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**The British Acquisition of New Holland: a residuum of allodial sovereignties?**

Submitted in fulfilment of the requirements of the degree of  
Doctor of Philosophy

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## ABSTRACT

The *Mabo (No 2)* decision in 1992 opened for re-examination the fundamental principles underpinning the colonial foundations of Australia. The High Court of Australia, reversing 200 years of legal understanding, recognised that an allodial native title sourced in the laws and customs of Indigenous societies had survived the acquisition of sovereignty by the British over New Holland in the late 18<sup>th</sup> and early 19<sup>th</sup> centuries. The High Court stated that the Australian common law could not continue to deny these pre-existing Indigenous proprietary interests based on the application of an enlarged *terra nullius* notion to the already-inhabited New Holland. It was found by six members of the Court to be ahistorical, discriminatory and unjust.

This enlarged *terra nullius* notion held that Indigenous peoples did not legally occupy their traditional lands, and so their territories were ownerless under the classical mode of Occupation. Incongruously, whilst this engorged *terra nullius* notion was discarded from Australian real property law, it was maintained as the basis upon which the British, under international law, had claimed sovereignty over New Holland. Under this mode, the British acquired an original, plenipotent and indivisible sovereignty that swept across the three million square kilometres of claimed territory of New South Wales in an instant in 1788, and across the balance of New Holland in 1824 and 1829. The New Holland territories, according to the High Court, were treated as sovereign-less, the Indigenous societies were 'backward', so low on a scale of civilisation that they were not possessed of anything resembling 'sovereignty'. They were 'bare life', human yet less so, and, in the language of Agamden, *Homo sacer*. Thus, although condemned in both Australian and international law, this ignominious enlarged *terra nullius* notion survives still in the Imperial constitutional law as the foundation stone of the modern Australian nation state.

Doctrinally, this orthodox theory could not easily be presently defended on this basis. Realising the pending interpretative crisis, commentators have argued that rather than positing New Holland as occupied under this egregious *terra nullius* notion, it should be regarded as a conquered territory. Under the extant international law of that time, Conquest would provide not only an unassailable and defensible title but also certainty as to the consequences of the British acquisition. This argument has found little acceptance in Imperial or Australian law, or generally. The British, on this view, would not be posited as peaceful settlers, but as invaders. Prescription, too, was posited but with little enthusiasm or traction. This doctrinal debate was proving infertile until the *Yorta Yorta* decision in 2002. There the High Court stressed that the Indigenous laws and customs that house these allodial titles must be 'traditional' to be recognised under the *Native Title Act 1993*. The Indigenous laws and customs must be traceable and in time to an epoch before the assertions of British sovereignty. Leaning heavily on positivist writings, the

judgment theorised that the meeting of the Indigenous societies with that of the British was 'an intersection of norms'. Accordingly, the immigrant English law intersected with, and recognised, the manifold normative systems of the Indigenous peoples of New Holland. It is these ancient – yet necessarily presently vital – allodial normative systems, which generate the laws and customs that source these native titles which are now being recognised in the Australian common law.

Thus, on this interpretation, each determination of native title in the Australian courts in the post-*Mabo (No 2)* era acknowledges not merely a native title but an extant Indigenous normative system wherein traditional laws and customs are presently alive. These normative entities survived the British assertions of sovereignty over mainland New Holland in 1788, 1824 and 1829 and survive still. The consequences of these determinations of native title – presently numbered over 200 – are profound for the Australian legal system. These normative societies and their laws are sourced *outside* of the present formal Australian constitutional framework and therefore represent a source of law running parallel with the Crown in right of Australia and the States and Territories. Each set of traditional law and customs emanate from a *grundnorm* other than that of the non-allodial Australian legal *grundnorm*. Herein lies a residuum of allodial sovereignties uncaptured by the fundamental Australian legal framework.

This thesis examines the mode of acquisition known as Occupation, that a vacant territory can be discovered and occupied, and thus acquired, from its classical origins to its expressions in the incipient international law, the Imperial law and, latterly, the Australian common law, to examine its provenance, justifications and present legitimacy. The focus becomes the Imperial constitutional law, including opinions and advice from the Colonial Office, and colonial and post-federation Australian cases. The conclusion reached is that the orthodox theory of the acquisition of sovereignty over New Holland is wholly compromised and cannot be sustained in the native title era. Every determination of native title under Australian law formally recognises an Indigenous society whose native title is sourced in its own extant laws and customs, which *Law* can be traced to the pre-British epoch. Indigenous *Law* is thus recognised in Australian law as both present in New Holland prior to the assertions of British sovereignty, and importantly, that same 'Law' is still vital and dynamic in contemporary Australia. Ancient, pre-existing normative entities traceable to the New Holland era are thus re-emerging and being recognised as such in the jural landscape of post-native title Australia, and presenting a mosaic of societies. The challenge for Australian jurisprudence is to abandon the orthodox theory which holds that the Indigenous societies of New Holland were so low on the scale of civilisation so as not to possess any 'sovereignty', and to incorporate the quiescent residuum of these Indigenous sovereignties into a 21<sup>st</sup> century jurisprudential framework. This unmaintainable orthodox legal theory of territorial sovereignty needs be abandoned for a coherent, historically congruent theory.

## PREFACE

A caveat needs to be issued at the outset. It must be understood that we are approaching this topic from the perspective of a non-Indigenous lawyer using Anglo-Australian common law legal concepts. Mindful of Chief Dan George's warning that to write from the other's perspective takes an 'especial act of the imagination', this writer cannot, and does not purport to, give the Indigenous perspective.

Parts of Chapter V have previously been published as 'A Greater Sense of Tradition: The Implications of the Normative System Principles in *Yorta Yorta* for Native Title Determination Applications' (2003) 10 (4) *E Law – Murdoch University Electronic Journal of Law*.

Citation follows the *Australian Guide to Legal Citation* (3<sup>rd</sup> edition, 2010), and in the citation of non-Australian or cases on appeal the court is identified.

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*It took me almost a lifetime to get that search for the green land out of my mind: it took me almost a lifetime to drop that European recoil in horror at our arid and harsh land, and see a fragile beauty in all those places I had earlier not wanted to know were there.*

Manning Clark, *A Discovery of Australia* (1976)



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## INTRODUCTION

In the Australian jurisprudence, until the latter part of the 20<sup>th</sup> century, scant attention was paid to the legal relationship of the Indigenous peoples of Australia with the broader Australian society. Despite 200 years of European presence on the Australian continent, many aspects of this relationship remained largely – if not wholly – unexplored. In recent decades, however, this field is receiving long-overdue attention. One area of enormous interest, from both the immigrant and Indigenous perspective, is the legal ramifications of the acquisition of the territorial sovereignty of the New Holland territories in the late 18<sup>th</sup> and early 19<sup>th</sup> centuries by the British. Various ringing questions concerning the acquisitions of sovereignty have not been answered definitively by the Australian jurisprudence.

Prior to 1992, the Australian jurisprudence accepted without cavil that, with the assertions of sovereignty in 1788, 1824 and 1829 over mainland New Holland and Van Diemen's Land, the British Crown became both the sovereign and the absolute beneficial owner of all lands.<sup>1</sup> Then, in *Mabo v Queensland (No 2)*<sup>2</sup> the High Court of Australia determined that whilst these assertions of British sovereignty were unchallengeable, the Crown did not necessarily acquire an absolute title to these lands; it acquired merely an ultimate or 'radical' title. The High Court held that this radical title was burdened by the allodial interests of Indigenous peoples of New Holland in their traditional lands and waters – a pre-existing 'native title' – which survived the assertions of British sovereignty. These allodial titles are sourced in, and given their content by, the traditional laws and customs of the Indigenous people of a territory. This native title was capable of recognition by the Australian

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<sup>1</sup> In the decision of *Attorney-General v Brown* (1847) 1 Legge 312, the New South Wales Supreme Court held that upon the assertions of British sovereignty all colonial lands belonged to the British Crown. This declaration of exclusive Crown ownership of all land was accepted without serious enquiry for nearly 150 years. As late as 1975, Stephen J wrote that, whether sourced in the Royal prerogative or as a necessary consequence of feudal doctrine, in either event the consequence is the same: 'the lands of Australia became the property of the King of England'; (*New South Wales v Commonwealth* (1975) 135 CLR 337, 439).

<sup>2</sup> (1992) 175 CLR 1 (*Mabo (No 2)*).

common law and, in *Mabo (No 2)*, the Meriam People were declared by the High Court of Australia as entitled to possession, occupation, use and enjoyment of the islands as against the whole world.<sup>3</sup>

### **New Holland as *Terra Nullius***

The Meriam People did not challenge the validity of the assertion of British sovereignty over their traditional islands. Their arguments for recognition of their allodial title resided principally within the private property law doctrines of the common law, not within the public law realms of international law or the Imperial constitutional law. Nonetheless, some of the relevant principles of the international and Colonial Law surrounding the acquisition of territorial sovereignty were necessarily canvassed in the reasoning of the High Court. This was because the mode of acquisition of sovereignty is a question anterior to, and largely determinative of, issues that the court needed to address in adjudicating the Meriam claim, the foremost being what property rights survived in an indigenous society after the assertion of another sovereignty.

The judgment of Brennan J in *Mabo (No 2)*, concurred in by Mason CJ and McHugh J, was scholarly and very finely reasoned in the Dixonian tradition in which the High Court of Australia is clothed,<sup>4</sup> and has been the main focus of subsequent developments. Justice Brennan examined the international and Imperial constitutional jurisprudence and determined the historical denial of the property rights of the Indigenous populations of New Holland, and of the customary laws

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<sup>3</sup> Ibid 217, Order 2.

<sup>4</sup> Sir Owen Dixon, long a puisne justice of the High Court of Australia, upon his elevation in 1952 to Chief Justice, stated what was accepted as the High Court of Australia's philosophy, that of complete and strict legalism. He said that 'close adherence to legal reasoning is the only way to maintain the confidence of all parties. [...] It may be thought to be excessively legalistic. I should be sorry to think that it is anything else. There is no other safe guide to judicial decisions in great conflicts than a strict legalism' (at (1952) 85 CLR xi, xiv). More recently, Selway has observed that this approach may have softened but 'the emphasis remains legalism. It may not be *strict* "legalism" but it is legalism nonetheless': see Bradley Selway, 'Constitutional Interpretation in the High Court of Australia' in Michael White and Aladin Rahemtula (eds), *Queensland Judges on the High Court* (Supreme Court of Queensland Library, 2003), 1, 20; emphasis in the original.

which sustained these rights and interests, rested on the proposition that New Holland, despite being inhabited by a large Indigenous population, was legally 'unoccupied' – a *terra nullius* belonging to no one – and was therefore open to Discovery and Occupation by Great Britain under the international law of that epoch. The principal consequences of regarding New Holland as *terra nullius* and belonging to no one were that no existing sovereignty was possible, the lands were under no proprietorship, and the territories a jural vacuum void of any 'law'. The British Crown thus purportedly became the original sovereign, the absolute owner of all lands, and the English law met no other law so that, as one legal historian lyrically portrayed its reception, '[a]s soon as the original settlers had reached the colony, their invisible and inescapable cargo of English law fell from their shoulders and attached itself to the soil on which they stood.'<sup>5</sup>

But New Holland *was* inhabited, and this human habitation was clearly known to the British. No less than Lieutenant James Cook, on the same day he departed New Holland in 1770, wrote in his journal that he

saw on all the Adjacent lands and Islands a great number of smooks, a certain sign that they are Inhabited, and we have dayly seen smooks on every part of the coast we have lately been upon.<sup>6</sup>

The High Court was thus faced with an interpretative dilemma in *Mabo (No 2)*, one in which incontrovertible historical fact collided with an uncontested legal position of long standing. Doctrine fell. The majority of the court refused to accept the ahistorical proposition that New Holland was *terra nullius* at the time of assertions of sovereignty by the British Crown. It cauterised this enlarged notion of *terra nullius* – that a territory was to be regarded as legally unoccupied if inhabited by 'uncivilised' or 'backward' peoples – from the Australian common law. All three majority judgments, that of Brennan J, the joint judgment of Deane and Gaudron JJ, and that

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<sup>5</sup> RTE Latham, 'The Law and the Commonwealth' (1937) 1 *Survey of British Commonwealth Affairs* 517.

<sup>6</sup> Cook's *Endeavor* Journal: the inside story, National Library of Australia, Canberra, 2006, 22 August 1770, (accessed 21 November 2009). Original spelling maintained.

of Toohey J, expressly rejected the application of the doctrine of *terra nullius* to an inhabited territory.<sup>7</sup> Brennan J stated:

If the international law notion that inhabited land may be classified as *terra nullius* no longer commands general support, the doctrines of the common law which depend on the notion that native peoples may be "so low in the scale of social organisation" that it is "idle to impute such people some shadow of the rights known to our law" can hardly be retained.<sup>8</sup> [...]

The fiction by which the rights and interests of indigenous inhabitants in land were treated as non-existent was justified by a policy which has no place in the contemporary law of this country.<sup>9</sup> [...]

The common law of this country would perpetuate injustice if it were to continue to embrace the enlarged notion of *terra nullius* and to persist in characterising the indigenous inhabitants of the Australian colonies as people too low in the scale of social organisation to be acknowledged as possessing rights and interests in land.<sup>10</sup>

A chain of colonial and post-federation precedent which had expressly held that the British Crown *did* acquire an absolute title to all lands in colonial New Holland was over-ruled.<sup>11</sup> A foremost authority in Australian constitutional law of the time, Professor RD Lumb, remarked that the decision had overturned 'the legal understanding of most judges and jurists'.<sup>12</sup> For the Australian legal orthodoxy this was revolutionary.<sup>13</sup>

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<sup>7</sup> *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 58, 109 and 182 respectively. Dawson J dissented.

<sup>8</sup> Ibid 41. His Honour was quoting from the Privy Council decision of *Re Southern Rhodesia* [1919] AC 211 (JCPC).

<sup>9</sup> Ibid 42.

<sup>10</sup> Ibid 58.

<sup>11</sup> There was also a long line of extra-curial commentary, the most extravagant of which was the claim made by Isaacs J (as he was then) that the whole of the continent of New Holland became the absolute property of King George III upon the issue of Captain-General Phillip's first commission in 1768: see *Williams v Attorney-General of New South Wales* (1913) 16 CLR 404.

<sup>12</sup> RD Lumb, 'The Mabo Case – Public Law Aspects' in MA Stephenson and Suri Ratnapala (eds), *Mabo: a Judicial Revolution* (University of Queensland Press, 1993), 1, 11 (Lumb, 'The Mabo Case').

## The Orthodox Theory

The *Mabo (No 2)* decision left the newly-recognised interests of Indigenous inhabitants to be retrospectively, and controversially, incorporated in the real property systems of the Australian jurisdictions after a hiatus of 200 years. Yet the decision shook, too, the constitutional foundations of the colonies of Great Britain in New Holland.<sup>14</sup> The clamour surrounding the belated acknowledgment of these allodial titles obscured the deeper corollaries of the newly-recognised interests and these foundational aspects have been largely neglected by all but a few commentators.<sup>15</sup> It is these facets of the *Mabo (No 2)* decision, resting essentially in the Imperial constitutional law, which are the focus of this thesis.<sup>16</sup>

## The Questions

Two fundamental issues arise for determination when the phenomenon is the arrival of a society that purportedly annexes territories already inhabited by aboriginal societies. First, were these Indigenous societies possessed of 'sovereignty' prior to

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<sup>13</sup> Callinan J wrote that Justice Brennan's judgment in *Mabo (No 2)* 'must rank as one of the most influential, if not the most influential single judgment written by a Justice of the Court': see Ian Callinan, 'The Queensland Contribution to the High Court' in Michael White and Aladin Rahemtula (eds), *Queensland Judges on the High Court* (Supreme Court of Queensland Library, 2003), 200, 212. Of the 6:1 decision in *Mabo (No 2)*, a former Chief Justice of Australia said that many High Court decisions had resulted in controversy 'but few, if any, have given rise to such a diversity of responses, ranging from euphoria to deep anxiety': Sir Harry Gibbs, 'Foreword' in MA Stephenson and Suri Ratnapula (eds), *Mabo: A Judicial Revolution* (University of Queensland Press, 1993), xiii. An example of rare extremism in legal debate came when Peter Connolly, a former judge of the Supreme Court of Queensland, vigorously attacked the decision, stating: 'Can it be seriously argued that on 3 June 1992 by the stroke of a pen on the banks of the Molonglo [River in Canberra where the High Court sits] the people's absolute right was set aside and became subordinate to a set of vague, undefined and indefinable "usufructs"? The notion belongs to the world on the other side of the looking glass'; see PD Connolly, 'The Theory of Universal and Absolute Crown Ownership' (1994) 18 (1) *University of Queensland Law Journal* 9, 11.

<sup>14</sup> In *Wik Peoples v Queensland* (1996) 187 CLR 1, 182, Gummow J described it as 'a perceptible shift'.

<sup>15</sup> See, for example, Nii Lante Wallace-Bruce, 'Two Hundred Years On: A Reexamination of the Acquisition of Australia' (1989) 19 *Georgia Journal of International and Comparative Law* 87, Gerry Simpson, 'Mabo, International Law, Terra Nullius and the Stories of Settlement: An Unresolved Jurisprudence' (1993) 19 *Melbourne University Law Review* 195 and *ibid*; Peter Bayne (ed), *The Legal Status of Aborigines, The Australian People: an encyclopedia of the nation, its people and their origins* (Cambridge University Press, 2001), 15.

<sup>16</sup> The post-World War II discourse of the rights of peoples, although complementary in many respects, is not inter-temporal and is not treated in this thesis.

the annexation? And, if so, what happened to those pre-existing sovereignties after the assertion by the incoming sovereign?

These juridical questions are, of course, not novel to New Holland or the Imperial constitutional law. As Professor Brian Slattery has pointed out, these same issues call for resolution in all modern states where the British asserted territorial sovereignty and then permanently colonised already-inhabited territories.<sup>17</sup>

No integrated principled approach was adopted in addressing these issues in the Imperial constitutional law because, as Professor McNeil noted:

More often than not *ad hoc* solutions were adopted, occasionally by colonial officials without the benefit of expert legal advice or adequate instructions from London. The inevitable result was a potpourri of irreconcilable approaches, often with a noticeable absence of sound legal principle behind them.<sup>18</sup>

Each Anglo-Immigrant jurisdiction evincing these issues had necessarily to find its own path through these difficult and thorny matters. They remain live issues in every such common law jurisdiction, most particularly Canada, Australia and New Zealand. In the New Holland context, however, this conflict between the immigrant British and the Indigenous peoples is unresolved at the juridical level.

### **And the Answers ...**

For the Australian jurisprudence, these sovereignty questions remain its oldest unclarified – and most obscure – juridical issues. The answers provided by the Anglo-Australian jurisprudence to these two most fundamental questions can be succinctly stated. The Anglo-Australian law holds – implicitly, not expressly – that the Indigenous societies of New Holland were not possessed of any form of 'sovereignty' prior to annexation to the British Crown. The second question is thus unnecessary to answer.

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<sup>17</sup> Brian Slattery, 'Understanding Aboriginal Rights' (1987) 66 *Canadian Bar Review* 727, 739.

<sup>18</sup> Kent McNeil, *Common Law Aboriginal Title* (Clarendon Press, 1989), 2.

## The orthodox legal narrative

The orthodox legal narrative surrounding the acquisition of territorial sovereignty by the British is that at a moment in time in February 1788, following the 'discovery' and declaration of 'possession' by Lt Cook in August 1770,<sup>19</sup> the Commissions of Captain-General Phillip of the 'First Fleet' were read at Sydney Cove, a volley of muskets fired, and the eastern portion of New Holland was seemingly acquired by His Majesty, King George III, as 'New South Wales'. The orthodox theory holds that, with this simple ceremony, an original and indivisible British 'sovereignty' swept instantly across 3,000,000 square kilometres of eastern New Holland. This British 'sovereignty' either met no other 'sovereigns' in its path, or, on meeting them, extinguished or failed to recognise them. His Majesty, in theory, thus acquired an original and plenipotent sovereignty within the bounds of this vast territory styled New South Wales.

The sovereignty acquired by the British is seen as an original sovereignty, owing nothing to the many hundreds of Indigenous societies inhabiting the vast territory. These societies were rendered legally invisible, seemingly, under an enlarged *terra nullius* notion that saw them as 'backward' and 'uncivilised'. They were human societies certainly, but too low on a Eurocentric societal scale to be acknowledged as possessing 'sovereigns' that the British Crown might recognise. A House of Commons report by a Select Committee in 1837 pithily captured their position, stating that British colonists in New Holland had contact with 'Aboriginal tribes, forming probably the least-instructed portion of the human race in all the arts of social life'.

Such, indeed, is the barbarous state of these people, and so entirely destitute are they even of the rudest forms of civil polity, that their claims,

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<sup>19</sup> Distorted, too, is the orthodox popular narrative, which has 'Captain' Cook claiming the *whole* of the continent at Botany Bay in April 1770: see Maria Nugent, *Captain Cook was here* (Cambridge University Press, 2009).

whether as sovereigns or proprietors of the soil, have been utterly disregarded.<sup>20</sup>

Whatever allodial property interests 'these people' may have possessed were thus 'utterly disregarded' because of their 'barbarous state'. Whatever 'law' they may have possessed was unacknowledged by the immigrant English law. Likewise, any form of sovereignty of these Indigenous societies went unrecognised. Yet, with the greatest irony in Anglo-Australian jurisprudence, as the 'Aborigines' of New South Wales became the instant subjects of King George III of England, whatever rights of real property or governance these Indigenous persons then possessed were wholly stripped of them, individually, communally and collectively. This was despite, and contrary to, legal principles established before the colonisation of New Holland. As recently as 1984 Lord Scarman made the point:<sup>21</sup>

He who is subject to English law is entitled to its protection. This principle has been in the law at least since Lord Mansfield freed 'the black' in *Sommersett's Case* (1772) 20 St. Tr. 1.<sup>22</sup>

Until belatedly acknowledged 200 years later in the *Mabo (No 2)* decision, the Anglo-Australian jurisprudence expressly denied any rights of real property – either personal or communal – held by the Indigenous peoples of New Holland.

Two points are to be noted. First, this justification – that it was the barbarity and destitute state of the 'Aborigines' which denied them any claims to be sovereigns or proprietors – was *ex post facto*. This Parliamentary Report was published in 1837, some 50 years after the alleged denial. As we will see, the earliest legal opinions from the Colonial Office pretended that the territory of the colony of New South Wales in New Holland was uninhabited by humankind, with legal opinion given to

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<sup>20</sup> Report of the UK Parliamentary Select Committee on Aboriginal Tribes (British Settlements) (Aborigines Protection Society, 1837)

<[http://books.google.com/books?id=JqUNAAAAQAAJ&printsec=frontcover&source=gbs\\_v2\\_summary\\_r&cad=0#v=onepage&q&f=false](http://books.google.com/books?id=JqUNAAAAQAAJ&printsec=frontcover&source=gbs_v2_summary_r&cad=0#v=onepage&q&f=false)>, 125. (*Report on Aboriginal Tribes* (1837)). It was published, with Comments, by the British and Foreign Aborigines Protection Society, the object of which was to assist 'in protecting the defenceless, and promoting the advancement of uncivilised Tribes'. Accessed on 21 November 2014.

