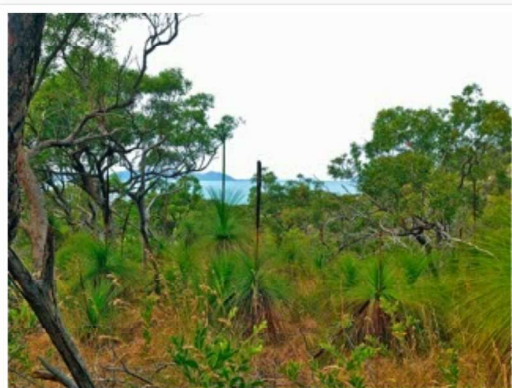


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Property law | women and law | contemporary legal issues

Friday, 4 July 2014

## Unsettled Great South Land? 'Um' indeed



Australia: settled? Unsettled?

The Prime Minister, Tony Abbott, in a speech concerning foreign investment is [reported as having said](#)

I guess our country owes its existence to a form of foreign investment by the British government in the then unsettled or, um, scarcely settled, Great South Land.

Similarly, this week [New Matilda reported](#) on Rolf Harris' racism, noting his 2008 comments that

The attitude is that in their [ie Aboriginal peoples'] original way of life they would really wreck the surrounding countryside that they lived in and they would leave all the garbage and they would go walkabout to the next place.

Without addressing the implications of the Prime Minister's equating English acquisition of Australian territory with the benign sounding 'foreign investment', the allegation of a 'scarcely settled' land deserves correction. Like Rolf Harris' statement, it represents a misunderstanding of the nature of connection, occupation and use of land by Aboriginal and Torres Strait Islander Australians. While I cannot speak for Aboriginal and Torres Strait Islander peoples, I believe that I can point out the obvious mistake in these outdated notions.

The foundation of the misunderstanding of the nature of original occupation of Australia rests with Anglo-European ideas of the justification of property and of territory. These are two different ideas, but their foundation lies in similar thinking.

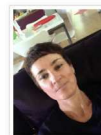
### Sovereignty

The first issue for the English was to justify their right to the territories of Australia. This was no domestic matter, but rather a matter of international law. International law of the day - which was really no more than European law - served the interests of the empire building nations. It existed to resolve issues of territory and competition for 'new found' resources. It did this recognising claims to new territory in [these circumstances](#):

- conquest
- cession
- occupation or settlement
- annexation

*Even though* many would argue that there was a war by the English against Aboriginal Australians, remember that these terms were viewed through 18th century English eyes. War in those days did not look like the campaigns waged in Australia.

### About Me



#### Kate Galloway

I lecture in land law at James Cook University and I write and think about the nature of

property and its representations in the law; about issues affecting women; about justice generally; and about legal education

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And *even though* we know that there were actual people who had been in possession of Australia for tens of thousands of years, for an empire-building nation it was convenient to interpret this possession through a narrow European lens. This lens could not find European-style leadership systems in the communities they encountered. They could not, or did not want to, find an existing sovereign nation. And so Australia was not *literally* 'belonging to no one' but as a convenient legal fiction, it was deemed terra nullius. In the eyes of the law of the English, it became their sovereign possession.

## Property

Having established sovereignty at international law, the English had to determine the issue of property. Who owned the land? This was a question of English law, and whether English law itself would apply to questions of land ownership. A concept similar to terra nullius was again used to justify applying English property law to Australia. Again, it was the English world-view that prevailed. This saw property and rights to land in a very particular way.

[John Locke](#) famously sought to justify private property based on the investment of one's own labour. His rationale was that the individual was paramount and so once one had expended one's labour on a 'thing' (land) then that thing became an extension of one's own person. The two merged in a sense, through the input of labour. On this basis, the 'thing' (land) was no longer part of the commons but became justifiably the personal domain of the individual.

This was recognised at law - and [Blackstone](#), in the 18th century, confirmed this idea. He suggested that God had given mankind (sic) dominion over nature in common, but that as society developed, it was necessary to appropriate particular things as individual property. And so, 'improved and meliorated through the bodily labor of the occupant' it became vested solely in that person. In the eyes of the English, ownership of land was denoted by the exercise of labour. In England, this looked like agriculture.

For the English eye, and the English mind, viewing Australia in 1788 did not resemble the agriculture of 'home'. On this view, there were not the indicia of individual ownership that had created systems of landholding recognised at English law. And so the English tenure system was imported into Australia. This system, the doctrine of tenure, held that the Crown (the State) owned all land. The only land interests recognised by the law were those granted by the Crown itself.

By definition, this excluded recognition of Aboriginal and Torres Strait Islander interests in land.

## 'Wandering' v agriculture

The English view of land improvement - and its association with private property - was firmly grounded in a stationary view of land occupation. A farm, after all, does not move and nor does its farmer. I don't know when or how the view arose, but there has been a persistent and long term view that Aboriginal people wander at will. And this view is presented in a way that seems to preclude the idea that Aboriginal people have connection with any particular part of the land - that Aboriginal people cannot have 'settled' Australia.

This is the view that I think the Prime Minister and Rolf Harris - and doubtless countless more - have of Aboriginal Australians. But it is incorrect.

As a question of logic, consider the diverse climatic conditions in Australia. Does it really make sense that people resident in Broome would just head to Thredbo and be equipped to deal with the change in environment? But we do not need to imagine or deduce the situation, because Aboriginal Australians have declared their territories, their estates, right from the time of the first encounters. Aboriginal cultures are indeed associated with particular tracts of country - both land and sea. For example, many language groups and their country are represented on [this map](#). Many types of Aboriginal artwork in fact represent quite detailed maps of the artist's country.

Simply because the way in which Aboriginal peoples have occupied and used land differs from English conceptions of 'settlement' and 'ownership' does not mean that there is no settlement. Nor does it mean that there is no ownership.

## Mabo and beyond

What is perhaps most concerning about the reported statements of both the Prime Minister

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## Followers

and Rolf Harris, is that the views inherent in these statements are so out of date.

In 1992, the High Court in the [Mabo decision](#) recognised the prior rights of Aboriginal and Torres Strait Islander Australians. In doing so, it altered the structure of Australian property law to incorporate these pre-existing rights where they had not already been extinguished.

This was perhaps the high water mark of decades of work including by historians (see eg the work of [Henry Reynolds](#)) and anthropologists, and of course the ongoing struggle of Aboriginal and Torres Strait Islander Australians themselves.

The dispossession of Aboriginal and Torres Strait Islander Australians from their territories resulted from now discredited myopic 18th century European attitudes. In light of what we now know to be the truth, it is hardly appropriate to invoke the attitudes that have caused so much pain, to prosecute an argument about the value of contemporary foreign investment. Or indeed any argument at all.

Posted by [Kate Galloway](#) at [11:16](#)

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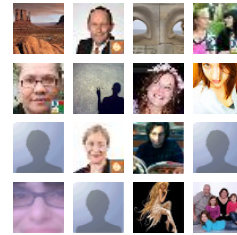
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