimates of the population in 1788, the most consistently mentioned number of aboriginal people at that date being 300,000 (see Encyclopaedia Britannica Vol. 1 (1969) at p. 795; C. M. H. Clark, A History of Australia, Vol. 1 (1962), at p. 4; The Modern Encyclopaedia of Australia and New Zealand (1964), at p. 75; and The Official Year Book of the Commonwealth of Australia, No. 23 (1930), at p. 696).

8. Although the Privy Council referred in Cooper v. Stuart to peaceful annexation, the aborigines did not give up their lands peacefully; they were killed or removed forcibly from the lands by United Kingdom forces or the European colonists in what amounted to attempted (and in Tasmania almost complete) genocide. The statement by the Privy Council may be regarded either as having been made in ignorance or as a convenient falsehood to justify the taking of aborigines' land.

9. The plaintiff is entitled to endeavour to prove that the concept of terra nullius had no application to Australia, that the lands were acquired by conquest, and to rely upon the legal consequences which follow. He may rely, in the alternative, on common law rights which would arise if there were peaceful settlement. Whether the territory is treated as having been acquired by conquest or peaceful settlement, the plaintiff is entitled to argue that the sovereignty acquired by the British Crown did not extinguish "ownership rights" in the aborigines and that they have certain proprietary rights (at least in some lands) and are entitled to declaration and enjoyment of their rights or compensation.

10. I agree generally with Jacobs J and with the order proposed by him.

AICKIN J I have had the advantage of reading the reasons for judgment prepared by my brother Gibbs. I am in full agreement with what he has said and there is nothing I can usefully add. I therefore agree that the appeal should be dismissed.