<sup>21</sup> *R v Secretary of State for the Home Department, Ex p Khawaja* [1984] AC 74.

<sup>22</sup> *Ibid* 111-112.



the Colonial Secretary from the Colonial Office that New South Wales, being neither ceded nor conquered, had been occupied by the British Crown as a 'desert and uninhabited' territory.<sup>23</sup>

The second point is that these 'Aborigines' came to be regarded as 'human' in the eyes of the common law of England, but any legal 'claims' by these persons could be disregarded, both by the Imperial constitutional law, which had protected other Indigenous peoples' rights and interests, throughout the British Empire, and also at common law. These 'Aborigines' thus became in the Anglo-Australian jurisprudence lesser juridical beings, not possessed of a full set of legal rights, or perhaps of any.

### **Definition of 'sovereignty'**

What then is this 'sovereignty' which the British had acquired over almost half the continent of New Holland, one of the largest territorial acquisitions in human history, upon the performance of a ceremony lasting not more than 15 minutes. Sovereignty, stated Jacobs J in 1975, is 'a concept notoriously difficult of definition'.<sup>24</sup> Since its conceptual enunciation by Auguste Bodin, the definition is said to have 'never stopped changing'. Robbed of its political complexities,<sup>25</sup> of which we are not concerned,<sup>26</sup> it means the ultimate legal and political authority over a defined territory.

It is the legal aspects that are here under examination, and in relation to territory it is usually regarded as having both an 'internal' and an 'external' aspect. Justice Jacobs explained in the *Seas and Submerged Lands* decision that

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<sup>23</sup> Historical Records of Australia, 4, 1, 330 ('HRA').

<sup>24</sup> *New South Wales v Commonwealth* (1975) 135 CLR 337, 479 (more commonly known as *Seas and Submerged Lands* decision).

<sup>25</sup> The anthropological and political complexities of the broader notion of sovereignty in the 21<sup>st</sup> century are nowhere better canvassed than in Thomas Blom Hansen and Finn Stepputat, 'Sovereignty Revisited' (2006) 35 *Annual Review of Anthropology* 295.

<sup>26</sup> The writings of jurists such as John Austin and John Locke on sovereignty will not be dealt with as their treatments principally concern the internal, political aspects of sovereignty. However, Austinian concepts of 'law', and Locke's views on the *stages* of civilisation are most relevant and important and will be addressed in Chapter V.

sovereignty under the law of nations is a power and right, recognised or effectively asserted in respect of that part to the exclusion of nations or states or peoples occupying other parts of the globe. External sovereignty, so called, is not mere recognition by other powers but is reflection [of], a response to, the sovereignty exercised within the part of the globe. Looked at from the outside, the sovereignty within that part of the globe, assuming it to be full sovereignty and not the limited sovereignty, which may exist in the case of protectorates and the like, is indivisible because foreign sovereigns are not concerned with the manner in which a sovereign state may under the laws of that sovereign state be required to exercise its powers or with the fact that the right to exercise those powers which constitute sovereignty may be divided vertically or horizontally in constitutional structure within the State.<sup>27</sup>

The 'external' sovereignty, the sovereignty recognised *inter se* by other nation states, is thus indivisible, but the 'internal sovereignty'

may be divided under the form of government which exists. However, that does not mean that external sovereignty and internal sovereignty are in kind different. Sovereignty in each case has the same content, the right and power to govern that part of the globe.<sup>28</sup>

While this modern legal concept of sovereignty is important to comprehend, it is not the guiding force when examining the law of another period: this raises the international law concerning inter-temporality.

### **The Inter-Temporal doctrine**

Because the modes of acquisition of sovereignty under examination are those in the late 18<sup>th</sup> and early 19<sup>th</sup> century, under the inter-temporal doctrine, the over-riding definition of 'sovereignty' to be utilised in this analysis must be that of the late 18<sup>th</sup> century, circa 1788. The definition accorded at that time, in the then-emerging international law, was that a sovereign was possessed of a territory if no allegiance or duty was owed to another outside that territory.<sup>29</sup> This very closely accords with

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<sup>27</sup> Ibid 479-80.

<sup>28</sup> Ibid 480.

<sup>29</sup> MF Lindley, *The Acquisition and Government of Backward Territory in International Law (being a treatise on the law and practice relating to colonial expansion)* (Negro Universities Press Reprint (1969), first published Longmans, Green and Company (1926)): see discussion in Chapter IV. This *fin de siècle* work is the definitive rendition of the legal approach to these issues in the Age of Empire.

the definition still accepted in the modern international law, where the concept of territorial sovereignty was stated by Arbitrator Huber in the *Island of Palmas Case* as:

Sovereignty in relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State.<sup>30</sup>

However, it also must be recognised that this definition of sovereignty was accepted only by European nations in the late 18<sup>th</sup> and early 19<sup>th</sup> centuries and is thus undeniably Eurocentric. Nonetheless, on this definition, it is clear that at the relevant times of assertions of sovereignty by Great Britain, New Holland was occupied by hundreds of small Indigenous societies, seemingly autonomous, each possessed of a defined territory. No evidence has been found that these societies were heteronomous. These societies, *prima facie*, could thus be described as 'sovereign' in the international law discourse of the late 18<sup>th</sup> century.

Yet, in the Anglo-Australian orthodox theory, the *prima facie* position is the reverse of the international legal discourse. The Anglo-Australian construct is that the Indigenous societies of New Holland were *not* sovereign, thus the incoming British sovereignty was both original and indivisible, externally and internally. Any claims, then or since, that these Indigenous peoples which have resided in their *countries* of New Holland for thousands of years under any prior 'sovereignty', have seemingly been disregarded or denied.<sup>31</sup> One plausible position is that the Indigenous peoples of the New World were not within the auspices of the Eurocentric international law. However, Dr Lindley in his thesis adopts the view – indeed strenuously so – that these Indigenous peoples were most certainly under the auspices of the international

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<sup>30</sup> *Netherlands v United States of America* (1928) 2 RIAA 829; *ibid* 838 (also known as the *Island of Palmas Arbitration*).

<sup>31</sup> As we shall see, the international legal position is that such peoples would have claims to sovereignty, both as discoverers and occupiers beyond the memory of man, and under a prescriptive title, their occupancy over that period being unchallenged.

law.<sup>32</sup> However, in the Anglo-Australian context, the rationale for not adopting the international law position is historically and legally opaque.

### **Mode of Acquisition of New Holland?**

The *Mabo (No 2)* decision resolved the historical-legal interpretative crisis but it exposed an astonishing doctrinal paradox. As shall be examined in Chapter I, the enlarged *terra nullius* notion was condemned<sup>33</sup> in the Australian jurisprudence as being unjust, discriminatory and ahistorical in the Anglo-Australian common law of real property: yet this very same notion is disclosed as the basis upon which territorial sovereignty over New Holland was asserted – validly, it is claimed – by Great Britain in the international law. In effect, the Anglo-Australian constitutional law holds this enlarged *terra nullius* notion to be both abhorrent *and* binding.

The mode of acquiring this vast territorial sovereignty, on this orthodox view, is as Brennan J expressly stated in *Mabo (No 2)*:

the British acquisition of sovereignty over the Colony of New South Wales was regarded as dependent upon the settlement of territory that was *terra nullius* consequent on discovery.<sup>34</sup>

Under this enlarged *terra nullius* notion, the Indigenous territories of New Holland were regarded as 'unoccupied' because the Indigenous peoples in habitation were backward or barbarous. This enlarged or engorged *terra nullius* notion held that the territories of Indigenous peoples were also *terra nullius* and ownerless under the

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<sup>32</sup> Lindley, above n 29, discussion in Chapter IV, 45-47.

<sup>33</sup> It is common to read 'that the High Court *buried* the doctrine of *terra nullius*', that the decision 'enabled the High Court to *overturn* the *terra nullius* doctrine', that the High Court '*rejected* the doctrine of *terra nullius*', but all of these statements misunderstand the decision: see Reynolds and Beckett respectively in Will Sanders (ed), *Mabo and Native Title: Origins and Institutional Implications* (Centre for Aboriginal Economic Policy Research, Australian National University 1994). The concept of New Holland being 'ownerless' was not accepted by the High Court of Australia, at least in the private property law sense. The classical notion of an uninhabited territory – a *terra nullius* in the post-*Afrikakonferen*ce parlance – remains unchanged. The *enlarged* notion of *terra nullius* was discredited but the classical Occupation notion of a *terra nullius* remains unchanged. Indeed, the High Court of Australia has no, or little, capacity to change the international law.

<sup>34</sup> *Mabo (No 2)* (1992) 175 CLR 1, 34.

classical mode of Occupation. This Anglo-Australian mutation of the ancient principle of Occupation will be called the enlarged notion of *terra nullius*.

The establishment of the incipient penal 'settlement' at Sydney Cove in early 1788 thus, it is contended, perfected an inchoate right created with the 'discovery' of the eastern part of New Holland by Cook in 1770,<sup>35</sup> and the claiming of 'possession' gave King George III territorial sovereignty over the entire eastern portion of New Holland including Van Diemen's Land. Similar claims of 'possession' by Captain James Bremer in 1824 and Captain Stirling in 1829 completed the acquisition of British sovereignty over the entire New Holland/Australian<sup>36</sup> mainland and, presumably, these further assertions of sovereignty were implicitly under this engorged notion of *terra nullius*.<sup>37</sup> This inglorious notion, rejected by the Australian common law and which we shall see is wholly discredited in the international law in 1974,<sup>38</sup> is the constitutional keystone of what emerged as the modern Australian state.<sup>39</sup>

Brennan J did not fully explore the provenance of the enlarged notion of *terra nullius* in his judgment. He noted that this same *terra nullius* notion had been condemned in

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<sup>35</sup> Lt James Cook did not 'discover' in 1770 all of the area later claimed as British Territory in the subsequent Commissions issued to Captain-General Arthur Phillip in 1786–87. This issue is addressed in Chapter II.

<sup>36</sup> *New Holland*, as the name of the continent, was giving way to *Australia* during this period.

<sup>37</sup> These extensions of sovereignty are discussed in Chapter II. However, it cannot be founded on any earlier British 'discovery', as most of western, southern and northern New Holland had been discovered and claimed by the Dutch in the 17<sup>th</sup> and early 18<sup>th</sup> centuries.

<sup>38</sup> *Advisory Opinion on the Western Sahara* (Spain v Morocco) [1975] ICJ Reports 12 (ICJ), and see discussion in Chapter I.

<sup>39</sup> As we shall see, in resolving a long-standing real property issue that had been ignored in the Australian jurisprudence for 200 years, the High Court exposed a fundamental issue which, while likewise ignored, now redounded in the Anglo-Australian jurisprudence. In *Wik Peoples v Queensland*, Gummow J commented that to the extent the common law is understood to be the ultimate constitutional foundation, there was 'a perceptible shift in that foundation' ((1996) 187 CLR 1, 182). Why this simplistic narrative remained unchallenged for such a time in the Anglo-Australian jurisprudence is open to conjecture. It may be that once the false narrative of New Holland as being uninhabited was secured as the legal position, it became a 'tangled web'.

the international law in 1975,<sup>40</sup> and in sourcing the notion in the Anglo-Australian jurisprudence, he cites cases in the Imperial constitutional law of the 19<sup>th</sup> century, principally *Cooper v Stuart*.<sup>41</sup> He then traces it sketchily to the 18<sup>th</sup> century writings of the continental jurist, Emmerich de Vattel.<sup>42</sup> This previously obscure notion appears to survive only in the arcane 'waters of colonial law'.<sup>43</sup> Its jural lineage, however, is tenuous and, when investigated, proves most elusive, despite it still clearly being of fundamental importance to the Australian jurisprudence.

### **Act of State Doctrine**

Being historically distant, the source in Anglo-Australian jurisprudence of this enlarged *terra nullius* notion was likely to remain obscure because of the Act of State doctrine. This doctrine holds that the acquisition of territory by a sovereign for the first time cannot be challenged, controlled or interfered with by the municipal courts.<sup>44</sup> This Act of State doctrine is thus a natural inhibitor to the agitation of issues questioning the acquisition of sovereignty.<sup>45</sup> Yet, as Brennan J explained, although the *validity* of the acquisition of territory cannot be challenged as they are Acts of State, the *consequences* of the assertion of sovereignty under the municipal law are open to interrogation before, and consideration by, domestic courts.<sup>46</sup> The mode, if not the validity, of the acquisition of sovereignty by the British over the expanses of

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<sup>40</sup> Ibid 41, citing the *Advisory Opinion on the Western Sahara (Spain v Morocco)* [1975] ICJ Reports 12 (ICJ).

<sup>41</sup> Ibid 36-7, *Cooper v Stuart* (1889) 14 AC 286 (JCPC) and *Attorney-General (Bengal) v Ranee Surnomoye Dossee* [1863] EngR 761 (JCPC).

<sup>42</sup> (1992) 175 CLR 1, 33.

<sup>43</sup> The definitive modern work in the field, Sir Kenneth Roberts-Wray, *Commonwealth and Colonial Law* (Stevens & Sons, 1966), warns of the 'uncharted reefs with which the waters of colonial law abound' (at vii).

<sup>44</sup> The most cited expression of this doctrine in the Anglo-Australian jurisprudence is in *Seas and Submerged Lands* case (1975) 135 CLR 337, 388, per Gibbs J. The authority in the Imperial constitutional law is *Salaman v Secretary of State in Council of India* (1906) 1 KB 613.

<sup>45</sup> Some commentators over-stated the restriction to include any *querying* of the basis of sovereignty, yet this is exactly what Brennan J did – and was logically required to do – in *Mabo (No 2)*: see, for example, RD Lumb, 'Native Title to Land in Australia: Recent High Court Decisions' (1993) 42 *International and Comparative Law Quarterly* 84.

<sup>46</sup> (1992) 175 CLR 1, 18.

New Holland is thus open to contestation post-*Mabo (No 2)*, for it is the mode of acquisition that governs the consequences at general law.<sup>47</sup>

### **Other Modes?**

Some commentators, realising the doctrinal paradox exposed in *Mabo (No 2)*, have argued subsequently that, rather than positing New Holland as discovered and occupied under an enlarged notion of *terra nullius*, it would be better regarded as territories acquired by Conquest of the Indigenous peoples.<sup>48</sup>

### **Conquest**

Under the extant international law of the late 18<sup>th</sup> and early 19<sup>th</sup> century, Conquest was a legitimate mode of acquiring territory and would provide not only an unassailable title, extinguishing or subsuming any prior 'sovereignties', it would provide greater certainty as to the consequences of this acquisition.<sup>49</sup> On this argument, although no war was formally declared on the Indigenous peoples of New Holland by Great Britain, this mode was, in effect, how these peoples were dispossessed of their lands and sovereignty acquired. Notwithstanding its attractions, this Conquest proposal has found little acceptance in the colonial or Australian law, pre- or post-*Mabo (No 2)*.<sup>50</sup>

### **Cession**

In the absence of historical evidence and judicial or other commentary in the Australian jurisprudence, few propose that the Indigenous territories of New Holland were acquired by Cession, that is, by way of treaty with the Indigenous

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<sup>47</sup> It has developed into a vein of contention in the academic and extra-curial commentary. In the wake of the *Mabo (No 2)* decision, Simpson and Bayne both explored the constitutional implications, and then the debate faded. See Simpson, above n 15, and Bayne, above n 15, 115. More recently, it has been judges writing or speaking extra-curially who have bothered the issues: see, for example, Robert French, 'Native Title – A Constitutional Shift?' (Paper presented at the University of Melbourne JD Lecture Series, 24 March 2009 <<http://www.hcourt.gov.au/speeches/frenchcj/frenchcj24mar09.pdf>>).

<sup>48</sup> See, for example, Simpson, above n 15, and Bayne, above n 15, 115.

<sup>49</sup> *Ibid*, and Lindley, above n 29, 47.

<sup>50</sup> *Paul Coe v Commonwealth* (1979) 24 ALR 118.

societies, despite it being the favoured method of British colonisers for establishing relations between indigenous peoples in British North America and New Zealand.<sup>51</sup>

### Prescription

Likewise, there is little credence for asserting a prescriptive title to New Holland. Prescription is the adverse possession of the international law, where a sovereign controls territory without challenge, so that a legitimate title is catalysed over time to the point where it is perfected. However, it does appear to be used as a fallback argument on occasion,<sup>52</sup> notably by the Senate Standing Committee on Constitutional and Legal Affairs which canvassed the issue of the basis of Australian sovereignty in 1983.<sup>53</sup> As we shall see, the continued disputation both before the Standing Committee<sup>54</sup> and generally, such as the 1988 Barunga Statement<sup>55</sup>, and in

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<sup>51</sup> Russell notes that from the time of the Treaty of Paris in 1763 until the commencement of the Revolution in 1774, 30 treaties were signed with Amer-Indian peoples: see Peter H Russell, *Recognising Aboriginal Title: The Mabo Case and Indigenous Resistance to English-Settler Colonialism* (University of New South Wales Press, 2006), 43-4. In the post-Independence expansion, treaty-making was a very important tool to resolve outstanding issues from conflicts, usually as to the spoils of war. The Mexican-American War for example, ended with the execution of the Treaty of Gaudalupe Hidalgo in 1848, where Mexico ceded present-day California, Nevada, Utah, Colorado, and large parts of present-day Arizona and New Mexico for less than US\$20m. Later, in 1853, Mexico privately ceded the remainder of Arizona and New Mexico for US\$10m under the *Gadsden Purchase*.

<sup>52</sup> In *Mabo (No 2)*, in Brennan J's discussion of the *Advisory Opinion on the Western Sahara (Spain v Morocco)* [1975] ICJ Reports 12 of the British sovereignty over the Murray Islands, His Honour notes that not any of the three 'justifications', even if accepted, 'would have sufficed to permit the acquisition of the Murray Islands as though the Islands were terra nullius'. He then likewise posits that 'it is not for this Court to canvass the validity of the Crown's acquisition of sovereignty over the Islands which, in any event, was consolidated by uninterrupted control of the Islands by Queensland authorities': (1992) 175 CLR 1, 33.

<sup>53</sup> Australian Parliament, 'Two Hundred Years Later ... (Report by the Senate Standing Committee on Constitutional and Legal Affairs on the feasibility of a compact, or 'Makarrata', between the Commonwealth and Aboriginal people', Australian Government Publishing Service, (1983), 45-6.

<sup>54</sup> *Ibid* 38. The quote, at 61, is:

Since 1788 our nation has been invaded by ever-increasing numbers of Europeans who, with superior weapons, have attempted to deport our people and destroy our law and culture and seize without compensation, our land. We have never conceded defeat ... The Aboriginal people have never surrendered to the European invasion and assert that sovereignty over all of Australia lies with them. The Settler state has never recognised the prior ownership of this land belonging to that of the Aboriginal nation. We demand that the colonial settlers who have seized the land recognise this sovereignty and on that basis negotiate their right to be there.

<sup>55</sup> *Barunga Statement*, 12 June 1988. The full text is set out at Appendix V.



the Torres Strait, means the title is challenged.<sup>56</sup> And, while the *external* sovereignty to New Holland/Australia may be argued to be a prescriptive title, the issue of its *internal* sovereignty remains very much under critical interrogation.<sup>57</sup>

### *Native Title Act*

In response to the *Mabo (No 2)* decision, the Australian Parliament passed the *Native Title Act 1993 (Cth)* ('the *Native Title Act*') adopting, in large measure, the definition of 'native title' as expressed in the opinion of Sir Gerard Brennan.<sup>58</sup> In his judgment, Brennan J said, parenthetically, that the term 'native title'

conveniently describes the interests and rights of indigenous inhabitants in land, whether communal group or individual, possessed under the traditional laws acknowledged by the traditional customs observed by the indigenous inhabitants'.<sup>59</sup>

The statutory definition in s 223(1) of the *Native Title Act* provides that the expression *native title* or *native title rights and interests* means the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where 'the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders'.<sup>60</sup>

It is clear that while the Australian common law is declaratory of this so-called native title, *it does not constitute it*. The allodial interests which are being recognised in determinations of native title under the *Native Title Act* are sourced in, and given

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<sup>56</sup> See Nonie Sharp, *Stars of Tagai: The Torres Strait Islanders* (Aboriginal Studies Press, 1993) for a chronicle of these calls.

<sup>57</sup> See, for example, the statements provided in 'Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution: Report of the Expert Panel (on Constitutional Recognition of Indigenous Australians)' (2012), in particular Chapter 9, 'The Question of Sovereignty', 205-215.

<sup>58</sup> Writing extra-judicially in 2003, Justice Callinan said of Brennan J's *Mabo (No 2)* judgment: '[i]t must be exceedingly rare – I am unaware of any other Australian instance – that the principal reasons for a judgement have been adopted, virtually word for word, in a resulting enactment, the *Native Title Act 1993 (Cth)*.' See Callinan, above n 13, 212.

<sup>59</sup> *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 57.

<sup>60</sup> *Native Title Act 1993 (Cth)*, s 223(1)(a).

its content by, the laws and customs of these distinct Indigenous peoples.<sup>61</sup> These laws and customs do not owe their existence to any Anglo-Australian source; this native title is generated by the Indigenous peoples' customary laws that both preceded the arrival of the British in New Holland by many thousands of years and which laws survived the arrival of the English common law and continued to co-exist with it.

*Mabo (No 2)* and the statutory formulation in the *Native Title Act* thus both expressly acknowledge that New Holland was *not* a jural vacuum in 1788, or subsequently. It was populated by a vast array of Indigenous societies all possessed of laws which they acknowledged and customs which were observed. Thus a central platform of the orthodox theory, that New Holland was a juridical vacuum, was dismissed from the Australian jurisprudence. New Holland was not a lawless void; rather, it was populated by Indigenous societies all possessed of laws which they acknowledged and customs which were observed. Far from being a 'law'-less void, there was a multitude of laws in the New Holland landscape.

### **The intersection of normative systems**

In the years following the passage of the *Native Title Act*, there were a welter of decisions interpreting the complexities of the controversial *Native Title Act* legislation, but no claims have been litigated, as was *Mabo (No 2)*, at common law. The discussion, therefore, of the foundational principles underpinning the British acquisition of sovereignty of the Australian colonies left exposed by the *Mabo (No 2)* decision had not been judicially progressed, other than tangentially in *Wik Peoples v Queensland* in 1996.<sup>62</sup> In this decision, in teasing out the incidents of statutory pastoral leases in Queensland, Gummow J made some relevant asides, recognising

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<sup>61</sup> Interestingly, the *Native Title Act* accepts that the Indigenous inhabitants of New Holland are 'peoples', and that the native title recognised resides in this communal entity. However, it still defines these 'peoples' as being one 'race'; the "Aboriginal peoples" means *peoples of the Aboriginal race of Australia*: see s 253 *Native Title Act*.

<sup>62</sup> *Wik Peoples v Queensland* (1996) 187 CLR 1.

that in the *Mabo (No 2)* decision there had been a 'perceptible shift' in the constitutional common law foundations.<sup>63</sup> However, the clamour surrounding the *Wik Peoples* decision, that such Crown grants and this native title could co-exist, drowned out the foundational aspects referred to by Gummow J and, again, they went largely unnoticed in the subsequent commentary.

Indeed, these doctrinal issues may have proven theoretically barren had it not been for the *Yorta Yorta* decision in 2002.<sup>64</sup> In this decision, the High Court wove together a series of judicial comments concerning the concept of native title underpinnings of the *Native Title Act* to provide an insightful illumination of the British acquisition of the New Holland territories and of the then-existing Indigenous societies. The joint judgment of Gleeson CJ and Gummow and Hayne JJ in *Yorta Yorta* enunciated a body of doctrine concerning what was described as 'the intersection of normative systems'. The judgment stated that 'the fundamental premise' from which *Mabo (No 2)* decision proceeded

is that the laws and customs of the indigenous peoples of this country constituted bodies of normative rules which could give rise to, and had in fact given rise to, rights and interests in relation to land or waters.<sup>65</sup>

When the English law was introduced to New Holland, it intersected with the normative systems of the Indigenous societies already present and there was an 'intersection' of normative systems.<sup>66</sup>

Their Honours grafted onto the adjective 'traditional', as used in the statutory definition in s 223(1) NTA, a greater meaning than is suggested by the ordinary meaning of that term. The joint judgment stated:

As the claimants submitted, 'traditional' is a word apt to refer to a means of transmission of law or custom. A traditional law or custom is one which has been passed from generation to generation of a society, usually by word of mouth and common practice. But in the context of the *Native Title*

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<sup>63</sup> Ibid 182.

<sup>64</sup> *Members of the Yorta Yorta Aboriginal Community v Victoria* (2003) 214 CLR 422 ('*Yorta Yorta*').

<sup>65</sup> Ibid 442.

<sup>66</sup> Ibid 439-443.

*Act* 'traditional' carries with it two other elements in its meaning. First, it conveys an understanding of the age of the traditions: the origins of the content of the law or custom concerned are to be found in the normative rules of the Aboriginal and Torres Strait Islander societies that existed before the assertion of sovereignty by the British Crown. It is only those normative rules that are 'traditional' laws and customs.

Secondly, and no less importantly, the reference to rights or interests in land or waters being *possessed* under traditional laws acknowledged and traditional customs observed by the peoples concerned, requires that the normative system under which the rights and interests are possessed (the traditional laws and customs) is a system that has had a continuous existence and vitality since sovereignty.<sup>67</sup>

The origins of the indigenous laws and customs which found and source these rights and interests which are capable of recognition, and which are protected by the *Native Title Act*, must thus pre-date the assertion of sovereignty. Otherwise, the term 'traditional', their Honours said, would have no present meaning. Their Honours held that acknowledgment and observance of these traditional laws and customs by the indigenous society must have continued, substantially uninterrupted, since the time of assertion of British sovereignty for this native title to achieve, and to maintain, recognition and protection.<sup>68</sup>

This self-styled 'jurisprudential' analysis proclaimed a major theoretical annexe to the common-law constitutional framework of the British colonisation of New Holland, and was of great assistance in exploring some of the foundational questions left excavated in the *Mabo (No 2)* decision. The analysis permits another vision of how the assertion of British sovereignty over the Indigenous peoples and their territories of New Holland might be theorised, perhaps a means to resolve the present doctrinal dissonance which surrounds the bringing of these Indigenous societies under the constitutional umbrella of the Imperial British Crown.

When the over 150 determinations of native title in the post-*Mabo (No 2)* era are illuminated by this jurisprudential light, the native titles being recognised in the

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<sup>67</sup> Ibid 553. Italics are in the original.

<sup>68</sup> Ibid 562.

Australian courts are seen to be generated by the laws and customs of an Indigenous society, the normative systems of which were clearly not extinguished by the British acquisition of the over-arching radical title. These aboriginal normative systems presently co-exist with the immigrant British normative system in New Holland, and clearly survived, not merely the annexation of Indigenous territories in 1788, 1824 and 1829, but also the federation of the British colonies into the Commonwealth of Australia in 1901. The normative systems recognised in the determinations of native title have continued, and continue into the present, to source and generate the customary law.

These post-*Native Title Act* determinations of native title accept that the traditional laws that are acknowledged and the traditional customs that are observed by the Indigenous societies of New Holland have remained vital and normative over the course of 200 turbulent years. Every determination therefore acknowledges as existing in the modern Australian legal landscape a normative wellspring of an ancient yet presently-vital Indigenous society.

How then can the Australian jurisprudence logically continue to accept the orthodox theory of sovereignty – which maintains that these same Indigenous societies are too barbarous to be possessed of law – when the present legal reality is that they were possessed of law in the 18<sup>th</sup> century, remain possessed of it in the 21<sup>st</sup> century, and indeed where the normative wellsprings of these laws is a requirement for its recognition of native title under its laws?

The short answer is that the Australian jurisprudence cannot continue to endorse this theory of sovereignty. With every determination of native title given by the Australian courts, another irremediable fissure appears in the orthodoxy.

Maintaining this colonial perspective is increasingly indefensible, and another interpretative crisis of starker constitutional importance looms.<sup>69</sup>

Even under the definition of sovereignty which was accorded in the late 18<sup>th</sup> and early 19<sup>th</sup> centuries in the international law of the European powers, these Indigenous societies of New Holland possessed a distinct territory or *country* within which they were autonomous and owed no allegiance beyond that *country*. They would appear to have possessed an autonomy that fell within the European definition of 'sovereignty' or was, at least, arguable. Yet that same theory plainly denies that these indigenous societies were 'sovereign' at the time of the assertion of British sovereignty.

The orthodox theory is becoming increasingly inadequate to explain this emergent contemporary situation. In effect, the Australian jurisprudence continues to adhere to the British colonial view that the 'laws' and 'sovereignties' of these Indigenous peoples are too low on the scales of civilisation to be 'recognised'. It would seem only a matter of time before this discredited view becomes unsupportable as these normative systems are of growing visibility to the jurisprudence and their obvious contemporary vitality is becoming incontrovertible. Incongruously, Australian law patently and constantly acknowledges the factual existence of this other 'Law' operating in many indigenous societies across Australia, the most comprehensive being the Australian Law Reform Commission report on Customary Law in 1986,<sup>70</sup> yet it refuses to 'recognise' this other 'Law'. The Australian jurisprudence 'sees' this other Law, but refuses to accept it as law. However, the rationale for recognising the allodial title in *Mabo (No 2)* and incorporating it wholesale into the definition of

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<sup>69</sup> From a philosophical perspective, this argument has already been made: see Duncan Iveson, Paul Patton and Will Sanders (eds), *Political Theory and the Rights of Indigenous Peoples* (Cambridge University Press, 2000), and discussion in Chapter VI.

<sup>70</sup> Australian Law Reform Commission, 'The Recognition of Aboriginal Customary Laws' (1986), 31 ('ALRC, *The Recognition of Aboriginal Customary Laws*'). See also Northern Territory Law Reform Commission, *Report on Aboriginal Customary Law* (Committee of Inquiry into Aboriginal Customary Law, 2003, hereinafter ('NTLRC, *Report on Aboriginal Customary Law*'). . This latter report recommended that customary law be recognised as a source of law.

'native title' in the *Native Title Act*, makes the denial of this other law increasingly implausible. Such fictions, however comforting and convenient, cannot be maintained because they rely most essentially, too, on a central plank of the enlarged *terra nullius* notion.

If these normative systems capable of generating Law are theorised as existing at the foundations of British colonisation in New Holland and then surviving into contemporary times, they are not formally recognised within Australian constitutionalism. Manifold systems of laws and customs survived the assertions of sovereignty by the British, and residuum of Indigenous 'sovereignties' are now re-emerging in the jural landscape in the native title era. These 'entities' must now be accounted for within the jurisprudence. In the contemporary Australian jurisprudence, the orthodox theory as to the acquisition of sovereignty of the British territories in New Holland is besieged and clearly moribund. In the conflict between fact and doctrine, the corrupt, withered doctrine must fall.

### **Purpose of Thesis**

This thesis is intended to modestly explore the basal principles underpinning the British acquisitions of territorial sovereignty in New Holland, a field of Australian law largely unexcavated for 200 years. The emphasis is on 'the wood'<sup>71</sup> in an attempt to bring clarity and coherence to a topic lacking both. In broad terms, this thesis seeks to explore the historical genesis of the mode of Occupation, its early expression in the incipient international law, its treatment in the Imperial constitutional law, and then to critically examine the present Australian jurisprudence. In doing so, it is necessary to introduce the Indigenous peoples of New Holland aka Australia<sup>72</sup> to

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<sup>71</sup> Roberts-Wray, above n 43, also stated that in this field the emphasis has been on the 'individual trees' to the detriment of 'the wood' (at *viii-ix*).

<sup>72</sup> The terms *Aborigine* or *Aboriginal* will not be used in the text unless in quotation or a title. The terms invoke long-discredited concepts of race but which are difficult to avoid in the Australian constitutional discourse because they are embedded. Used from the indigenous perspective, they refer to a pan-Indigenous position, usually a political position. Neither use is appropriate in the context of this thesis. Additionally, other indigenous peoples of the Earth use the terms *Aborigine* and

which this study applies. This is but a brief sketch. No attempt is made to fully portray their history, yet, as background to this discussion, it is essential to an understanding of the parameters of the legal issues. The jurisprudence of other countries with a common law heritage will be drawn upon, particularly the important early American precedents.<sup>73</sup> The treatment will be with an emphasis on the conflict between the doctrinal and the historical, with a questing for doctrine and fact to be reconciled. Despite the apparent antiquity of the issues to be resolved, this realm is an obscure area of law – perhaps purposely – as it raises discomfiting questions to an otherwise self-assured so-called settler society. As such, it is troubled by definitional questions, gaps in theory and apparent conflicts of principle.<sup>74</sup> The problems that this field of law present are compounded by the fact that it is at the confluence of four legal orders: the early international law, the Imperial constitutional law, Australian law, and the customary legal orders of the Indigenous societies. Our journey involves searching at the interface of international legal order and Imperial constitutional law, a shadowy realm, and then a searching gaze at the intersection between the imported English law, which includes the principles of the Imperial constitutional law, and the Indigenous legal orders of New Holland. It will be necessary to examine the question whether the Indigenous societies of New Holland were possessed of 'sovereignty' at relevant times and, if so, could still possess it.

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*Aboriginal* to self-describe, and this may lead to confusion. And as Kapuschinski notes of the term *African*, it is a 'gross simplification': see Ryszard Kapuschinski, *The Shadow of the Sun: My African Life* (Klara Glowczewska trans, Penguin Books, 2002). Section 51 (xxvi) of the Australian Constitution, the so-called 'race' power, will be outlined in Chapter VI. In this thesis, the capitalised *Indigenous* will be a reference to Indigenous peoples of New Holland/Australia and, without capitalisation, will be to indigenous peoples generally. The terms *indigenous* and *aboriginal* will be used synonymously in the New Holland context, although this equation may be questionable if used globally.

<sup>73</sup> The tendency in the Australian treatments has been to conflate the doctrine of communal native title (in real property law) and the doctrine of aboriginal title (a constitutional doctrine in the Imperial constitutional law). This conflation, it is submitted, is erroneous and the distinction will be made and discussed in Chapter III.

<sup>74</sup> See generally the caveats issued in Roberts-Wray, above n 43.



In beginning the investigation of whether these Indigenous Australian societies might still be possessed of a contemporary residuum of autonomy, perhaps of a 'sovereignty', the definition of which, consistent with inter-temporal law doctrine, is located in late 18<sup>th</sup> and early 19<sup>th</sup> century international jurisprudence and practice. It is proposed in Chapter I to outline the relevant modes of acquisition of sovereignty in the international law in the late 18<sup>th</sup> century. The ancient principles of the acquisition of territory by Occupation will be synoptically traced from their expression in Roman Law, through the Age of Discovery to their acceptance into the Imperial constitutional law. It will be necessary to background the extant state of the international law and practice surrounding the acquisition of territory at the points in time – *circa* 1800 – sovereignty was asserted in New Holland by the British Crown, including the relevant writings of the Swiss jurist Vattel, and the creative post-Revolutionary jurisprudence of the incipient US Supreme Court. Chapter II will foreground this New Holland situation, tracing the Imperial constitutional law from its expression in Lt Cook's Secret Instructions from the Admiralty to its mutation by the Privy Council to form the Peaceful Settlement doctrine in *Cooper v Stuart* in 1889, containing what Brennan J later styled 'the enlarged notion of *terra nullius*'. Opinions from the Colonial Office and in decisions of the Judicial Committee of the Privy Council, and their treatment in Australian decisions, including the early colonial jurisprudence of New South Wales, will be noted. This eugenicist and ironic notion – that the 'more advanced peoples' might dispossess the 'less advanced' of their territories as necessity demanded – was accepted into Anglo-Australian law in the *Milirrpum* decision, and this decision is analysed in Chapter III.

This sets the stage for the 'judicial revolution' of *Mabo (No2) v Queensland* in 1992. Chapter IV explores the ramifications of this watershed decision, yet only so much as is necessary to guide our discussion surrounding the public law issue of the acquisition of territorial sovereignty on the orthodox theory of sovereignty. This thesis will not examine the property law aspects of native title; rather, the focus will

remain firmly on the foundational issues as they are portrayed presently in the Australian common law. *Mabo (No 2)*, although not expressly condemning this orthodox theory,<sup>75</sup> recognised an allodial interest sourced in Indigenous 'law', thus placing the orthodox sovereignty theory under enormous contemporary strain. The decision excavated and laid bare the enlarged *terra nullius* notion, not merely the concept upon which the Australian real property theory was neglectfully premised but also as the foundation stone of the modern Australian nation state.

Chapter V sets out the doctrine of the intersection of normative systems from the *Yorta Yorta* decision in 2002, and analyses the implications of this unheralded doctrine. To understand the utility of the doctrine, the works of Austin, Hart and other jurists, where relevant, will be considered, and most particularly the implications of the concept of native title recognised in *Mabo (No 2)* and the discussion in the *Yorta Yorta* decision on the integrity of the theoretical Kelsenite *grundnorm*. We examine then, in Chapter VI, its ramifications, both to the historical circumstances surrounding the acquisition of New Holland and the 200+ determinations of native title which have exposed a vast network of other non-Anglo-Australian *Law* in the Australian jural landscape, and look to the ramifications of this alternative vision of the intersection of norms and present a coherent and defensible theoretical construct of sovereignty. This construct is based on our present knowledge and appreciation of the fundamental facts and fuses the historical and legal underpinnings.

We conclude that these existing determinations of native title have put the orthodox theory of the acquisition of sovereignty over New Holland under unbearable pressure. And with another 500 applications for such determinations before the Federal Court for adjudication, an overwhelming pressure will grow.

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<sup>75</sup> In their joint judgment, Deane and Gaudron JJ questioned the orthodox legal theory, writing circumspectly of 'problems': (1992) 175 CLR 1, 78.

There are autonomous legal orders extant in Australia that lie outside our formal constitutional structures, and the theory, and the increasingly hollow proposition, that New Holland was a sovereign-less vacuum in 1788 cannot be sustained.

## CHAPTER I BACKGROUNDING THE ISSUES

In this first chapter, the relevant modes of acquisition of sovereignty in the international law in the late 18<sup>th</sup> century will be outlined. The ancient principles of the acquisition of territory by Occupation will be synoptically traced from their expression in Roman Law through to the Age of Discovery. It will be necessary to background the extant state of the international law and practice surrounding the acquisition of territory at the points in time sovereignty was asserted in New Holland by the British Crown *circa* 1800. The writings of Emmerich de Vattel will be noted, as will the post-Revolutionary jurisprudence of the incipient United States Supreme Court.

### Introduction

The acquisition of territorial sovereignty is as old a political and juridical issue as any known to the history of humankind. Professor Jennings, at the conclusion of his Schill Lectures, noted that the established formal rules play a very small part in the acquisition of territory. He reminded his audience that

the orthodox rules governing the acquisition of territorial sovereignty seem to have played a relatively minor role in actual territorial changes. The reason is not far to seek. This traditional law is, as it were, a system of conveyancing law. It is almost exclusively concerned with the 'modes' by which territorial sovereignty is transferred from one State to another. It has little or nothing to do with the much more important policy question whether territory should be conveyed at all, and to whom. On the contrary, it assumes the old individualistic international society in which these questions of policy were determined by the outcomes of struggles for power between sovereign States. The great historical redistributions of territory have resulted from the resolutions of peace conferences in which the victor's will has been applied by constraint. To interpret these important changes in the balance of power simply in terms of the legal techniques of cession or subjugation is to take a view of the situation that is so narrow and partial as almost to border on the

irrelevant; yet this does no more than reflect accurately the minute part that law has been allowed to play in these great historical movements crystallized in the shifts of territorial sovereignty.<sup>76</sup>

With this sobering reminder of the role of law in this context, we recall that the issue of territorial sovereignty is essentially a political issue involving questions in which the law plays but a small role. Yet the rules and procedures of the acquisition of territory, in the dual sense of territorial sovereignty and the property in the territory, are at the core of the whole system of international law.<sup>77</sup> Jennings also stated that:

The mission and purpose of traditional international law has been the delimitation of the exercise of sovereign power on a territorial basis. No rule is clearer than the precept that no State may lawfully attempt to exercise its sovereignty within the territory of another.<sup>78</sup>

### **Occupation**

The issues calling for resolution are common to many jurisdictions, both within and without the common law world: New Holland is but one example. Yet, during that period roughly spanning the 16th and 18th centuries, upon the *discovery*<sup>79</sup> of the New World by the European powers, assisted by a developed technology and superior military strength, the European powers sought to lawfully assert sovereignty over these newly-found territories. There was a frenzied acquisition of territories, both inhabited and uninhabited, by these powers, some purportedly resting the lawful basis of their annexation on the internationally-accepted mode of acquisition termed *Occupation*.

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<sup>76</sup> RY Jennings, *The Acquisition of Territory in International Law* (Manchester University Press, 1963), 69. Robert Yewdell Jennings was a Member of the International Court of Justice from 1982 to 1991, and ICJ President from 1991 to 1994.

<sup>77</sup> *Ibid* 2.

<sup>78</sup> *Ibid*.

<sup>79</sup> The term *discovery* is used in its technical sense throughout, not in its ordinary sense of *the first to find or find out*, unless otherwise indicated.

The *Advisory Opinion on the Western Sahara* (Spain v Morocco)<sup>80</sup> is the most contemporary and authoritative treatment of the position of territories occupied by indigenous peoples allegedly coming within the rubric of the Occupation mode as *terra nullius*. The International Court of Justice<sup>81</sup> explained in the *Advisory Opinion* delivered in October 1975:

The expression "terra nullius" was a legal term of art employed in connection with "occupation" as one of the accepted legal methods of acquiring sovereignty over territory. "Occupation" being legally an original means of peaceably acquiring sovereignty over territory otherwise than by cession or succession, 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" (cf. *Legal Status of Eastern Greenland*, P.C.I.J., Series A/B, No. 53, pp. 44 f. and 63 f.). In the view of the Court, therefore, a determination that Western Sahara was a "terra nullius" at the time of colonization by Spain would be possible only if it were established that at that time the territory belonged to no-one in the sense that it was then open to acquisition through the legal process of "occupation".<sup>82</sup>

At issue was territory in North Africa colonised by Spain in the late 19<sup>th</sup> century, known as the Western (or Spanish) Sahara. Despite being on the Atlantic coast, it was largely desert and one of the most sparsely populated areas on Earth. In 1884, Spain purportedly *annexed* the Western Sahara as *terra nullius*, and thus sovereign-less, despite it being inhabited by Bedouin peoples. The judges of the International Court of Justice wholly rejected the argument that the international state practice of the late 19<sup>th</sup> century regarded territories inhabited by tribes or peoples having a social and

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<sup>80</sup> *Advisory Opinion on the Western Sahara* (Spain v Morocco) [1975] ICJ Reports 12 (ICJ).

<sup>81</sup> The Court was composed of President Lachs, Vice-President Ammoun, Judges Forster, Gros, Bengzon, Petrán, Onyeama, Dillard, Ignacio-Pinto, de Castro, Morozov, Jiménez de Aréchaga, Sir Humphrey Meredith Waldock, Nagendra Singh and Ruda, and Judge Boni (*ad hoc*). The Court divided 13:3 to comply with the request for an advisory opinion and, further, unanimously that Western Sahara was at the time of colonisation by Spain not a territory belonging to no one and so *terra nullius*. Sir Humphrey Waldock, the British representative, was formerly Chichele Professor of Public International Law at Oxford.

<sup>82</sup> *Ibid* 39.

political organisation as *terra nullius* and so sovereign-less in international law.<sup>83</sup> In the *locus classicus* in the modern international law, the International Court of Justice, through Vice-President Ammoun, stated:

Whatever differences of opinion there may have been among the jurists, the state practice of the relevant period indicates that the territories inhabited by tribes or peoples having a social and political organisation, were not regarded as *terrae nullius*. It shows that in the case of such territories the acquisition of sovereignty was not generally considered as effected unilaterally through occupation of *terra nullius* by original title, but through agreements concluded with local rulers. On occasion, it is true, the word "occupation" was used in a non-technical sense denoting a simple acquisition of sovereignty; but that did not signify that the acquisition of sovereignty through such agreements with authorities of the country was regarded as an occupation of *terra nullius* in the proper sense of these terms. On the contrary, such agreements with local rulers, whether or not considered as a natural cession of the territory, were regarded as derivative roots of the title, and not original titles obtained by occupation of *terrae nullius*.<sup>84</sup>

The International Court of Justice thus held that territory occupied by peoples, albeit tribal and nomadic, cannot be *terra nullius* in the international law. This is in accord with the preponderance of modern opinion.<sup>85</sup> For example, Starke's *Introduction to International Law* (10<sup>th</sup> edition, 1989) states that Occupation 'consists in establishing sovereignty over territory not under the authority of any other state whether newly discovered, or – an unlikely case – abandoned by the state formerly in control'.<sup>86</sup>

Classically, the subject matter of an occupation is *terra nullius*, and territory inhabited by tribes or peoples having a social and political organization cannot be of the nature of *terra nullius*. Where land is inhabited by organised tribes or peoples,

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<sup>83</sup> Ibid.

<sup>84</sup> Ibid. Wallace-Bruce notes that the Court dealt the eugenicist doctrine of the 19<sup>th</sup> century 'a fatal blow': see Nii Lante Wallace-Bruce, *Claims of Statehood in International Law* (Carlton Press, 1994), 43.

<sup>85</sup> See Lindley, above n 29, 20.

<sup>86</sup> JG Starke, *Introduction to International Law* (Butterworths, 10<sup>th</sup> ed, 1989), 160.

territorial sovereignty has been on occasions acquired by local agreements with the rulers or representatives of the tribes or peoples.<sup>87</sup>

Yet Professor Jennings, writing in 1963, accredited, incorrectly it would appear, the Occupation mode a broader application so as to include the territory of peoples living 'under a tribal organization'.

It [Occupation] is the appropriation by a State of a territory which is not at the time subject to the sovereignty of any State. This is not to say, of course, that the territory need be uninhabited. Natives living under a tribal organization were not regarded as a State for this purpose, and though force, even considerable force, might be used for the establishment of the settlement, the result in law was not conquest but occupation.<sup>88</sup>

The territories of 'Natives living under a tribal organisation', being largely indigenous peoples, were thus asserted by Jennings to be *terrae nullius* and capable of thus being annexed under the principles of Occupation.

The different treatment of Jennings and Starke of territories inhabited by indigenous populations is that the *Advisory Opinion (Western Sahara)* was adjudicated between the publication dates of their works.<sup>89</sup> However, it seems clear that Professor Jennings places very little store in the exaggerated claim by European states of 'occupying' territories of peoples living under a tribal organisation:

This somewhat lofty attitude towards peoples who did not enjoy 'civilisation' in the sense of living under a State organised after the manner of the States of Europe seemed natural in the late nineteenth century, though its survival in the term 'civilised states' may cause some embarrassment now.<sup>90</sup>

Professor Jennings noted, too, that by the mid-20<sup>th</sup> century, Occupation was largely redundant as a mode of acquisition, because other than at the polar

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<sup>87</sup> Ibid.

<sup>88</sup> Jennings, above n 76, 20.

<sup>89</sup> The authority cited in the text for the position of socially and politically organised tribes or peoples is the *Advisory Opinion on the Western Sahara* [1975] ICJ Reports 12 (ICJ).

<sup>90</sup> Jennings, above n 76, 20.



extremes, most of the Earth was already under the occupation of nation states, and that this mode was relevant only in the proving of historic titles.<sup>91</sup>

And, centuries later, the legal and political ramifications of these purported titles in the colonists is still the subject of continuing debate.<sup>92</sup> Perhaps none is of more continuing controversy than the acquisition of New Holland by Great Britain, because as Bayne has pointed out, it is commonly, but falsely, assumed that Great Britain made a conscious choice at or near the time of first acquisition in 1788 to assert that New Holland, though occupied by Indigenous societies, was nonetheless *terra nullius*, and so available in international law under Discovery/Occupation.<sup>93</sup>

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<sup>91</sup> Ibid.

<sup>92</sup> Gordon Bennett, 'Aboriginal Title in the Common Law: A Stony Path through Feudal Doctrine' (1978) 27 *Buffalo Law Review* 617.

<sup>93</sup> Bayne, above n 15, 115. Michael Connor in his *Invention of Terra Nullius* is partly correct in this respect. Indeed, Sir Harry Gibbs, a former Chief Justice of the High Court, wrote in the wake of the *Mabo (No 2)* decision that "the expression '*terra nullius*' seems to have been unknown to the common law": see Gibbs, above n 12, *xiv*. This comment is of little critical weight because, firstly, it is not a concept of the common law, but one of international law. Moreover, the assertion of sovereignty not being justiciable in the municipal courts meant that it is not often, if at all, found in municipal case law. We have seen that *terra nullius*, as an expression, was not used at or near 1788 in relation to the British annexation of New Holland territories but the concept of an unoccupied territory belonging to no-one, and so *terra nullius*, has an ancient and honourable lineage in the international legal discourse. It is difficult to pinpoint when the term began to be re-employed in the modern legal discourse but the Earl of Birkenhead wrote of *territorium nullius* in his 1917 text *International Law*, Dr Lindley utilised it very generously in his 1926 thesis, and the Arbitrator used it in the contest between France and Mexico over Clipperton Island in 1932. Scott used the term in his 1940 article, see Ernest Scott, 'Taking Possession of Australia - The Doctrine of "Terra Nullius" (No-Man's Land)' (1940) 26 *Royal Australian Historical Society and Proceedings* 1. The International Court of Justice employed it in 1974, likewise the High Court of Australia in that year, and Professor Lumb mentions the term in his published note in 1984. It is theorised by the author that it may have been the African Conference of Berlin (*Afrikakonferenz*) (1884–85) that sparked its modern usage, and this finds some support in the research of Andrew Fitzmaurice, 'The genealogy of *Terra Nullius*' (2007) 38 (129) *Australian Historical Studies* 1, 10-11, where he notes that the Institute de Droit International met in September 1888 and commissioned one of its members, Professor Ferdinand de Martitz, to distil the principles emerging from the *Afrikakonferenz* into regulations of international law. His highly contentious draft of Article I used the term *territorium nullius*: see the discussion at 10-11.

Yet the modern international law is clear. In the one litigated example of a contested historical title attempting to be claimed against peoples living under a tribal organisation, the Bedouin, it was found that there was no international law or state practice in the mid-1880s which allowed territories inhabited by tribes or peoples having a social and political organisation to be regarded as *terra nullius*. Such claims of 'Settlement' or 'Occupation', according to the International Court of Justice, appear to be empty rhetorical claims, perhaps used in a non-technical or descriptive sense and denoting an annexation of territory, not by Occupation, but by other modes of acquisition.

However, in light of the historical controversy, it is relevant to trace the origins of the Occupation mode, and to trace its developments through the ages.

### **The ancient origins of Occupation**

The origins of the mode of acquisition known as Occupation can be traced to the Roman law of the Eastern Empire, the *Corpus Juris Civilis*, codified in the reign of Emperor Justinian I (483-565). The ancient Laws of the *jus gentium* are derived from the *jus civil* principles concerning the acquisition of things in private ownership.<sup>94</sup> The rule of *occupatio* – that ownerless things, movable or immovable in the Roman nomenclature, and capable of being owned, became the property of the first person to take possession of them – was the source. In the *Institutes*, the outline of the elements of the Roman law of the time, this principle of first occupancy is expressed thus: '*First occupancy is the basis of ownership for natural reason gives to the first occupant that which had no previous owner.*'<sup>95</sup>

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<sup>94</sup> Jennings, above n 76, 3.

<sup>95</sup> The *Institutes* of Justinian (A facsimile of the Moyle Latin edition of 1912 together with the English edition of 1913). Birmingham, Alabama: Legal Classics Library, 1985, XLI, I, 3.

Fundamental to this principle of *occupatio* is that there is no owner of the thing; it is *res nullius*. In time this principle was extrapolated and applied to newly-discovered uninhabited territories. The ownership to these vacant territories was in the person or government of the people who first discovered and occupied those lands.<sup>96</sup> The eminent lawyers who compiled the *Corpus Juris Civilis* referred to the writings of the 2<sup>nd</sup> century jurist, Gaius, as the source of this extrapolated principle. Even at this seminal stage in the development of the doctrine of Occupation (or Discovery, as it was later styled) there are two prerequisites necessary to found a valid title: discovery *and* occupation. Two scenarios are permitted in the principle which relates to the acquisition of uninhabited territory by Occupation. The first is the discovery of such territory without subsequent occupation. In this first case, an inchoate right to *imperium* is created which, if not perfected by actual occupation, lapses with time. The discovery, absent occupation, was insufficient to provide any lawful title. In the second situation, the newly-discovered territory is occupied by the discoverer. There, the inchoate title is perfected with both the territorial sovereignty (the *imperium*) and an absolute property in the land (the *plenum dominion*) acquired.

### **Conquest**

A third scenario, the discovery of previously unknown territory, but which is *inhabited*, offers jurisprudential difficulties which did not become apparent for nearly a millennium after the publication of the *Corpus Juris Civilis*. All difficulties encountered by the ancient Romans concerned military tactics, for the recognised mode of territorial acquisition was Conquest by war. Discovery of newly-found lands, and the conquest of the

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<sup>96</sup> FE Smith, *International Law* (JM Dent & Sons Ltd, 6<sup>th</sup> ed, 1917), 90-1. Smith was the Earl of Birkenhead.

inhabiting populations and territories as a mode of territorial acquisition, is most relevant and will be juxtaposed in the tracing of the historical development of Occupation. In the event of war between a discovering people and the inhabiting people, the latter could be conquered. The conqueror assumed *imperium* over the territory and the people. Rights to the private moveable property of those peoples were seen to also lie with the discoverer-conqueror, being adjudged *res nullius*.<sup>97</sup> The annulment of such property rights was automatic and extended to the immovable, but *honoris causa* some lands were allowed to remain with the conquered owner.<sup>98</sup> However, the practice developed, founded on firm public policy considerations, that the conqueror retained the *status quo* in the conquered territories. The sovereignty of the conquered lands would thus fall to the conqueror but the private property rights of those conquered remained in force until otherwise dealt with by the conqueror in exercise of the prerogative. Emmerich de Vattel captured the essence of it, writing:

[t]he conqueror takes possession of the property of the State and leaves that of individuals untouched. The citizens suffer only indirectly by the war; conquest merely brings them a change of sovereign.<sup>99</sup>

Vattel also rhetorically asked:

But if the state is conquered, if the entire nation is subjugated, what treatment must the conqueror accord it without overstepping the bounds of justice? What right has he over the conquered territories? Some writers have dared assert the monstrous principle that the conqueror is the absolute master of his conquest, that he can dispose of it as his own property.<sup>100</sup>

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<sup>97</sup> RW Lee, *The Elements of Roman Law* (Sweet & Maxwell, 4<sup>th</sup> ed, 1956), 129. A *res/terra derelicti* is a thing/land abandoned.

<sup>98</sup> Lindley, above n 29, 337.

<sup>99</sup> Emmerich de Vattel, *The Law of Nations (or the Principles of the Law of Nature Applied to the Conduct and Affairs of Nations and Sovereigns)* (London ed, 1758), Book III, 309.

<sup>100</sup> *Ibid.*

## Conquest of the Infidel in English law

However, in the English law, the earlier rule concerning the property of the conquered held longer sway. The issue in *Calvin's case*<sup>101</sup> was whether a Scot born after the accession of James I to the Crown of England was an alien and thus disqualified from holding land in England. The *dictum* of Lord Coke, which became notorious, was that

if a Christian King should conquer a kingdom of an infidel, and bring them under his subjection, then *ipso facto* the laws were abrogated for that they be not only against Christianity but against the law of God and of nature, contained in the Decalogue.<sup>102</sup>

In Lord Coke's judgment, all English law would immediately and automatically be in force in the newly-conquered territory, abrogating any extant law. This rendition of principle harked back to Crusader times when Moslem infidels were held to be perpetual enemies of the Christian. It was consistent, as outlined above, with earlier European ecclesiastical and legal thought up to and including the 15<sup>th</sup> century.

The English invoked this principle both prior to and after the fracture from the Papacy. In 1496, for instance, King Henry VII issued Letters Patent to John Cabot and his sons empowering him to seek out and find unknown territories held by infidels and to subdue them and so acquire for the King the rule, title and jurisdiction of such territories.<sup>103</sup>

## Re-alignment with continental jurisprudence

However, this position was put paid to convincingly in *Campbell v Hall*<sup>104</sup> in 1774. In this case, Lord Mansfield CJ upheld the principle that the laws of the conquered country continue to be in force until altered by the

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<sup>101</sup> 77 ER 377.

<sup>102</sup> Ibid 397.

<sup>103</sup> Lindley, above n 29, 25.

<sup>104</sup> [1558–1774] All E R Rep 252.

conqueror in the exercise of the prerogative. His Lordship mentioned the 'absurd exception as to pagans mentioned in *Calvin's* case shows the universality and antiquity of the maxim'.<sup>105</sup>

This was seemingly then accepted in the Imperial constitutional law. Wheaton, for example, in his 1836 work, *Elements of International Law*,<sup>106</sup> stated that with 'conquest, even when confirmed by treaty or peace', the 'property belonging to the government or the vanquished nation passes to the victorious State' but 'private rights are unaffected'.<sup>107</sup>

### **New World Infidels *versus* Old World Christians**

Small heed was paid to peaceful means of acquisition as Conquest was the dominant and accepted mode of acquisition of inhabited territories well into the 16th century when the New World territories became increasingly known to and desired by the Old World European powers. The dominant belief system of the Europeans, the Abrahamic religion based on the teachings of Christ, albeit later fractured, became both an imperative and a justification for this New World activity. Those populations not within the aegis of this Christian faith were infidels and the perpetual enemies of the Christian nations. These infidels of the New World were thought, in the mainstream ecclesiastical and legal discourse of the early Age of Discovery, not to be capable of possessing rights to property or to government. War could thus be waged perpetually upon these lesser human beings without regard to their person or property. Their lack of Christianity so

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<sup>105</sup> Ibid 254. Later in time, Sir William Blackstone would analogise this conquest principle, mitigating its absolute application to newly-discovered and uninhabited territories to the extent that only those English laws which are appropriate to the new circumstances are to be applied, with, self-obviously, some legislation not being applicable to such an infant colony.

<sup>106</sup> Henry Wheaton, *Elements of International Law* (Carey, Lea and Blanchard, 1836).

<sup>107</sup> Ibid 346.

disqualified them. They were heathens still tainted by mortal sin and incapable of rational thought.<sup>108</sup>

### **Inhabited territories**

In a series of Papal Bulls Pope Alexander VI divided the New World between Spain and Portugal with an imaginary north-south line joining the Poles 100 leagues to the west of the Cape Verde Islands.<sup>109</sup> Everything west of that line was to go to Spain, everything east to the Portuguese.<sup>110</sup> After some negotiations, the Treaty of Tordesillas was concluded between Spain and Portugal in 1494 to settle the details of their respective newly-granted possessions. But other European powers strenuously railed against this generous papal division, protesting that it was contrary to accepted international principle, as practised by the European nations, because no claim to possession of the New World territory could be upheld over these uncharted regions which, if uninhabited, required actual occupation by the claiming nation or, if inhabited, subjugated by Conquest.<sup>111</sup>

Most of the territories of the New World that the Europeans powers sought to exploit were inhabited, not vacant. This caused the issue of the status of these New World peoples – 'Indians' they were styled – to be canvassed in the European discourse when the New World for the Europeans was only in its infancy. A significant intellectual development was occurring in the Spanish theological discourse in the early 1500s.

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<sup>108</sup> Felix Cohen, 'The Spanish Origin of Indian Rights in the Law of the United States' (1942) 31 *Georgetown Law Journal* 1, 11 (Cohen, 'The Spanish Origin').

<sup>109</sup> Simon Barton, *A History of Spain*, (Palgrave Macmillan, 2nd ed, 2009), 107.

<sup>110</sup> Under this division, New Holland was theoretically divided between Spain and Portugal.

<sup>111</sup> Cohen, 'The Spanish Origin' above n 108, 11.

## **On the Indians and the Law of War**

This development centred on the lectures of Francisco de Vitoria (1486–1546), a Spanish theologian, at the University of Salamanca in 1537.<sup>112</sup> These were published under the title of *De Indis et de Jure Belli Relectiones* (*On the Indians and the Law of War*).<sup>113</sup> Steeped in Thomasian learning, Fra Vitoria's concern was the moral and legal issues surrounding the colonisation of the New World and its peoples. With a striking independence of mind, he challenged the conventional ecclesiastical and secular belief that held that these *heathens* and *infidels* were incapable of having rights reposed in them. It did not depend, in Vitoria's view, on their Christianity but ran instead with their essential humanity. Following the teachings of Aquinas, he argued that the lack of Christianity could not annul the natural law from whence human rights, possessed by every human being, sprang. Thus, the rights of these indigenous populations of the New World could not simply be annulled or ignored. Vitoria argued that if Spain acquired territorial sovereignty over these distant lands the peoples of the New World became subjects of Spain, as much a subject 'as any man in Seville'.<sup>114</sup>

### **No Discovery**

Vitoria also challenged the application of the principles surrounding Discovery to any of these New World territories, arguing that these lands were already discovered and populated and, therefore, the relevant

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<sup>112</sup> Fra Vitoria studied and lectured at the University of Paris, then returned to the prime chair in theology at the University of Salamanca. Both these universities were major European seats of learning in the mid-16<sup>th</sup> century, rivalled only by Bologna and Oxford.

<sup>113</sup> Francisco de Vitoria, *De Indis et de Jure Belli Relectiones* (*On the Indians and the Law of War*), The Classics of International Law Series (Translation by John Cawley Bate) (Oceana, 1964).

<sup>114</sup> Cohen, *The Spanish Origin*, above n 108, 11.



Discovery/Occupation principles, which related only to uninhabited lands, did not apply. His basic premise was that the Indigenous peoples

were in peaceable occupation of their goods, both publicly and privately. Therefore, unless the contrary is shown, they must be treated as owners and not disturbed in their possession unless cause be shown.<sup>115</sup>

### **de Las Casas v Sepulveda**

Following Vitoria, in the Valladolid Debate in 1550 before a council of fourteen judges, two leading advocates of the era put the case for and against the validity of Spain's dominion over the Indians of the New World. Juan Gines de Sepulveda put the case that Spain was entitled to wage war on these Indians as they were heathens outside the purview of the Christian faith. Soulless, and thus non-human, they could therefore be deprived of their life and property. Fra Bartolome de Las Casas put the case that Spain had no such right, arguing that, though non-Christian, the Indians were nonetheless human and could not be compelled by violence to become Christians.<sup>116</sup>

The debate, at least in ecclesiastical thought, culminated and was settled by the Papal Bull *Sublimis Deus* of Pope Paul III in 1537. To appreciate the parameters of the debate at this juncture in history it is worthy of quotation in full.

We, who, though unworthy, exercise on earth the power of our Lord and seek with all our might to bring those sheep of His

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<sup>115</sup> Vitoria, above n 113, 120. To Fra Vitoria's thinking, a refusal on the part of the Indians of the New World to accept the Christian faith was such a just cause for conquest. However, what situations gave rise to a 'just cause' for conquest remained contentious. Subsequent publicists unshackle themselves of this view and propagate other views, and this will be returned to below.

<sup>116</sup> For an outline of the Valladolid Debate, see Justin Malbon, 'The Extinguishment of Native Title: The Australian Aborigines as Slaves and Citizens' (2003) 12 (2) *Griffith Law Review* 310. For the classic modern treatment, see Lewis Hanke, *All Mankind is One: a study of the disputation between Bartolome de Las Casas and Juan Gines de Sepulveda in 1550 on the intellectual and religious capacity of the American Indians* (Northern Illinois University Press, 1974).

flock who are outside, into the fold committed to our charge, consider, however, that the Indians are truly men and that they are not only capable of understanding the Catholic faith but, according to our information, they desire exceedingly to receive it. [N]otwithstanding whatever may have been or may be said to the contrary, the said Indians and all other people who may later be discovered by Christians, are by no means to be deprived of their liberty or the possession of their property, even though they be outside the faith of Jesus Christ; and that they may and should, freely and legitimately, enjoy their liberty and the possession of their property; nor should they be in any way enslaved; should the contrary happen, it shall be null and of no effect.<sup>117</sup>

These Indians of the New World, and other indigenous peoples discovered by Christians, were thus declared truly human. All mankind was declared a common ecclesiastical and juridical class. In the now tautological words of Bartolome de Las Casas: '*All the peoples of mankind are human*'.

### **Grotius**

This Vitorian thinking was adopted by the Dutch jurist and scholar, Hugo Grotius, in the writing of his *On the Law of War and Peace* published in 1625. This work, along with others of the epoch, set the foundations for the corpus of modern international law. Starting from the Roman private law principle of *occupatio*, he stated, classically, that ownerless objects belong to the one who finds and takes possession of them and analogises to the acquisition of uninhabited territories. He cites an example of this from Plutarch, that of the uninhabited island of Acanthus, to uphold the dual elements of the principles of Discovery. The ownerless isle was adjudged to the Chalcidians, who first entered it, and not to the Andrians who 'had first thrown a javelin upon it'.<sup>118</sup>

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<sup>117</sup> Quoted in Cohen, 'The Spanish Origin', above n 108, 12.

<sup>118</sup> Hugo Grotius, *On the Law of War and Peace* (Oceana, Reprint, 1964 ed, 1625), II, 8, s.6. In an earlier work in 1604, *On the Law of Prize and Booty*, the Dutchman Grotius strenuously argued against the generous division in the Treaty of Tordesillas of the whole New World between Spain and Portugal.

'Unoccupied lands become the property of the individuals who become occupants of them, unless they have been taken over as a whole by a people,' Grotius wrote.

Equally shameless is it to claim for oneself by right of discovery what is held by another, even though the occupant may be wicked, may hold wrong views about God, or may be dull of wit. For discovery applies to those things which belong to no one.<sup>119</sup>

Fra Vitoria is cited as the source that the Right of Discovery did not apply in the case of inhabited territories.<sup>120</sup>

And Grotius adopts the Vitorian position that Discovery could not vitiate the rights of peoples in territories which were already occupied. The inhabitants of the New World, he stated, 'enjoyed public and private ownership of their own property and possessions, an attribute which could not be taken from them without just cause'.<sup>121</sup> But, as stated by other observers, such ivory-tower discourse did little to impede the dispossession of the indigenous peoples by the colonising Christian powers.<sup>122</sup>

### **Emmerich de Vattel**

The intellectual discourse of the European nations questing for acquisition and exploitation of New World territories gave rise to numerous theories and justifications in the cause of their imperial ambitions. The leading publicist and most influential in the common law world was Emmerich de

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<sup>119</sup> Ibid II, 22.

<sup>120</sup> Ibid II, 2, s.4.

<sup>121</sup> Ibid c.12.

<sup>122</sup> *La Leyenda Negra* (The Black Legend) held that Spain was the most merciless of the European powers in the New World. For example, a 1598 engraving by Theodorus de Bry depicted a Spaniard feeding live Indian children to his dogs. An estimated 50 million Indigenous inhabitants in Spanish territories in the Americas in the early 16<sup>th</sup> century were allegedly reduced to about 5 million by the late 17<sup>th</sup> century, principally through disease; as to the Spanish influence, see Cohen, 'The Spanish Origin', above n 108, generally.

Vattel, principally through his *Law of Nations*. Vattel (1714–1767) published his *The Law of Nations (or the Principles of the Law of Nature applied to the Conduct and Affairs of Nations and Sovereigns)* in 1758.<sup>123</sup> It was not an international law text<sup>124</sup> but rather an extended argument as to what principles from the Law of Nature may or should be applicable as between the emerging nation states.<sup>125</sup>

### **Modes of Acquisition in the Emerging International Law**

Vattel upheld the three principal modes, Conquest, Cession and Discovery/Occupation, under long-standing international practice by which territory might be acquired. The former two were available to acquire inhabited territories, yet Occupation was only available as a means of acquisition of uninhabited territory. Vattel upheld the ancient view that a valid title based on Discovery can only be perfected by actual 'occupation'.<sup>126</sup> 'The law of nations', he wrote,

will only recognize the ownership and sovereignty of a nation over unoccupied lands when the nation is in actual occupation of them, when it forms a settlement upon them, or makes some actual use of them.<sup>127</sup>

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<sup>123</sup> Vattel, above n 99. It was a popularisation of an earlier work of the same title by the German philosopher, Christian von Wolff, who published in 1749. It was first published in London in French in 1758. In *Mabo (No 2)*, Brennan J mistakenly states that Vattel's *Law of Nations* was published 'at the end of the eighteenth century' in 1797, after the colonisation of New Holland by Great Britain ((1992) 175 CLR 1, 33). This error has carried through the subsequent literature: see, for example, statements attributed to Sir Anthony Mason, the former Chief Justice of Australia, in Deborah Hope, 'Smokescreen nullius', *The Australian* 25 February 2006 and Bayne, above n 15, 115.

<sup>124</sup> *Contra* Henry Reynolds, *Aboriginal Sovereignty: Reflections on Race, State and Nation* (Allen & Unwin, 1996), x ('Reynolds, *Aboriginal Sovereignty*').

<sup>125</sup> This seminal work of the early international law became most influential in the common law world of the early 19<sup>th</sup> century. It is widely acknowledged that it had an influence on the Founding Fathers of the revolutionary United States government, it was put in argument in the US Supreme Court in 1832 in *Worcester v Georgia* and quoted in the Opinion of London Counsel, William Burge, which was concurred in by Thomas Pemberton, and Sir William Follett, on Batman's Treaty in 1835.

<sup>126</sup> Vattel, above n 99, Book II, s 207 and s 208.

<sup>127</sup> *Ibid* s 208.

In this, Vattel did not state the principles of Discovery/Occupation any differently from the writings of other principal progenitors of the modern international law such as Francisco de Vitoria, de Las Casas, Grotius and von Wolff. The fundamental principles remained unchanged.

With accounts of the indigenous peoples of the New World circulating in Europe, the rights of these peoples can be seen to be coming into focused analysis in the discourse.

### **'Engrossing' territory**

The level of sophistication in the application of the doctrine of Discovery/Occupation was heightening. Vattel questioned 'whether a nation can, by the bare act of taking possession, appropriate to itself countries which it does not really occupy, and thus engross a much greater extent of territory than it is able to people or cultivate'. To this, he replied:

It is not difficult to determine that such a pretension would be an absolute infringement of the natural rights of men, and repugnant to the views of nature, which, having destined the whole earth to supply the wants of mankind in general, gives no nation a right to appropriate to itself a country, except for the purpose of making use of it, and not of hindering others from deriving advantage from it.

The law of nations will, therefore, not acknowledge the property and sovereignty of a nation over any uninhabited countries, except those of which it has really taken actual possession, in which it has formed settlements, or of which it makes actual use. in effect, when navigators have met with desert countries<sup>128</sup> in which those of other nations had, in their transient visits, erected some monument to show their having taken possession of them, they have paid as little regard to that empty ceremony as to the regulation of the popes, who divided a great part of the world between the crowns of Castile and Portugal.<sup>129</sup>

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<sup>128</sup> The term *desert* in the early discourse refers to uninhabited or abandoned (as in *terra derelicti*) territories, not to an area of sparse or no vegetation.

<sup>129</sup> Vattel, above n 99, Book 1, s.208.

Vattel also recognised the Roman law distinction between territorial sovereignty (*imperium*) and property in the lands (*plenum dominion*), writing that 'when a nation takes possession of a country which belongs to no-one, it is considered as acquiring sovereignty over it as well as ownership'.<sup>130</sup> It acquires the *imperium* and the *plenum dominion*.

### **The 'uncultivated wilds'**

In relation to territories occupied by aboriginal peoples, Christian von Wolff's earlier analysis is of particular interest because it considers the title to territory of peoples who have 'no settled abode but wander through the uncultivated wilds'. Of these New World peoples, von Wolff wrote in 1749:

[T]hey are understood to have tacitly agreed that the lands in that territory in which they change their abode as they please, are held in common, subject to the use of individuals, and it is not to be doubted but that it is their intention that they should not be deprived of it by outsiders. Therefore they are supposed to have occupied that territory as far as concerns the lands subject to their use, and consequently to have jointly acquired ownership of those lands, so that the use of them belong to all without distinction.<sup>131</sup>

According to von Wolff, nomadic peoples owned, in a *communal* holding, the 'uncultivated wilds' which they traversed and were not to be disturbed in their occupation by outsiders.

His follower, Vattel, clearly adopts the same fundamental principles on this issue, writing of 'families wandering in a country':

as the nations of shepherds who pass over it, according to their wants require, possess it in common; it belongs to them exclusively of all other nations and we cannot without injustice deprive them of the countries which are appropriated to their use.<sup>132</sup>

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<sup>130</sup> Ibid s.205.

<sup>131</sup> Christian von Wolff, *The Law of Nations* (Clarendon Press (Reprint 1934), 1748), 158, quoted in Reynolds, above n 124, 49.

<sup>132</sup> Vattel, above n 99, Book II, s.97.

Consistent with Fra Vitoria, Grotius and von Wolff, Vattel upholds the principle that these indigenous inhabitants lawfully occupied such territories and, cannot 'without injustice' be dispossessed of their *countries*. Applying the ancient principle of Occupation to the indigenous inhabitants of a territory, Vattel wrote:

Immemorial possession is therefore an indefeasible title and immemorial prescription, a plea which cannot be avoided: both are founded upon a presumption which the natural law requires to be taken as an incontestable truth.<sup>133</sup>

These New World peoples thus had a valid and prior title to their territories on two bases: as first Discoverers, by reason of possession of their countries time out of mind, and under a perfected title based on an unchallenged, and equally timeless, prescription.

*'another celebrated question'*

Vattel wrote, too, of 'another celebrated question', to which the discovery of the New World has principally given rise:

whether a nation may lawfully take possession of some part of a vast country, in which there are none but erratic nations whose scanty population is incapable of occupying the whole?

In answering this question, Vattel adapted the classical principles of Occupation for European nations dealing with newly-encountered territories in the New World which were inhabited by indigenous peoples. It was that no nation has the right to reduce the bounds of the territories of these indigenous peoples *unless* the European power was under an absolute want of land.

His argument is expressed thus. Cultivation of the soil was 'an obligation imposed by nature on mankind'.

The whole earth is destined to feed its inhabitants; but this it would be incapable of doing if it were uncultivated. Every

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<sup>133</sup> Ibid II, s.143.

nation is then obliged by the law of nature to cultivate the land that has fallen to its share; and it has no right to enlarge its boundaries, or have recourse to the assistance of other nations, but in proportion as the land in its possession is incapable of furnishing it with necessaries.<sup>134</sup>

Some nations (he names 'the ancient Germans and some modern Tartars') inhabit fertile countries, but disdain to cultivate their lands and choose rather to live by plunder, and 'deserve to be extirpated as savage and pernicious beasts'. Yet there are other nations, Vattel asserted, who choose to live only by hunting, and/or by herding their flocks. These people ranged over their tracts, rather than inhabiting them. And, in the first ages of the world, when the Earth, without cultivation, produced more than was sufficient to feed its small number of inhabitants, this was acceptable. He argued that with the humanity now so greatly multiplied, it could not subsist if all nations were disposed to live in that manner.

Those who still pursue this idle mode of life, usurp more extensive territories than, with a reasonable share of labour, they would have occasion for, and have, therefore, no reason to complain, if other nations, more industrious and too closely confined, come to take possession of a part of those lands. Thus, though the conquest of the civilized empires of Peru and Mexico was a notorious usurpation, *the establishment of many colonies on the continent of North America might, on their confining themselves within just bounds, be extremely lawful.* The people of those extensive tracts rather ranged through than inhabited them.<sup>135</sup>

*'erratic nations'*

Thus, on the Vattelian argument, when a country is populated by 'wandering tribes, possessed of vast territories, whose small numbers cannot populate the whole country', their 'uncertain occupancy' was not 'a

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<sup>134</sup> Ibid Book I, s.81.

<sup>135</sup> Vattel, Book I, s.81, emphasis added.



real and lawful taking of possession'.<sup>136</sup> Because they were nomadic and did not cultivate the soil, their possession was not 'real and lawful'.

But, let us here recollect what we have said more than once (Book I. s81 and 209, Book II. s69). The savages of North America had no right to appropriate all that vast continent to themselves; and since they were unable to inhabit the whole of those regions, other nations might, without injustice, settle in some parts of them, provided they left the natives a sufficiency of land. [...] For, in fine, they possess their country, they make use of it after their manner, they reap from it an advantage suitable to their manner of life, and in which they receive laws from no one.<sup>137</sup>

It was lawful, therefore, for European nations in dire need of new situations for colonies, and duty-bound to cultivate the soil where fertility allowed, to appropriate part of a territory not continuously possessed by these 'erratic nations',<sup>138</sup> if that European nation was under a want of land for its burgeoning population. As stated by Vattel, it was:

[T]he people of Europe, too closely pent up at home, finding land of which the savages stood in no particular need, and of which they made no actual and constant use, were lawfully entitled to take possession of it, and settle it with colonies.

The pre-condition was followed by a qualification –the reduction in the bounds of the territories of these indigenous peoples of the New World was justifiable provided that the savages stood in 'no particular need' of that part which was to be colonised and they were left sufficient of their territory. It was not, as some have argued,<sup>139</sup> a *carte blanche* position which permitted the seizure of the whole of indigenous territories. Parts of the territory of these 'erratic nations', those parts unwanted and unused by them, could therefore be justifiably 'settled' upon by the European nations.

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<sup>136</sup> Vattel, Book I, Chapter 7, s.81 and Book I, Chapter 18, s.209.

<sup>137</sup> Vattel, Book II, Chapter VIII, s.97.

<sup>138</sup> Vattel, Book I, Chapter XVIII, s.208.

<sup>139</sup> See, for example, the exaggerated claims of George Chalmers, discussed in Chapter III, under the heading *Certain Wide Principles*.

Written in the mid-1700s, this urged amendment to the classical principles was an *ex post facto* argument some 150 years after the event, remembering that the first European colonies in North America commenced in 1606.

### **The Principal Apologist?**

Emmerich de Vattel is regarded as the principal apologist for the wholesale dispossession of many Indigenous peoples in the Americas and elsewhere. However, it is well to pause and ask whether Vattel argued for any gross extension to the classical doctrine of Occupation.

Monsieur Vattel argued that the classical doctrine of Occupation might be extended so that European nations with a burgeoning population under a want of land could acquire convenient locations for colonies in the New World territories. It was a novel extension of doctrine where a European nation for a burgeoning population with a want of land treated with or purchased from the 'wandering tribes' or 'erratic nations' with some of their lands unneeded a part of their territory. Vattel never condoned the acquisition of anything other than a part of the territory of these Erratic Nations, and certainly not the whole. It is doubtful also that Vattel's writings ever amounted to support for any *forced* dispossession of indigenous populations; rather, he recommended the method of treating with the Indians adopted in New England and Pennsylvania in the early 1600s.

The earth, as we have already observed, belongs to mankind in general, and was designed to furnish them with subsistence: if each nation had, from the beginning, resolved to appropriate to itself a vast country, that the people might live only by hunting, fishing, and wild fruits, our globe would not be sufficient to maintain a tenth part of its present inhabitants. We do not, therefore, deviate from the views of nature, in confining the Indians within narrower limits, However, we cannot help praising the moderation of the English Puritans who first settled in New England; who, notwithstanding their being furnished with a charter from their sovereign, purchased of the Indians the

land of which they intended to take possession. This laudable example was followed by William Penn, and the colony of Quakers that he conducted to Pennsylvania.<sup>140</sup>

His arguments reduce to the basal proposition that 'the establishment of many colonies on the continent of North America might, on their confining themselves within just bounds, be extremely lawful', and not to any wholesale dispossession of indigenous populations.

Vattel's *Les Droit de Gens* found a large English and post-Revolutionary American audience after its publication in English in 1797, and was largely influential, yet any doctrinal extension of Discovery/Occupation found little judicial or other support in the Imperial constitutional law or in the jurisprudence or practice of other European nations.

It must be remembered that Vattel's argument was in no sense authoritative in the emerging international law, merely the writings – and somewhat belated – of a respected jurist.<sup>141</sup> It was an opinion of a single jurist. Of such opinions, Lord Alverstone CJ stated:

The views expressed by learned writers on international law have done in the past, and will do in the future, valuable service in helping to create the opinion by which the range of the consensus of civilized nations is enlarged. But in many instances their pronouncements must be regarded rather as the embodiments of their views as to what ought to be, from an ethical standpoint, the conduct of nations inter se, than the enunciation of a rule or practice so universally approved or assented to as to be fairly termed, even in the qualified sense in which that word can be understood in reference to the relations between independent political communities, "law."<sup>142</sup>

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<sup>140</sup> Vattel, above n 99, s.208.

<sup>141</sup> The published opinion of eminent jurists, according to Amphlett JA in *R v Keyn (The Franconia)* (1876) 2 Exchequer Division 63, while they cannot make the law, can if there is found a practical unanimity or a great preponderance of opinion among them, it would afford weighty, and in many cases, conclusive evidence that their statement of the law had been received with the general consent of the civilized nations of the world.

<sup>142</sup> *West Rand Central Gold Mining Company, Limited v The King* [1905] 2 KB 391, 402.

Vattel's argument, therefore, whether as written or in its glossated form, did not amount to international 'law' in the mid-to-late 18<sup>th</sup> century, or subsequently.

### **Acceptance of Discovery/Occupation into English law**

England ebulliently joined with the other European nations in competition for the acquisition of the territories and the wealth-in-waiting in the New World and the evidence suggests that it abided by the international principles and practices in its pursuit of Empire.

### **Selden's *Mare Clausum***

In 1652 James Selden, in his thesis, *Mare Clausum*, wrote of the universality of the principles relating to the acquisition of these uninhabited territories and their place in the Imperial law:

But as for the rest, which neither are possessed in several, nor expressly held in common, that is which have continued vacant and desert, what shall we saie. It hath been truly a custom of old, and which hold's to this daie in the more eminent Nations, that Vacancies are his who apprehend's them by occupation; as wee use to saie of those wee call, *no man's Goods*. This appear's plain in the Imperial Law, nor do wee know of any Nation where it is not received.<sup>143</sup>

This is a correct statement of the international legal position. The Roman origins are clearly discernible, emphasising the parallel of the rule in personal property, and the universality (at least in the European discourse) of the application of the rule in international practice in respect of newfound, uninhabited territories. 'Vacancies', 'vacant and desert' and 'no man's' infers that there are no inhabitants to lay claim to the territory.

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<sup>143</sup> John Selden, *Of the Dominion, Or, Ownership of the Sea (Mare Clausum)* (Facsimile Edition, The Lawbook Exchange Ltd, Clark, New Jersey 2004 ed, 1652), 21. Original spelling maintained.

### The Privy Council decision of *Anonymous* (1722)

The case of *Anonymous*<sup>144</sup> in 1722 compounds this view. It is reported in a Memorandum by the Master of the Rolls 'to have been determined by the Lords of the privy Council, upon an appeal to the King in council from the foreign plantations', seemingly Barbados. It concerned the validity of a devise of land. In setting out the findings, the report canvasses two positions; firstly, where the King of England conquers a country, and by saving the lives of the people conquered gains property in such persons, upon whom he may impose such laws as he pleases. But until such laws 'are given by the conquering prince',

the laws and customs of the conquered country shall hold place; unless where these are contrary to our religion or enact anything that is *malam in se*, or are silent; for in which cases the laws of the conquering country shall prevail.<sup>145</sup>

The Report also addresses the situation of 'the new and uninhabited country, found out by English subjects'.<sup>146</sup> As the law is the birthright of every subject, wherever they go they carry their laws with them and therefore such new-found countries are to be governed by the laws of England. Being uninhabited and thus with no *lex loci*, after such countries were inhabited by English colonists, their laws go with them, but acts of Parliament made in England would not bind them without the legislation expressly nominating that foreign plantation. Following these principles, it was held that the *Statute of Fraud and Perjuries*, which required three witnesses in the testator's presence for a devise of land to be valid, did *not* extend to the colony of Barbados.

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<sup>144</sup> *Anonymous* 2 P WMS 75. Original spelling and capitals maintained.

<sup>145</sup> *Ibid.*

<sup>146</sup> *Ibid.*

## Royal Proclamation of 1763

In the wake of the first Treaty of Paris, which drew an end to the 7-year French and Indian War, King George III issued the *Royal Proclamation* of 1763. It sought to regulate relations in all British possessions in North America, not only the thirteen pre-Revolutionary British colonies, but including the large parcels of territory such as Quebec and the Florida territories which were ceded by France under the Treaty earlier that year.

Underpinning the *Royal Proclamation* are some general principles which the English Crown was adopting in its dealings with Indigenous populations.<sup>147</sup> First and foremost, the *Royal Proclamation* asserted sovereignty over nominated colonies in North America, yet the Preamble acknowledged:

[T]he several Nations or Tribes of Indians with whom We are connected, and who live under our protection, shall not be molested or disturbed in the Possession of such parts of Our Dominions and Territories as, not having been ceded to or purchased by Us, are reserved to them or any of them, as their Hunting Grounds.<sup>148</sup>

The document also forbade the Commanders-in-Chief of the colonies of Quebec, East Florida, West Florida and any other colony in America, to grant warrants of Survey or to pass patents for any lands 'not having been ceded to or purchased by Us'. The Royal Proclamation continued:

And We do hereby strictly forbid, on Pain of our Displeasure, all our loving subjects from making any Purchase or Settlements whatever, or taking Possession of any of the Lands above reserved, without our especial leave and Licence for the Purpose first obtained.

Moreover, it declared:

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<sup>147</sup> Fra Prucha, a leading authority on American Indian history, cites a legal opinion from Thomas Jefferson in 1792 evincing that in the juridical discourse of the day, the reconciling and refining of the indigenous and settler rights to land was ongoing: see Francis Paul Prucha, *American Indian Policy in the Formative Years* (University of Nebraska, 1970), 140.

<sup>148</sup> The relevant parts of the Royal Proclamation of 1763 are set out in Appendix III.

And Whereas Great Frauds and Abuses have been committed in purchasing Lands of the Indians, to the Great Prejudice of our Interests, and to the Great Dissatisfaction of the said Indians; In Order, therefore, to prevent such irregularities for the future, and to the end that the Indians may be convinced of our Justice and determined Resolution to remove all reasonable Cause of Discontent, We do, with the advice of our Privy Council, strictly enjoin and require, that no private person do presume to make any Purchase from the said Indians of any Lands reserved to the said Indians, within those parts of our Colonies where We have thought proper to allow Settlement; but that, if at any Time any of the said Indians should be inclined to dispose of the said Lands, the same shall be Purchased only for Us, in our Name, at some public Meeting or Assembly of the said Indians, to be held for that Purpose by the Governor or Commander in Chief of our Colony respectively within which they shall lie; [...].

### **Application of the Imperial Constitutional Law**

The principles concerning indigenous peoples and their territories formed part of the special branch of law that governed the Crown's relationship with its far-flung colonies,<sup>149</sup> this branch formally known as the Imperial Constitutional law,<sup>150</sup> commonly called the Colonial Law. Of these colonial law principles, Professor Brian Slattery has written:

The legal principles concerning aboriginal peoples developed at the same time as other doctrines of colonial law and shared essentially the same juridical character. Many of the basic tenets can be discerned as early as the seventeenth century in British practice in the American colonies. They emerge more fully developed during the next century and are reflected, if only partially, in the major Indian document of this era, the Royal Proclamation of 1763. Just as the eighteenth century colonial law harboured rules governing such matters as the constitutional status of colonies, the relative powers of the Imperial Parliament and local assemblies, and the reception of English law, it also contained rules concerning the status of native peoples living

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<sup>149</sup> Slattery, 'Understanding Aboriginal Rights', above n 17, 737.

<sup>150</sup> Brian Slattery, *The Land Rights of Indigenous Canadian Peoples, as affected by the Crown's Acquisition of their Territories* (D.Phil. Thesis, Oxford University, 1979), 35-6. ('Slattery, *Land Rights*').

under the Crown's protection, and the position of their lands, customary laws, and political institutions.<sup>151</sup>

### **Blackstone's *Commentaries on the Laws of England***

The continental discourse, and Selden and *Anonymous*, was largely adopted by Sir William Blackstone in his *Commentaries on the Laws of England*<sup>152</sup> published between 1765 and 1769.<sup>153</sup> The *Commentaries* was the first complete historical account of the development of English law and the first exposition of this body of law as an organised, coherent system of law.<sup>154</sup> In his chapter *Of Title by Occupancy*, Blackstone's *Commentaries* refer directly to the principle of *occupatio* and he correctly cites their classical source.

Occupation is the taking possession of those things, which before belonged to nobody. This, as we have seen, is the true ground and foundation of all property, or of holding those things in severalty, which by the law of nature, unqualified by those of society were common to all mankind. But, when once it was agreed that everything capable of ownership should have an owner, natural reason suggested, that he who could first declare his intention of appropriating anything to his own use, and, in consequence of such intention, actually took it into his possession, should thereby gain the absolute property of it according to that rule of the law of nations, recognized by the laws of Rome, *quod nullius est, id ratione naturali occupanti conceditur* (natural reason concedes ownership to the first occupier).<sup>155</sup>

The two prerequisites are maintained: there needs be a declaration of intention to possess, creating an inchoate right, and which right is perfected only if he 'actually took it into his possession'. Then an absolute sovereignty over and ownership of this territory (the *imperium* and the

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<sup>151</sup> Slattery, 'Understanding Aboriginal Rights', above n 17, 737.

<sup>152</sup> William Blackstone, *Commentaries on the Laws of England* (University of Chicago Press 1979, first published 1765–69 (Facsimile Edition of the Four Books published by The Clarendon Press in the period 1765–69)) ('Blackstone *Commentaries*').

<sup>153</sup> The quaintly named first volume, Book the First, of the *Commentaries*, *Of the Rights of Persons*, was published in November 1765, Book the Second, *Of the Rights of Things*, the following October: see Wilfrid Prest, *William Blackstone: Law and Letters in the Eighteenth Century* (Oxford University Press, 2008), 219.

<sup>154</sup> David M Walker, *The Oxford Companion to Law* (Oxford University Press, 1980), 136.

<sup>155</sup> Blackstone, *Commentaries*, above n 153, Book the Second, Chap. 16, 258.



*plenum dominion*) would pass to the Discoverer/Occupier. This passage is entirely consistent with the *Institutes* of Justinian, the treatment by subsequent glossators and the international legal developments.

This is, for Blackstone, 'according to the rule of the law of nations'.

Blackstone clearly states this principle and when settling the issue of what law is to govern in such a newly-found territory.

For it is held, that if an uninhabited country be discovered and planted by English subjects, all the English laws are immediately in force. For as the law is the birthright of every subject, so wherever they go carry their laws with them.<sup>156</sup>

Adopting the *dicta* in *Anonymous*,<sup>157</sup> the circumstance to which Blackstone refers is restricted to uninhabited territories. With no inhabitants in the territory, there was no extant system of law, and if the colonists were English, then the *lex loci* must be English law. English law, consonant with the situation of the infant colony, would sensibly be the undisputed *lex loci*. It was a rational and uncontroversial statement of principle, and any difficulty of application lay in relation to statute law to these distant plantations. Blackstone, again heeding the Memorandum by the Master of the Rolls in *Anonymous*, judiciously recognised this, stating:

But this must be understood with very many and very great restrictions. Such colonists carry with them only so much of the English law as is applicable to their new situation and to the condition of the infant colony.<sup>158</sup>

It is to be perfectly understood that Sir William Blackstone was referring to the reception of English law in an uninhabited territory. Blackstone was not speaking to the modes of acquisition of sovereignty of these newly-found territories, the mode of acquisition of territory being an antecedent issue to the question of the reception of law. Most importantly, he was *not*

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<sup>156</sup> Ibid, Book the First, 104-5.

<sup>157</sup> *Anonymous* 2 P WMS 75.

<sup>158</sup> Ibid Book the First, 107.

purporting to address the situation where such newly-discovered territories were inhabited. Explicitly, his discussion is restricted to uninhabited territories, and his expression of it is wholly consistent with the corpus of international principle developed to this point in time.

Sir William's position is galvanised beyond argument by later passages where he wrote:

Property in lands and movables being thus originally acquired by the first taker, which taking amounts to a declaration that he intends to appropriate the thing to his own use, it remains in him, by the principles of universal law, till such a time as he does some other act which shows his intention to abandon it: for then it becomes, naturally speaking, *publici juris* once more, and is liable to be again appropriated by the next occupant.<sup>159</sup>

#### **Pristine societies residing in a state of nature**

When speaking of pristine societies residing in a state of nature and their territories, Blackstone, again adopting much of the continental discourse, stated:

Thus the ground was common, and no part of it was the permanent property of any man in particular; yet whosoever was in the occupation of any determined spot of it, for rest, for shade, or the like, acquired for the time a sort of ownership, from which it would have been unjust and contrary to the law of nature, to have driven him by force; but the instant that he quitted the use or occupation of it, another might seize it, without injustice.<sup>160</sup>

This Arcadian society Blackstone envisages here owes much to the classical imagination.<sup>161</sup> Echoes of the continental discourse are clearly heard, particularly the writings of von Wolff and Vattel. The passage last quoted

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<sup>159</sup> Ibid Book the Second, Chapter the First, 9.

<sup>160</sup> Ibid Book the Second, 3. This passage bears a strong resemblance to the passage of von Wolff's quoted earlier at page 75.

<sup>161</sup> Henry Reynolds, *The Law of the Land* (Penguin, 2nd ed, 1992), 27 ('Reynolds, *The Law of the Land*'). Indeed, Blackstone mentions in his preface to these remarks, 'the state of primeval simplicity: as may be collected from the manners of the American nations' and 'the memorials of [the first Europeans] preserved in the golden age of the poets', above n 153, Book the Second, 3.

envisages both common or communal property and individually-held property. The right to individual property rested in the occupier whilst in occupation: the Law of Nature protecting the temporary tenure. But this individual tenure was temporary and, when abandoned, could be assumed by another without injustice. Yet what of the communally-held ground; might that, too, be seized without injustice? To this question Sir William Blackstone had an answer 'according to the rule of the law of nations'.

**'according to the rule of the law of nations'**

In the above-quoted passages, Sir William draws heavily on the international discourse and practice. He explicitly refers to the sources of these principles as 'according to the rule of the law of nations' recognised in the Roman law, and 'the principles of universal law'. And, these passages are not his final statements on these important issues, as he then moves the discussion, in the same volume of the *Commentaries*, from the classical vision of wandering families to the actual situation of colonising.

Plantations or colonies, in distant countries, are either such where the lands are claimed by right of occupancy only, by finding them desart and uncultivated, and peopling them from the mother-country; or where, when already cultivated, they have been either gained by conquest, or ceded to us by treaties. And both these rights are founded upon the law of nature, or at least upon that of nations.<sup>162</sup>

These 'plantations' are in Blackstone's dichotomy, 'desart and uncultivated' or 'already cultivated'. The term 'desart', an ancient form of 'desert', is here used by Blackstone, not to mean an area of little or no vegetation but to mean an uninhabited – or if once inhabited, now deserted – territory.<sup>163</sup>

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<sup>162</sup> Blackstone *Commentaries*, above n 153, Book the First, 104.

<sup>163</sup> The continental jurists, principally Grotius and de Vattel, likewise used the term, but the 'desart' spelling fell into desuetude in the discourse by the early 1800s.

For Blackstone, there were two species of plantation, the uninhabited and the inhabited.<sup>164</sup> In the former, the lands are claimed by 'right of occupancy', whilst the latter, already inhabited, need to be gained either by conquest and/or cession. Both of these 'rights', that is, the 'right of occupancy' and that of conquest/cession, in Blackstone's view, 'are founded upon the law of nature, or at least upon that of nations'.

Speaking directly of Great Britain's American colonies, he wrote:

*Our American plantations are principally of this latter sort, being obtained in the last century either by right of conquest in driving out the natives (with what natural justice I shall not at present inquire) or by treaties.*<sup>165</sup>

It is clear from his parenthesised disclaimer that Sir William *would* inquire into the natural justice of driving out 'the natives', but that he was deferring his discussion.

### **Ground not occupied by 'other tribes'**

It is in Book the Second of the *Commentaries* that Sir William Blackstone returns to address the acquisition of territory in the international law. Citing first the Book of *Genesis*, where the division of territories was necessary to resolve the conflict for grazing land in the exodus from Egypt – Lot chose the Plain of Jordan leaving Abraham the Land of Canaan – Blackstone reasoned that this 'plainly implied an acknowledged right, in either, to occupy whatever ground he pleased, that was not pre-occupied by other tribes'.<sup>166</sup> Blackstone wrote:

Upon the same principle was founded the right of migration, of sending colonies to find new habitations when the Mother Country was overcharged with inhabitants; which was practiced

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<sup>164</sup> See Bayne, above n 15, 115.

<sup>165</sup> Blackstone, *Commentaries*, above n 153, Book the First, 105. Emphasis added.

<sup>166</sup> Blackstone, *Commentaries*, above n 153, Book the Second, Chapter the First, 7.

as well by the Phaenicians and Greeks, as [well as] the Germans, Scythians, and other northern people.<sup>167</sup>

Then he returns to the parenthesised aside he made in Book the First in which he discussed the reception of laws in the colonies, stating:

And, so long as it was confined to the stocking and cultivation of desert uninhabited countries, it kept strictly within the limits of the law of nature. But how far the seising of countries already peopled and driving out and massacring the innocent and defenceless natives, merely because they differed from the invaders in language, in religion, in customs, in government or in colour; how far such a conduct was consonant to nature, to reason, or to Christianity, deserved well to be considered by those who have rendered their names immortal by thus civilizing mankind.<sup>168</sup>

The obvious passion of Blackstone's expression cannot be doubted. The seizing of countries already peopled by 'defenceless natives' was, to Sir William Blackstone, contrary to the law of nature.<sup>169</sup>

Blackstone does not, however, then attempt to state the general principles that governed the circumstances he is here addressing – the acquisition of the territories of indigenous populations by the European nations – *nor does he attempt to state any resolution*. This is not an oversight of the *Commentaries* because, quite simply, the principles were seminal within the Imperial constitutional law, the *Royal Proclamation of October 7, 1763* being the most complete rendition of the relevant principles.<sup>170</sup> The emergent international

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<sup>167</sup> Ibid.

<sup>168</sup> Ibid.

<sup>169</sup> There is reason to suspect that Blackstone was herein principally railing against the Spanish colonising practices in the New World. Spain, the subject of the fabled *La Leyenda Negra* (or the Black Legend), Felix Cohen argues that Spain was no worse than other European powers in its colonising practices and was the subject of what we would today style 'a bad press': see Cohen, 'The Spanish Origin', above n 108.

<sup>170</sup> Slattery, above n 17, 737.

law, too, did not address such issues with any detail under either the rubric of Cession or Conquest.<sup>171</sup>

Blackstone's citation of English authority in this discussion is justifiably scarce, and the references tangential, because he had so little precedent from which to draw. The extant English case law said very little on the issues to be addressed, *Anonymous* allowing only two clean scenarios, the Conquest of occupied territory or the Occupation of uninhabited territory. And the cases called into discussion regularly in the acquisition of territory discourse, *Calvin's case*<sup>172</sup> and *Campbell v Hall*,<sup>173</sup> dealt with the principles of Conquest following warfare and so were of very limited assistance to the issues calling for resolution.

### **Blackstone and New Holland**

Blackstone's Book the First was published in November 1765, Book the Second in October 1766.<sup>174</sup> Sir William was writing at a time when North America was being actively colonised by Great Britain, France and Spain. Blackstone was also mindfully writing in the wake of the *Royal Proclamation of 1763*, the purpose of which was to consolidate His Majesty's colonial possessions in North America and to stabilise relations with its indigenous Amer-Indian peoples.

At this time, in the mid-1760s, New Holland was well known to European nations, albeit not in full continental outline. And, although various European powers had made 'discoveries', some making claims of

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<sup>171</sup> The force of these statements cannot be underestimated as the *Commentaries on the Laws of England* was easily the most revered legal work of the time in England and, indeed, the common law world, which included the once-British north American colonies. Although somewhat difficult to contemplate nowadays, the publication of Blackstone's *Commentaries* was a runaway best-seller by then existing standards, it being the first work to attempt to treat English Law as a coherent corpus of principle.

<sup>172</sup> 77 ER 377.

<sup>173</sup> *Campbell v Hall* [1558–1774] All ER Rep 252.

<sup>174</sup> See Prest, William Blackstone, above n 153, 219.

possession, no settlement was attempted.<sup>175</sup> At the time of instructing Lt Cook in Secret Additional Instructions, dated July 1768, the fundamental principles of Discovery/Occupation were wholly accepted and aligned in the both the international law and the Imperial constitutional law.

Foremost of these principles was that Discovery/Occupation, as a mode of acquisition, applied only to uninhabited territories. It can be asserted confidently that the three principal means of the lawful acquisition of territory 'according to the rule of the law of nations', and adopted by Blackstone's in his *Commentaries*, were Conquest, Cession and Discovery/Occupation.<sup>176</sup> These are set out in Figure I-1.

**Figure I-1 Relevant Modes and their Consequences of Acquisition in International Law and the Imperial Constitutional Law (circa mid-1760s)**

Mode	Inhabited	Sovereignty	Laws	Land title
Discovery/Occupation	No	An original <i>Imperium</i>	Law of the discoverer as the <i>lex loci</i> (as the only law)	An immediate <i>plenum dominion</i>
Conquest	Yes	Change, a derivative <i>Imperium</i>	Remain as is, unless changed by conqueror	Remain as is, unless changed by conqueror
Cession	Yes	Change, a derivative <i>Imperium</i>	Remain as is, yet subject to terms of any cession	Remain as is, yet subject to terms of any cession

<sup>175</sup> By the time of British arrival in New Holland in 1788, the *Commentaries* of Sir William Blackstone had had many printings: see Wilfred Prest (ed), *Blackstone and Biography in Blackstone and his Commentaries* (Hart Publishing, 2009), 9.

<sup>176</sup> Prescription and Accretion are not presently relevant.

Into the late 18<sup>th</sup> century, there was no perceptible movement in the international law or in the Imperial constitutional law. However, the American Revolutionary War occurred soon after and King George III lost his North American territories, other than modern-day Canada. That fracture created another important source of law in the post-Independence United States, the United States Supreme Court. It was a creative jurisprudence because, although the general principles relating to the Crown and indigenous peoples were writ large in the pre-Revolutionary Imperial constitutional law by the *Royal Proclamation of 1763*, the detail had to be addressed. It is to the post-Independence jurisprudence of the United States Supreme Court to which we must now turn, particularly that of the early years of the 19<sup>th</sup> century.

### **The Post-Independence American jurisprudence**

The United States Supreme Court was called upon early in its history to address the issues that concern this thesis. A chain of suits beset the Court in the early 19<sup>th</sup> century that called for principled guidance on the respective rights of the indigenous societies and the immigrant Europeans. Chief Justice John Marshall headed that Court in these years and set the modern legal foundation stones for the accommodation of these competing interests. This resolution of interests, a political compromise of enormous proportion, and which gives rise to legally enforceable rights, has been styled the doctrine of aboriginal rights.<sup>177</sup> There are three broad aspects of this doctrine: the question of title to aboriginal lands, the sovereignty of the indigenous peoples found in occupation of these lands, and the jural relationship between these indigenous peoples and the immigrant European society. These aspects will be discussed separately, the property

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<sup>177</sup> Slattery, above n 17, 732 and 736-7.



rights of the indigenous possessors being first canvassed, but only to the extent of elucidating the broader principles.

### **Indian title as a property interest**

Five decisions between 1810 and 1835 provide the subsequent American common law basis of the legal framework between the indigenous Indians and the United States. Three, however, those of *Fletcher v Peck* (1810),<sup>178</sup> *Johnson and Graham's Lessee v M'Intosh* (1823)<sup>179</sup> and *Worcester v Georgia* (1832),<sup>180</sup> are of particular relevance to an early exegesis of the 'Indian title'<sup>181</sup> as a cognisable property right in the seminal years of the post-Independence United States common law.<sup>182</sup>

In *Fletcher v Peck*<sup>183</sup> the issue turned on the power of the State of Georgia to grant a seisin-in-fee interest in certain lands with Indian occupants. It was the nature of the Indian interest in land which was at issue. The defendant argued that Indian possession did not constitute a right of property in the Anglo-American common law, Indian title being 'a mere occupancy for the purpose of hunting', 'not true and legal possession',<sup>184</sup> but a 'mere privilege'.<sup>185</sup> Reaching into the von Wolff/Vattellian discourse, he contended that Indian title 'is not like our tenures; they have no idea of a

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<sup>178</sup> *Fletcher v Peck* (1810) 6 Cranch 87 (USSC).

<sup>179</sup> *Johnson and Graham's Lessee v M'Intosh* (1823) 8 Wheaton 543 (USSC) (commonly cited as *Johnson v M'Intosh* or *Johnson v McIntosh*).

<sup>180</sup> *Worcester v Georgia* (1832) 6 Peters 515 (USSC).

<sup>181</sup> In the North American discourse, native title is styled commonly *Indian title* or, sometimes, *aboriginal* title.

<sup>182</sup> The other two decisions, of greater relevance to governmental rights, are *Cherokee Nation v State of Georgia* (1831) 5 Peters 1 (USSC) and *Mitchel v United States* (1835) 9 Peters 711 (USSC). These decisions are discussed below.

<sup>183</sup> (1810) 6 Cranch 87 (USSC).

<sup>184</sup> *Ibid* 122.

<sup>185</sup> *Ibid* 123.

title to the soil itself. It is overrun by them, rather than inhabited'.<sup>186</sup>

Additionally, it was argued:

The rights of governments are allodial. The Crown of Great Britain granted lands to individuals, even while the Indian claim existed, and there has never been a question respecting the validity of such grants. When the claim was extinguished, the grantee was always admitted to have acquired a complete title.<sup>187</sup>

The John Marshall-led Court, approaching the question of the aboriginal title to the soil for the first time, eschewed the issue, cautiously and ambiguously stating:

The majority of the court is of the opinion that the nature of the Indian title, which is certainly to be respected by all courts, until it be legitimately extinguished, is not such as to be absolutely repugnant to seisin in fee on the part of the state.<sup>188</sup>

The next case, *Johnson v M'Intosh*,<sup>189</sup> contains the early *locus classicus* of the legal principles surrounding aboriginal title. The plaintiff was the successor-in-title of certain lands purchased from Indian vendors, the lands at that time being within the then British colony of Virginia. The defendant, M'Intosh, later purchased the same lands from the post-Revolutionary United States Government, Virginia being ceded to the newly-sovereign United States in the *Treaty of Paris (1783)* in the meantime.

The plaintiff, to uphold his chain of title, argued that the Indians had a right of property in the soil and, concomitantly, the right to alienate such title. To the contrary, M'Intosh argued that the discovery by and

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<sup>186</sup> Ibid 122.

<sup>187</sup> Ibid. One commentator has noted that these same arguments are still invoked: see John Hurley, 'Aboriginal Rights, The Constitution and the Marshall Court' (1982–83) 17 *Revue Juridique Themis* 403, 413. The argument of Davies QC, Solicitor-General for Queensland, in his submissions in the *Mabo (No 2)* litigation, was that after the assertion of sovereignty by the Colony of Queensland the Crown acquired not merely the *imperium* but also an immediate *plenum dominion*. The Meriam People therefore retained no title or rights but became mere licencees, removable at the will of the Crown, and who could have 'lawfully been driven into the sea': see *Mabo (No 2)*, Transcript of Proceedings, 30 May 1991, 280.

<sup>188</sup> (1810) 6 Cranch 87, 142 (USSC).

<sup>189</sup> *Johnson and Graham's Lessee v M'Intosh* (1823) 8 Wheaton 543 (USSC).

occupation of Virginia vested the European nation with both territorial sovereignty *and* an absolute property in the soil, that is the *imperium* and a *plenum dominion*. Any prior rights of property in the Indian occupants was thus annulled or extinguished. Great Britain had ceded sovereignty to the United States, and his title, granted by the United States, was therefore valid.

Although fractured from the common law in 1783, the United States legal system still drew upon common law sources in its early period.<sup>190</sup> Until the publication of the first edition of 4 volumes of Chancellor Kent's *Commentaries on the American Law* (1826–30), the *Commentaries* of Sir William Blackstone held overwhelming credence.<sup>191</sup> Yet the USSC could not draw on Blackstone because, as shown above, the *Commentaries* are of so little assistance to the preliminary issue as to the technical mode of acquisition of sovereignty over New World territories already inhabited by indigenous peoples. Blackstone, writing more than 50 years earlier, did not address

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<sup>190</sup> The first American edition of Blackstone's *Commentaries on English Law* was published in 1771–72. In the period anterior to the Revolution and into the early 19<sup>th</sup> century, English law, and in particular the work of Blackstone, was still a very considerable force in the jurisprudential make-up of the American colonies: see Laurence M Friedman, *A History of American Law* (Simon & Schuster, 2nd ed, 1985). At 112, Friedman states:

As a practical matter, English law continued to be used by lawyers and courts, throughout the period, throughout the country. England remained the basic source of all law that was not new or strictly American. The habits of a lifetime were not easily thrown over, despite ideology. Indigenous legal literature was weak and derivative. There was no general habit of publishing American decisions; American case reports were not common until a generation or so after Independence. To common-law lawyers, a shortage of cases was crippling. To fill the gap, English materials were used, English reports cited, English judges quoted as authority. In the first generation, more English than American cases were cited in American reports.

<sup>191</sup> *Ibid*, where the author writes: 'Ordinary lawyers referred to [the *Commentaries* of] Blackstone constantly; they used his book as a shortcut to the law; and Blackstone was English to the core. Sometimes curiously old-fashioned bits of law – phrases, old doctrines, old writs – turned up in curious places; the reason was the ubiquity of Blackstone.' Likewise, in *Alden v Maine* 527 US 706, 715 in 1999, the US Supreme Court described Sir William Blackstone's work as constituting 'the pre-eminent authority on English law for the founding generation'.

that issue beyond stating that the seizing of their territories was contrary to the Law of Nature<sup>192</sup> and condemning 'the driving out and massacring the innocent and defenceless natives'. The US Supreme Court was thus left to approach the issue largely without judicial precedent or commentary, aware, however, that the principled resolution had begun with the *Royal Proclamation of 1763*.

In the chapeau to his judgment,<sup>193</sup> Chief Justice Marshall described the course of events in the European colonisation of North America.

European policy, numbers and skill, prevailed. As the White population advanced, that of the Indian necessarily receded. The country in the immediate neighbourhood of agriculturists became unfit for them. The game fled into thicker and more unbroken forests, and the Indians followed. The soil, to which the Crown originally claimed title, being no longer occupied by its ancient inhabitants, was parcelled out according to the will of the sovereign power, and taken possession of by persons who claimed immediately from the crown, or mediately, through its grantees or deputies.<sup>194</sup>

It was difficult to ascribe a legitimate mode of acquisition known to the extant international legal discourse of the time that correctly described this European colonisation of North America principally by the English on the east coast, but including the Spanish and French acquisitions there in the 16<sup>th</sup> and 17<sup>th</sup> centuries. This European colonisation was not any 'pure' acquisition mode known to international law or practice. It was not Conquest, or Cession or Discovery/Occupation. Rather, it was a hybrid mode of annexation which had yet to be identified as any distinct mode of

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<sup>192</sup> Blackstone *Commentaries*, above n 153, Book the Second, 7. This point will be addressed in the discussion of *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141 in Chapter III.

<sup>193</sup> (1823) 8 Wheaton 543 (USSC). This is not dissimilar to that complained of by the indigenous inhabitants of New Holland. See, for example, the diary entry of the Port Phillip Protector, William Thomas, in 1841: "The blacks this morning very dissatisfied, and talk much about 'no good white men take away country, no good bush, all white men sit down, go go kangaroo"; quoted in Henry Reynolds, *Aboriginal Land Rights in Colonial Australia*, Occasional Lecture Series No 1 (Canberra: National Library of Australia, 1988), 14.

<sup>194</sup> *Ibid* 590-1.

acquisition in the international law. It resembled, in part, the 'abandonment' scenario spoken of by Grotius and Vattel, where the indigenes abandoned their territories in the face of European civilisation, thus creating territory that was *terra derelicti*. This abandonment by the indigenous peoples was less than wistfully classical; it was sometimes attended by war, frontier violence, and largely by force or necessity. The 'policy, numbers and skill' of the Europeans prevailed. The Discovery/Occupation principles were of some relevance, as were the principles of Conquest, and moreover, the most common means of settling these territorial disputes, even in the pre-Revolutionary period, was the purchase or cession of such territories from the mostly much-weakened Amer-Indian peoples.<sup>195</sup>

In the absence of established legal principle to govern the issues, the United States Supreme Court was called upon to forge principles suitable to these historical circumstances. The Court was to reach into the English common law, the Imperial constitutional law and the writings of the European publicists, to begin to assemble a body of coherent principle. Of the respective rights of the Europeans and the Indians, Marshall CJ stated:

On the discovery of this immense continent, the great nations of Europe were eager to appropriate to themselves so much of it as they could respectively acquire. [...] But, as they were all in pursuit of nearly the same object, it was necessary, in order to avoid conflicting settlements and consequent war with each other, to establish a principle which all should acknowledge as the law by which the right of acquisition, which they all asserted, should be regulated as between themselves. This principle was that discovery gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments, which title might be consummated by possession.

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<sup>195</sup> See generally Felix S Cohen, 'Original Indian Title' (1947) 32 *Minnesota Law Review* 28 ('Cohen, Original Indian Title'), and James Kent, *Commentaries on the American Law* (Clayton, 2<sup>nd</sup> ed, 1832), Volume III.

The exclusion of all other Europeans, necessarily gave to the nation making the discovery the sole right of acquiring the soil from the natives, and establishing settlements upon it. It was a right with which no Europeans could interfere.<sup>196</sup>

This statement was the conflation of centuries of intellectual discourse. The ancient principles of Discovery/Occupation were applied in respect of newly-discovered *inhabited* territories but with obvious necessary qualifications. The European nations had adopted the principle, as a regulation amongst each other, the title went to the discovering nation against all other European nations. However, the discovery, consistent with the ancient Roman source of the principles, must be perfected by actual occupation by the discovering nation. Importantly, this 'title' the Discovering/Occupying Crown obtained was the right, *inter se* other European powers, to assert territorial sovereignty. As to the effect on aboriginal sovereignty, the Chief Justice stated:

In the establishment of these relations, the rights of the original inhabitants were, in no instance, entirely disregarded; but were necessarily, to a considerable extent, impaired. They were admitted to be the rightful occupants of the soil, with the legal as well as just claim to retain possession of it, and to use it according to their own discretion; but their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will to whomsoever they pleased, was denied by the original fundamental principle that discovery gave exclusive title to those who made it.<sup>197</sup>

The aboriginal title to the soil was respected yet with the indigenous peoples restricted in that the right of acquiring their rights of real property as original inhabitants, a right of pre-emption vested exclusively with the relevant Crown. Their aboriginal title was a 'legal as well as just' title of the indigenous peoples to retain possession of their lands and use their lands

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<sup>196</sup> (1823) 8 Wheaton 543, 574 (USSC). The Chief Justice would later write that the principle was 'acknowledged by all Europeans, because it was the interest of all to acknowledge it': see *Worcester v State of Georgia* (1832) 6 Peters 515, 544 (USSC) and the discussion following.

<sup>197</sup> *Ibid* 593.

according to their own discretion – seemingly the equivalent to a seisin-in-fee to adopt the American terminology – but burdened by the Crown's right of pre-emption.

In other words, the sovereignty (or radical) title was acquired by the Crown according to the principle of Discovery; it was subject only to the aboriginal title of the indigenous inhabitants who could alienate this title to only that Crown.<sup>198</sup> And while the *external* sovereignty of the Indian peoples was denied, they each retained an *internal* autonomy to manage their own affairs. Their inherent sovereignty, which was not denied, was not extinguished but was necessarily diminished.

In 1832, the US Supreme Court had occasion to further articulate this inter-societal resolution in *Worcester v State of Georgia*.<sup>199</sup> In that decision the following celebrated passage appears.

America, separated from Europe by a wide ocean, was inhabited by a distinct people, divided into separate nations, independent of each other and of the rest of the world, having institutions of their own, and governing themselves by their own laws. It is difficult to comprehend the proposition that the inhabitants of either quarter of the globe could have rightful original claims of dominion over the inhabitants of the other, or over the lands they occupied; or that the discovery of either by the other should give the discoverer rights in the country discovered which annulled the pre-existing rights of its ancient possessors.<sup>200</sup>

There could be no annulment of the pre-existing property rights of the indigenous peoples under the principles of Discovery/Occupation. That the allodial rights to the land of 'its ancient possessors' were not to be denied was stressed by the Court.

This principle, acknowledged by all Europeans, because it was the interest of all to acknowledge it, gave to the nation making the discovery, as its inevitable consequence, the sole right of acquiring

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<sup>198</sup> Ibid 592.

<sup>199</sup> (1832) 6 Peters 515 (USSC).

<sup>200</sup> Ibid 542-3.

the soil and of making settlements upon it. It was an exclusive principle, which shut out the right of competition among those who agreed to it; *not one which could annul the previous rights of those who had not agreed to it.* It regulated the right given by discovery among the European discoverers but could not affect the rights of those already in possession, either as aboriginal occupants, or as occupants by virtue of a discovery made before the memory of man.<sup>201</sup>

This aboriginal title was later considered by the US Supreme Court to be as sacred to the Indian occupants as the fee simple to the European immigrants,<sup>202</sup> amounting to a full beneficial interest in their lands. This proprietary interest of the aboriginal inhabitants could not be denied; there was a mere and necessary derogation of that right in one vital respect, the right of alienation lay solely to the European power asserting the principles of Discovery/Occupation.

### **Domination**

This then was the skeletal drafting of the resolution of this intersection of societies. In effect, it was the recognition of another mode of the acquisition of territory sovereignty, a hybrid of the other modes of acquisition, with elements of conquest, occupation and cession, which might be called Domination.

### **European sovereignty versus Indigenous sovereignty**

The second broad aspect of this Domination mode is the principle, already alluded to in the above discussion, and integral to the symmetry of the compromise which the doctrine of aboriginal rights represents: that, although the external sovereignty of the Indian nations was circumscribed, the aboriginal peoples were accorded a measure of residual sovereignty. This concept found expression as a 'domestic dependent nationhood'. Its clearest enunciation is in the already-introduced case of *Worcester* and that

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<sup>201</sup> Ibid 543-4. Emphasis added.

<sup>202</sup> *Mitchel v United States* (1835) 9 Peters 711, 746 (USSC).



of *Cherokee Nation v State of Georgia*.<sup>203</sup> In this latter decision, the State of Georgia sought to enact legislation seizing the lands of the Cherokee Nation and nullifying their political structures. The US Supreme Court denied its own jurisdiction to adjudicate the claim by the Cherokee Nation which had sought an injunction to prevent the legislation from being enacted.<sup>204</sup>

In *obiter*, Marshall CJ stated:

The Indian nations have always been considered as distinct, independent, political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial, with the single exception of that imposed by irresistible power, which excluded them from intercourse with any other European potentate than the first discoverer of the coast of the particular region claimed; [...].

The Cherokee Nation, then, is a distinct community occupying its own territory, with boundaries accurately described in which the laws of Georgia can have no force, and which the citizens of Georgia, have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of [C]ongress. The whole intercourse between the United States and this [Cherokee] nation is, by our constitutions and laws, vested in the government of the United States.<sup>205</sup>

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<sup>203</sup> (1831) 5 Peters 1 (USSC).

<sup>204</sup> This decision must be viewed in the light of the constitutional framework of the United States of America. The US Constitution does not contain any express statement as to governmental authority of the affairs of its indigenous peoples. However, the Commerce Clause, though a tangential reference, can be construed as adding weight to the view arrived at by the US Supreme Court. Article I, § 8, Clause 3 grants jurisdiction to Congress to 'regulate Commerce with foreign nations, and among the several States, and with the Indian Tribes'. The Supremacy Clause also adds cogency to the position adopted by the Court. Article VI states, *inter alia*, that: 'This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; [...].'

<sup>205</sup> 6 Peters 515, 559 (USSC).

The same passage stressed that the language used, and the treaty process adopted in political intercourse with the Indians, raised a strong inference of independent statehood.<sup>206</sup> It continued:

[T]he settled doctrine of the law of nations is, that a weaker power does not surrender its independence – its right to self government, by association with a stronger power, and taking its protection. A weak state, in order to provide for its safety, may place itself under the protection of one more powerful, without stripping itself of the right of government, and ceasing to be a state.<sup>207</sup>

Cohen's *Handbook of Federal Indian Law* stated that the *Worcester* decision held: 'that the political existence of the tribes continued after their relations with both the states and the federal government'.<sup>208</sup> The authoritative work continued:

As a consequence of the tribes' relationship with the federal government, tribal powers of self-government are limited by federal statutes, by the terms of treaties with the federal government, and by restraints implicit in the protectorate relationship itself. In all other respects the tribes remain independent and self-governing political communities.<sup>209</sup>

The Court also stated:

Though the Indians are acknowledged to have an unquestionable, and, heretofore, unquestioned right to the lands they occupy, until that right shall be extinguished by a voluntary cession to our government; yet it may well be doubted whether those tribes which reside within the acknowledged boundaries of the United States can, with strict accuracy, be denominated foreign nations. They may, more correctly, perhaps, be denominated domestic dependent nations. [...] They and their country are considered by foreign nations, as well as by ourselves, as being so completely under the sovereignty and domination of the United States, that any attempt to acquire their lands, or to form a political connection with them,

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<sup>206</sup> Ibid 559-60.

<sup>207</sup> 6 Peters 515, 560 (USSC).

<sup>208</sup> Felix S Cohen, *Handbook of Federal Indian Law* (The Michie Company, 1982), 235 (hereinafter Cohen, '*Handbook of Federal Indian Law*').

<sup>209</sup> Ibid. From a public policy perspective, the unscrupulous private seizure of land from the indigenous inhabitants could be avoided and the substantial cause for indigenous discontent truncated.

would be considered by all as an invasion of our territory and an act of hostility.<sup>210</sup>

The external aspect of the inherent sovereignty of the Cherokee Nation was thus expressly denied. Territorial sovereignty, or *imperium*, lay with the federated United States of America. The lawful basis was not sheeted home to any extant mode of acquisition in the international law and practice but seemed to be grounded in the reason offered in *Johnson v M'Intosh*,<sup>211</sup> that European policy, numbers and skill prevailed over a period of time so as to dominate the indigenous peoples. There was not the one act of conquest or cession or settlement at a single moment in time by which territorial sovereignty was gained; the acquisition was truly a process of 'domination' over a period of time. But the *imperium* which was obtained through a process of domination was imperfect – *because the sovereignty (or radical title) was derivative and not an original title*. Indian societies were a partial source of this ultimate title as the loss of an aspect of their sovereignty contributed to the ultimate title now held by the European immigrants. The sovereignty concept thus had to suffer an internal division. A residual, but necessarily qualified, internal sovereignty was upheld as being possessed by the Cherokee Nation. This can be understood by the Latin phrase *imperium in imperio*, an independent authority within the domination of another authority, autonomous yet dependent.

The Indian Nations were autonomous entities, yet, at the same time, dependent communities.<sup>212</sup> The dependent nature of the Indian Nations was stressed in *Cherokee Nation v State of Georgia*.<sup>213</sup> In so doing, the Court

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<sup>210</sup> (1831) 5 Peters 1, 17-8 (USSC).

<sup>211</sup> (1823) 8 Wheaton 543 (USSC).

<sup>212</sup> The contradictory nature of the status of the Indian Nations has often been emphasised but they differ little from the position of federated states.

<sup>213</sup> (1831) 5 Peters 1 (USSC).

also laid the legal framework for the special relationship which exists between the US Government and the Indian peoples, that of guardian and ward, which gives rise to trust-like or fiduciary-like duties on the part of the government of the United States.

They [the Cherokee Nation] occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases. Meanwhile they are in a state of pupillage. Their relation to the United States resembles that of a ward to his guardian.

They look to the government for protection; rely upon its kindness and its power; appeal to it for relief to their wants; and address the president as their great father.<sup>214</sup>

This case must be read in conjunction with the second authority in this chain, *Worcester*, where the independent nature of the Indian societies was emphasised.

The Domination mode, as an accommodation of competing sovereignty and territorial rights, was simple and efficacious. Synoptically, it had three key elements: an aboriginal title, a residual internal sovereignty and the special protectorate relationship. It worked both externally and internally. Ultimate title was assumed by the European power and it was valid *inter se* against other European nations. The Indian peoples retained a qualified residual internal sovereignty, but the external aspect of their inherent sovereignty was annulled. The pre-existing aboriginal title to their territories was upheld with a burden: should the Indians seek to alienate their interest in the lands, that aboriginal title necessarily flowed to the Crown under a right of pre-emption. The aboriginal title thus was irreversibly drawn into the dominant tenurial system, and devolved to the US Government.

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<sup>214</sup> (1831) 5 Peters 1, 17-8 (USSC).

### **An illustration**

The classic illustration of the operation of the internal division is the *Louisiana Purchase* when the US Government privately purchased the vast Louisiana Territory from Napoleon I of France in 1803.<sup>215</sup> The ultimate title or *imperium* – often equated with sovereignty *inter se* nation states – was ceded by the French Emperor for \$US15 million. The US Government then paid twenty times that sum to the Indian Nations for the surrender of their aboriginal title, thus acquiring the *plenum dominion*.<sup>216</sup> Moreover, by reason of the qualifications placed on the Indian societies, a special protectorate relationship sprang from this inter-societal arrangement.

### **An inherent sovereignty in the indigenous peoples**

There was no question in the early Marshall-led precedents that the aboriginal title and sovereignty of the Indian peoples was other than allodial; in other words, that these rights of property and government of the indigenous peoples were not derived from European sources. These rights obviously had to be recognised in the European legal system to be capable of enforcement in that system but this recognition was *prima facie* evidenced by the fact of self-sustaining indigenous societies inhabiting defined territories governed by their own traditional laws and customs.

By 1830 then, it is argued that there was recognition in the law of nations that a new mode of acquisition, here conveniently called Domination, had been, and was, being utilised in the New World. Figure I-2 shows this new mode of acquisition contrasted with Discovery/Occupation.

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<sup>215</sup> This 'Louisiana Territory' was a vast swathe of territory in central North America, from the present state of Louisiana on the Gulf of Mexico, through present-day Idaho, Utah, Nebraska and up to the Dakotas and Montana on the Canadian border.

<sup>216</sup> See Cohen, 'Original Indian Title', above n 195, 37-38.

**Figure I-2 Occupation in contrast to Domination**

<b>Mode</b>	<b>Inhabited</b>	<b>Sovereignty</b>	<b>Laws</b>	<b>Land title</b>
Discovery/ Occupation	No	Original <i>imperium</i>	Law of the discoverer is the <i>lex loci</i> (as the only law)	An immediate <i>plenum dominion</i>
Domination	Yes	Change of <i>imperium</i> but an internal sovereignty remains with the Indigenous peoples (as <i>imperio in imperium</i> )	Remain as is, yet with an overarching legal order	Remain as is, yet with an overarching 'radical' title to land and a right of pre-emption in the Crown/Government to acquire the <i>plenum dominion</i>

**Reliance by US Supreme Court decisions on colonial principles/practice**

The US Supreme Court had not been wholly creative in their task as the principles upon which the doctrine of aboriginal title is based were not novel in any real sense. The synthesis had its roots in hard-headed colonial principles and practice which purported to reconcile the competing interests of the immigrant and the indigenous peoples. As we have seen, the US Supreme Court relied upon principles of a traceable ancestry of some 1500 years, with Spanish juristic thought holding an especial place in that development.<sup>217</sup> The *Royal Proclamation of 1763* also sowed the elements of the resolution.

Whilst the US Supreme Court does not nominate when exactly this Domination mode of acquisition was accepted into the international law

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<sup>217</sup> For the historical argument of this, see Cohen, 'The Spanish Origin', above n 108.

and practice, joining Conquest, Cession and Discovery/Occupation as a legitimate means of acquiring sovereignty over territory, it was seemingly of long-standing reaching back to the earliest days of European contact with the New World.

Thus, when towards the end of the 18<sup>th</sup> century, Great Britain sought to acquire territorial interests in New Holland, it had at its disposal various modes of acquisition accepted in the international law as state practice.<sup>218</sup> Cession was by far the most practiced but, more often than not in the era, followed a declaration of war and the conquest of territory. Occupation, the classical mode derived from Roman law, could be applied to newly-discovered uninhabited territory. Some jurists had asserted more modern adaptations to the classical Occupation principles but these had not been endorsed by state practice or incorporated into the emerging law of nations. What had emerged and seemingly found acceptance as state practice in the incipient international law was a new mode of acquisition, both a compromise and a combination of other modes, called Domination. Having traversed the international position, it is now necessary to turn to the historical matrix surrounding the colonisation of New Holland and the accompanying legal discourse.

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<sup>218</sup> Accretion is not relevant to the facts. Under the Inter-temporal Rule, Prescription would not have been available, and may not yet be applicable to the New Holland situation because of the dissent expressed by Indigenous peoples (as discussed in the Introduction).

## CHAPTER II THE HISTORICAL-LEGAL DISCOURSE CONCERNING NEW HOLLAND

In order to comprehend the application of the issues surrounding the acquisition of territorial sovereignty to the British endeavours in New Holland in the late 18<sup>th</sup> century, it is necessary now to foreground the historical matrix surrounding the colonisation of New Holland and the relevant legal discourse in the Imperial constitutional law, much of which had been in development as colonial principles and practice which purported to reconcile the competing interests of the colonising English and the indigenous peoples in North America. The Imperial constitutional law, from its expression in Lt James Cook's Instructions from the Admiralty to its mutation in the Privy Council to form the Occupation of Backward Peoples doctrine in *Cooper v Stuart* in 1889. The orthodox theory of acquisition of sovereignty also will be stated.

### **Cook's Secret Additional Instructions**

The first event of consequence is the text of *Secret Additional Instructions* given to Lt James Cook by the Admiralty, commissioning him to seek an unknown 'Continent or Land of great extent' in the South Pacific,<sup>219</sup> and his claim in 1770, as a by-product, to possession of the eastern portion of New Holland for His Majesty, King George III.

### **'with the consent of the Natives'**

When, in 1768, Cook was commissioned to journey to Tahiti in the HMB *Endeavour* and to observe the transit of Venus, he was also secretly instructed by the Lords of the Admiralty to thereafter proceed southward as 'there is reason to imagine that a Continent or Land of great extent may be found'. This 'Continent or Land of great extent' was *not* a reference to

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<sup>219</sup> Secret Additional Instructions to Lieutenant James Cook, 30 July 1768 (UK). The text of these secret instructions is set out in Appendix II. The original spelling is maintained.



'Nova Hollandia' or New Holland, which had been known to the European nations since the early 17<sup>th</sup> century, but to the fabled Great Southern Land, *Terra Australis Incognita*.<sup>220</sup> The preamble to his *Secret Additional Instructions* sets out the voyage's strategic objectives:

Whereas the making Discoverys of Countries hitherto unknown, and the Attaining a Knowledge of distant Parts which though formerly discover'd have yet been but imperfectly explored, will redound greatly to the Honour of this Nation as a Maritime Power, as well as to the Dignity of the Crown of Great Britain, and may tend greatly to the advancement of the Trade and Navigation thereof.

If he did discover 'the Continent abovementioned either in your Run to the Southward or to the Westward', he was to navigate and chart the coastline diligently, and to carefully observe the nature of the soil, its products, the beasts, fowls and fishes, and to gather specimens of seeds of the trees, fruits and grains for examination. He was instructed also as to his dealings with any indigenous populations:

You are likewise to observe the Genius, Temper, Disposition and Number of the Natives, if there be any and endeavour by all proper means to cultivate a Friendship and Alliance with them, making them presents of such Trifles as they may Value inviting them to Traffick, and Shewing them every kind of Civility and Regard; taking Care however not to suffer yourself to be surprized by them, but to be always upon your guard against any Accidents.

And in terms of claiming valuable or strategic territory, Cook was directed:

You are also with the Consent of the Natives to take Possession of Convenient Situations in the Country in the Name of the King of Great Britain: Or: if you find the Country uninhabited take Possession for his Majesty by setting up Proper Marks and Incriptions, as first discoverers and possessors.

In all its aspects, Cook's *Secret Additional Instructions* accurately reflect the extant international law and practice of the period. The acquisition of these 'Convenient Situations' in this as-yet-undiscovered *Terra Australis Incognita*

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<sup>220</sup> Frank Welsh, *Great Southern Land: A New History of Australia* (Allan Lane, 2004), 2 and 12.

was to be made by obtaining 'the Consent of the Natives', that is, by some form of treated agreement. If this Great Southern Land was uninhabited, then Cook was to assert a claim as first discoverer 'by setting up Proper Marks and Inscriptions', again as was the conventional practice in the international law. Abel Tasman, for example, landed in the territory that now bears his name in 1642 (and thought to be part of continental New Holland<sup>221</sup> until the late 18<sup>th</sup> century), and there conducted a flag raising ceremony, and claimed possession of Van Dieman's Land for the Netherlands.<sup>222</sup>

Cook did not, of course, find the Great Southern Land, *Terra Australis Incognita*. Instead, he encountered eastern New Holland, of which he was clearly aware from previous mapping. The 'Continent or Land of great extent' referred to in the *Secret Additional Instructions* is often conflated with New Holland, but this is a mis-reading. Various parts of New Holland had been subject to claims of 'possession' by various European nations since *circa* 1606.

The New Holland situation, then, fell into the category in the *Secret Additional Instructions* of those 'distant Parts which though formerly discover'd have yet been but imperfectly explored'.

### **Lord Morton's Hints**

Lord Morton, the President of the Royal Society, which in part sponsored Cook's expedition, penned a set of *Hints* which, *inter alia*, suggested the principles Lt Cook should adopt with peoples they would encounter. The Hints were 'offered to consideration of Captain Cooke, Mr Bankes, Doctor

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<sup>221</sup> It is generally believed that New Holland was named by Abel Tasman, as *Nova Hollandia*. The name New Holland was popularised in English by the travelogue of the ex-buccaneer, William Dampier, *A New Voyage Around the World, the Journal of an English Buccaneer* (hummingbird press reprint 1998 (originally published in 1699)).

<sup>222</sup> Dirk Hartog had similarly claimed territory for the Dutch on the west coast of New Holland as early as 1616.

Solander and the other Gentlemen who go upon the Expedition on Board the Endeavour'.<sup>223</sup>

The first hint offered was '[t]o exercise the utmost patience and forbearance with respect to the Natives of the several lands where the ship may touch'.

Lord Morton wrote that the Natives

are human creatures, the work of the same omnipotent Author, equally under his care with the most polished European; perhaps being less offensive, more entitled to his favour.<sup>224</sup>

Relevantly he also wrote of these 'Natives':

They are the natural, and in the strictest sense of the word, the legal possessors of the several Regions they inhabit.

No European nation has a right to occupy any part of their country, or settle among them without their voluntary consent.<sup>225</sup>

### **Cook's claim of Possession**

Before leaving northern New Holland in August 1770, Lieutenant Cook had performed a ceremony in which he claimed the newly-discovered and charted eastern part of New Holland for his Majesty King George III.<sup>226</sup> On 22 August 1770, Cook recorded in his Journal:

Having satisfied myself of the great Probability of a Passage, thro' which I intend going with the Ship and there<sup>for</sup> may land no more upon this ~~Western~~ Eastern coast of New Holland and on the Western side I can make no new discovery the honour of which belongs to the Dutch navigators ~~and as such may lay claim to it as their property~~ but the Eastern Coast from the latitude of 38° South, down to this place I am confident was never seen or visited by any European before <sup>us and</sup> ~~therefore by the same rule belongs to great Brittan~~ Notwithstand I had in the Name of his Majesty taken possession of several places upon this coast I now once more hoisted English Coulers, and in the name of His Majesty King George the Third took

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<sup>223</sup> The correspondence of James Douglas, the 14th Earl of Morton, is reprinted in facsimile in Cook's Endeavour *Journal*: above n 6, 150. The original spelling is maintained.

<sup>224</sup> Ibid.

<sup>225</sup> Ibid.

<sup>226</sup> This 'final' ceremony is the assertion of British sovereignty relied upon in the orthodox legal theory and historiography, the earlier ceremonies claiming possession along the eastern New Holland seaboard are seemingly ignored.

possession of the whole Eastern Coast from the above Latitude down to this place by the name of New South <sup>Wales</sup>, together with all the Bays, Harbours Rivers and Islands situate upon the ~~same~~ <sup>said</sup> coast.<sup>227</sup>

It has been argued that Cook exceeded his *Secret Additional Instructions* by claiming possession of eastern New Holland<sup>228</sup> because he did not seek the 'consent of the Natives' and, rather than seeking to obtain 'Convenient Situations', declared possession of a vast tranche of the inhabited continent of New Holland. However, the better reading is that in claiming this vast area of eastern New Holland, Cook was merely complying with the established international practice of the time. His discovery and assertion of possession was not an assertion of sovereignty in relation to Indigenous societies of New Holland but an *inter se* assertion to other European powers. It gave an inchoate title to the European power against all other European powers. The ceremony performed on Possession Island was a legal nullity in respect of the Indigenous peoples of New Holland.<sup>229</sup>

Indeed, it was of no practical consequence under the established international legal principles of Discovery/Occupation, as such an assertion had to be consummated by actual occupation.<sup>230</sup> Various parts of New

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<sup>227</sup> *Cook's Journal*, above n 6, 22 August 1770. Corrections and annotations included.

<sup>228</sup> Williams argues that Cook exceeded his Instructions. I argue the Instructions did not explicitly address the New Holland situation other than in the abstract because the country referenced in the Instructions was not New Holland – in which the British were largely disinterested in planning this venture – but the fabled *Terra Australis Incognita*: see Glyndwr Williams, *The Death of Captain Cook: a Hero Made And Unmade* (Profile Books, 2008), 174. Flinders aided the conflating of New Holland and *Terra Australis Incognita* by arguing, successfully over time, that the part of the latter's name be utilised, that New Holland be renamed Australia: see Matthew Flinders, *Voyage to Terra Australis* (G. & W. Nicol, 1814, London (Facsimile edition, 1966, Libraries Board of South Australia, Adelaide)).

<sup>229</sup> Russell, above n 51, 39.

<sup>230</sup> Cumbræ-Stewart deftly avoided the large questions when he noted that Cook claimed eastern New Holland, writing: 'Whatever may have been the effect of this in Public International Law, a title by occupation was obtained by effective settlement of the islands [New Holland and Van Diemen's Land] and appendages which followed', see FWS Cumbræ-Stewart, 'Australian Boundaries' (Paper presented at the Australian and New Zealand Society of International Law Conference, Sydney, 1933), 3.

Holland had been subject to claims of 'possession' by various European powers in the 17<sup>th</sup> and 18<sup>th</sup> centuries. Just a few hundred kilometres south from where Cook claimed possession, Captain Jan Carstenszoon had performed an elaborate ceremony on the western Cape York Peninsula in 1623 to claim it for the Dutch. Carstenszoon had erected a plaque to commemorate the event.<sup>231</sup> This was over 150 years before Cook claimed it for his King as first discoverer of parts of New Holland which included the eastern Cape York. Cook was very careful in asserting the claim to possession for his King of eastern New Holland to restrict it to that part of the continent 'never seen or visited by any European before'.<sup>232</sup>

The legal consequence of Cook's assertion of 'possession' was thus very limited, although it was more than 'mere puffery'.<sup>233</sup> It was likely to amount to mere puffery and have no legal consequences because for nearly 200 years European vessels had discovered parts of New Holland, gone ashore to make claim for their kings and queens, and then left hurriedly condemning New Holland as both inhospitable and uninhabitable. The Englishman, William Dampier, is perhaps the most uncomplimentary, declaring in his celebrated travelogue the inhabitants of New Holland 'the miserablest People in the World'.<sup>234</sup>

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<sup>231</sup> For a review of the history of the performance of acts of possession – erecting plaques or cairns, burying documents, etc – see Elizabeth Evatt, 'The Acquisition of Territory in Australia and New Zealand' in Charles Henry Alexandrowicz (ed), *Studies in the History of Nations* (Martinus Nijhoff, 1970) 16, 22-26. Carstenszoon was following the earlier discovery of Willem Janszoon in 1606.

<sup>232</sup> Cook was in possession of a copy of *Archipelagus Orientalis sive Asiaticus*, a large-scale map of New Holland, created by master cartographer, Joan Blaeu, for the Dutch East India Company. It showed, with remarkable accuracy for its time, western and northern New Holland, including the entire Gulf of Carpentaria, and parts of Van Dieman's Land.

<sup>233</sup> It was Russell who called the assertion by Cook 'mere puffery'; above n 51, 39.

<sup>234</sup> Above n 221, at 218, where Dampier wrote:

The Inhabitants of this Country [of New Holland] are the miserablest People in the World. The Hodmadods of Monomatapa, though a nasty People, yet for Wealth are Gentlemen to these. They have no Houses or skin Garments, Sheep, Poultry, Fruits of the Earth, Ostrich Eggs, &c., as the

These claims of possession, in which Tasman, Hartog, Carstenz and Cook engaged, gave the discovering nation an inchoate right of pre-emption, *inter se* other European nations,<sup>235</sup> in dealing with the indigenous inhabitants of that new-found territory, to its territorial or other imperial advantage if the claim was perfected by the establishment of a settlement, usually by treating with the inhabitants. As explained by Marshall CJ in *Johnson v M'Intosh*<sup>236</sup> in 1823, the rule evolved in the Age of Discovery at this time was that

the great nations of Europe [...] were all in pursuit of nearly the same object, it was necessary, in order to avoid conflicting settlements and consequent war with each other, to establish a principle which [...] was that discovery gave [...] against all other European governments, [...] the sole right of acquiring the soil from the natives, and establishing settlements upon it. It was a right with which no Europeans could interfere.<sup>237</sup>

Yet between the years Lt Cook claimed the eastern part of New Holland, and promptly departed, and in the mid-1780s, it mattered not at all, as neither England nor any of the other European powers which had discovered parts of New Holland, and had declared their intent to possess, had sought to occupy or colonise any part of their possessed New Holland territories.

### **The Numbers?**

Whilst it was clear to Lt Cook and his complement that the eastern coast of New Holland was inhabited, it became a matter of great interest to the

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Hodmadods have. And setting aside their human shape, they differ little from Brutes.

<sup>235</sup> Elizabeth Evatt expressed doubt that Lt Cook was 'authorised' to claim possession of the east coast of New Holland because, correctly, she states that his Instructions were limited to the mythical Southern Continent and to islands not previously discovered by Europeans: see Evatt, above n 231, 25.

<sup>236</sup> (1823) 8 Wheaton 543.

<sup>237</sup> *Ibid* 595.

Admiralty upon Cook's return to England as to the exact numbers of 'Indians' in New Holland. Joseph Banks wrote in his journal:

This immense tract of land, [...] is thinly inhabited even to admiration, at least that part of it that we saw: we never but once saw so many as thirty Indians together and that was a family, Men and women and children, assembled upon a rock to see the ship pass by. At Sting-Rays Bay where they evidently came down to fight us several times they never could muster above 14 or 15 fighting men, [...]. We saw indeed only the sea coast: what the immense tract of inland country may produce is to us totally unknown: we may have liberty to conjecture however that they are totally uninhabited.<sup>238</sup>

Cook, too, spoke to the numbers of inhabitants, recording in his Journal:

The number of inhabitants in this country appears to be very small in proportion to its extent. We never saw so many as thirty of them together but once, and that was at Botany Bay, when men, women and children, assembled upon a rock to see the ship past by; when they manifestly formed a resolution to engage us, they never could muster above fourteen or fifteen fighting men; and we never saw a number of their sheds or houses together that could accommodate a larger party. It is true indeed, that we saw only the sea-coast of the eastern side; and that, between this and the western shore, there is an immense tract of land wholly unexplored: but there is greater reason to believe that this immense tract is wholly desolate, or at least still more thinly inhabited than the parts we visited.<sup>239</sup>

George III had lost in recent years His American colonies, the previous repository for the felony of Great Britain, to the now sovereign nation of the United States of America. The prisons of England were overflowing with convicts and the hulls of barks and cutters, left to rot in the River Thames and barely buoyant, were used to accommodate other prisoners.<sup>240</sup> A new foreign depot for the felons was clearly necessary to replace the American colonies. In the proceedings before the House of Commons

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<sup>238</sup> Quoted in Henry Reynolds, *Aboriginal Sovereignty*, above n 124, 17-18. Original spelling is maintained.

<sup>239</sup> James Cook, 'An Account', Chapter VIII, 631. Cook's 'borrowing' of passages from Banks's writing has been noted previously: see *Cook's Endeavour Journal: the inside story*, above n 223, 14 and 81.

<sup>240</sup> See, generally, the account given in Robert Hughes, *The Fatal Shore* (Collins Harvill, 1987).

Committee on Transportation in 1786, the now-celebrated Sir Joseph Banks, President of the Royal Society, was questioned on the numbers and arms of the inhabitants of New Holland.

- Committee: Is the coast in General or the particular part you have mentioned much inhabited?
- Banks: There are very few Inhabitants.
- Committee: Are they of peaceable or hostile Disposition?
- Banks: Though they seemed inclined to Hostilities they did not appear at all to be feared. We never saw more than 30 or 40 together ...
- Committee: Do you think that 500 men being put on shore there would meet with that Obstruction from the Natives which might prevent them settling there?
- Banks: Certainly not – from the experience I have had of the Natives of another part of the same coast *I am inclined to believe that they would speedily abandon the country to the newcomers.*
- Committee: Were the Natives armed and in what Manner?
- Banks: They were armed with spears headed with fish bones but none of them we saw in Botany Bay appeared at all formidable.<sup>241</sup>

Proceeding to a largely unknown destination, the number of 'the Natives' inhabiting the neighbourhood of any intended penal settlement was strategic information that the Imperial authorities were clearly desirous of knowing. To those commissioning Captain Phillip to establish this penal settlement, the numbers and capacity of 'the Natives' to make 'Obstruction' would have been foremost in their minds.

The decision was made – at the urging principally of Banks – to convene a fleet to establish a penal garrison at Botany Bay in eastern New Holland to

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<sup>241</sup> Quoted in Reynolds, *Aboriginal Sovereignty*, above n 124, 103.



which to export the felonry.<sup>242</sup> An expedition, styled the 'First Fleet', was to lay the foundation stone for such a distant prison. It was clear, on the evidence of Banks and others, that the Fleet would have sufficient numbers, an advanced technology and weaponry, and that the Indians would not, and could not, offer any resistance.

### **The indigenous peoples of New Holland and their territories**

On a late January day in 1788, Phillip's flagship, the HMS *Sirius*, reached the eastern seaboard of New Holland.<sup>243</sup> Phillip's party made landfall at Botany Bay, but decided not to establish camp there because of its inhospitality, and relocated to Sydney Cove where, on 7 February, the Union Flag was raised, his Commissions read and volleys of muskets fired.<sup>244</sup> With this ceremony, territorial sovereignty over New South Wales, including Van Diemen's Land, was seemingly perfected, at least in Anglo-Australian orthodox theory, by Great Britain in the name of His Majesty, King George III.<sup>245</sup>

### **'Our Territory called New South Wales'**

Arthur Phillip R.N. was assigned the mission and was first commissioned on 22 August 1786 as 'Captain General and Governor in Chief' of 'Our Territory called New South Wales'. This Territory of 'New South Wales'

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<sup>242</sup> Legislation was passed by the Imperial Parliament in 1784 for the "transportation of felons" under which the King-in-Council was authorised to nominate a place to which to send them. Orders-in-Council of 6 December 1786, appointed the "Eastern coast of New South Wales" or adjacent islands. See the account in WYV Windeyer, *Lectures on Legal History* (Law Book Company of Australasia, 1938), 249-253.

<sup>243</sup> Alan Moorehead, *The Fatal Impact: The Invasion of the South Pacific 1757-1840* (Hamish Hamilton, 1966), 13.

<sup>244</sup> Tench provides a firsthand account of this occasion, in Watkin Tench, *A Narrative of the Expedition to Botany Bay with an Account of New South Wales, its Productions, Inhabitants, & to which is subjoined, A List of Civil and Military Establishments at Port Jackson* (J. Debrett, 1789), 65.

<sup>245</sup> WG McMinn, *A Constitutional History of Australia* (Oxford University Press, 1979), 1-3. Popularly, this is celebrated annually on 26 January but the present legal consensus it is 7 February 1788.

was stated to extend from the Northern Cape to South Cape and westward to the 135<sup>th</sup> degree of longitude.<sup>246</sup> This comprised the entire eastern half of New Holland including Van Diemen's Land, an area of some 3,000,000 square kilometres. This 'New South Wales' was, in Elizabeth Evatt's words, 'an area vast in dimensions when compared to Captain Cook's modest claim' in 1770.<sup>247</sup>

### **Exceeding the boundaries**

Both of Phillip's Commissions state the boundaries of 'Our Territory of New South Wales' as:

extending from the Northern Cape or Extremity of the Coast called Cape York in the Latitude of Ten Degrees thirty seven Minutes south, to the Southern Extremity of the said Territory of New South Wales, or South Cape, in the Latitude of Forty three Degrees Thirty nine Minutes south, and of all the Country Inland to the Westward as far as the One hundred and Thirty fifth Degree of East Longitude [...].

Of the boundary of this New South Wales, Watkin Tench wrote:

By this partition it may be fairly presumed that every source of future litigation between the Dutch and us will be for ever cut off, as the discoveries of English navigators alone are comprized in this territory.<sup>248</sup>

Tench is incorrect in this statement. Not only did this New South Wales purportedly comprise Van Diemen's Land, discovered a century earlier by

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<sup>246</sup> Lt Cook in 1770 had only claimed possession westward to the 135<sup>th</sup> degree of longitude. Why the British then vastly expanded the area claimed is unclear. In strategically choosing the westward 135<sup>th</sup>, however, there would have been good reason. It is likely that that demarcation arose by reason of the Treaties of Tordesillas and Saragossa in 1494 and 1529 respectively, which specified the line of demarcation which divided the newly-discovered lands between Portugal (Aragon) and Spain (Castille). The lands to the east belonged to Portugal and those to the west to Spain. When mapped through New Holland, the western and central continent belonged to Spain, and the eastern third to Portugal. Portugal established colonies at Flores and in eastern Timor in the 16<sup>th</sup> and 17<sup>th</sup> centuries but showed little, if any, interest in New Holland. By the 18<sup>th</sup> century, Portugal had ceased to be a major power and was thus unlikely to challenge the expansive area claimed by the British. However, in claiming westward only to the 135<sup>th</sup> degree of longitude, any Spanish challenge was in all likelihood circumvented or, at least, defensible.

<sup>247</sup> Evatt, above n 231, 27.

<sup>248</sup> See Tench above n 244, 67.

Tasman, but a vast tranche of the New Holland mainland to the 135<sup>th</sup> degree of longitude which had previously been discovered and claimed by the Dutch.<sup>249</sup>

Lt Cook had taken considerable pains in 1770 *not* to claim such territory for King George III because, as he wrote in his journal, 'I can make no new discovery the honour of which belongs to the Dutch navigators'.<sup>250</sup>

The territory claimed as New South Wales was approximately twice the size of the territory discovered and claimed by Cook in 1770, a clear departure from the relevant international legal principles. Viewed from 200 years on, it was the first ambit land claim in Australia.

Likewise, if this was an assertion of an absolute sovereignty, the *imperium* and the *plenum dominion*, in this New South Wales, then it was departing from established international legal principle. There was no basis in the international law of the era upon which this assertion could legitimately or lawfully rest. 'It is difficult to comprehend,' wrote John Marshall, Chief Justice of the United States Supreme Court, in 1832:

the proposition that the inhabitants of either quarter of the globe could have rightful original claims of dominion over the inhabitants of the other, or over the lands they occupied.<sup>251</sup>

Marshall CJ also expressed incomprehension that any 'discoverer' could gain rights in the country discovered 'which annulled the pre-existing rights of its ancient possessors' merely by the fact of discovery,<sup>252</sup> which is what, seemingly, Phillip's Commissions purported to do. Absent from Phillip's Commissions is any statement of the legal basis upon which the

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<sup>249</sup> And so, to which no claim of possession had ever been made by Great Britain.

<sup>250</sup> *Cook's Journal*, above n 6, 22 August 1770. Evatt, in her early paper, also made the point that 'Cook was careful to limit his claim to that territory of which he was the first discoverer', above n 231, 25.

<sup>251</sup> (1832) 6 Peters 515, 543.

<sup>252</sup> *Ibid.*

assertion of territorial sovereignty over this New South Wales was made. Based on the extant international law and practice of the time, Phillip's Commissions were both extravagant, and possibly extra-lawful against other European nations, in at least three respects:

- They purported to assert rights, *inter se* other European nations, to territory not discovered by Cook.
- They purported to assert rights, *inter se* other European nations, to territory which Cook had not proclaimed any intention to possess.
- They asserted territorial sovereignty over such a vast tranche of territory over which there was no possibility of the First Fleet expedition asserting effective control *inter se* other European nations.

#### **'Open an Intercourse with the ~~Savages~~ Natives'**

Phillip was instructed 'to endeavour by every possible means to open an Intercourse with the Savages'. The word 'Savages' is struck through in the original and replaced with the term 'Natives'. He was further instructed 'to conciliate their affections, enjoining all Our Subjects to live in amity and kindness with them'. Phillip was also to conduct an 'account of the Numbers inhabiting the Neighbourhood of the intended settlement' and to report 'in what manner Our Intercourse with these people may be turned to the advantage of this country'.

It is patent in Phillip's Commissions that this territory of New South Wales was inhabited by 'Natives'. And it was thought necessary to expressly protect these 'Natives' from destruction or interruption by 'Our Subjects'. Phillip was thus empowered to punish 'any of Our Subjects' who 'wantonly destroy them, or give them any unnecessary Interruption in the exercise of their several occupations'.

It is not expressed, or indeed contemplated, in the Commissions that these 'Natives' would be automatic subjects of King George III.<sup>253</sup>

### **The contact**

At a cautious distance in the bush of New Holland were representatives of societies as old as any known to humankind. These Indigenous peoples, too, were immigrants but the uncontested archaeological evidence suggests they came up to 50,000 years earlier, the discovery and occupation of their *countries* 'made before the memory of man'.<sup>254</sup> Their ancestors had travelled south from Asia at a time when all the continents were perhaps joined. When this land bridge was inundated, these peoples remained on the world's largest island and its driest continent.

It is estimated that there were some 300,000 indigenes of some 500 distinct peoples inhabiting the Australian continent at the time of European contact.<sup>255</sup> These inhabitants survived by accommodating themselves to their environment. Many remained in the more-abundant coastal regions but some found themselves in the harsh semi-arid and desert interior. Necessity required that their overall numbers be few, their groupings

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<sup>253</sup> In *Advocate-General of Bengal v Ranees Surnomoye Dossee* (1863) 12 ER 782, Lord Kingsdown, for the Privy Council, said:

Where Englishmen establish themselves in an uninhabited or barbarous country, they carry with them not only the laws, but the sovereignty of their own State; and those who live amongst them and become members of their community become also partakers of, and subject to the same laws.

However, Professor Daryl Lumb, a foremost authority on the colonial and constitutional law, has said of the Indian decisions: 'In India, there were different types of acquisition of territory, and the precedents there have always been regarded as conflicting in nature. Quoted in Lumb, 'The Mabo Case' above n 12, 11.

<sup>254</sup> This was the phrase utilised by Marshall CJ in *Worcester v Georgia* (1832) 6 Peters 515, 544 (USSC).

<sup>255</sup> Hughes, *The Fatal Shore*, above n 240, 9. Some estimates put the population as high as 750,000. The English were not the first Europeans to have contact with mainland New Holland. It is generally believed that the initial contact was by the Dutch vessel, *Duyfken*, commanded by Willem Janszoon, which sighted the western side of what is now known as Cape York, in about March 1606: see, generally, Andrew Sharp, *The Discovery of Australia* (Clarendon Press, 1963).

small. Their subsistence economies depended on available resources. The sophistication of the means of production, use and distribution of resources within these economies is only now starting to be understood.<sup>256</sup> Divorced from the developing technologies of other continents, theirs was adapted to the circumstances in which they lived. The peoples developed extraordinarily complex societies, based substantially on kinship groupings, and with which complexity anthropologists in the field are still grappling. Although their material cultures were barren in contrast with the technology of the European societies, these societies were rich with mythology, stories, song, dance and painting.

There was tremendous diversity in these hunting and gathering societies, not only in language, but in ceremony and custom. Underlying this diversity, there were certain shared cultural understandings and social behaviour: certain hallmarks which showed an essential commonality.<sup>257</sup>

The creation myths of the different linguistic groups were in essence common to most of continental Australia. In the Dreaming, a seminal creation period of immense antiquity, ancestral beings, part-animate and part-inanimate, wandered the landscape and left the physical features, the mountains, escarpments, rivers and plains, and the flora and the fauna in their wake.<sup>258</sup> In this epoch, the people, too, were created and left in their *country*. These creation myths and stories are told from generation to generation. However, the details of each story were reposed with those

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<sup>256</sup> See, for example, Bill Gammage, *The Biggest Estate on Earth* (Allen & Unwin, 2011).

<sup>257</sup> Basil Sansom, 'The Aboriginal Commonality' in RM Berndt (ed), *Aboriginal Sites, Rights and Resource Development* (University of Western Australia Press, 1982) 117, and Edmunds, Mary, 'Doing Business: Socialisation, Social Relations, and Social Control in Aboriginal Society' (Department of Prehistory and Anthropology, Australian National University, May 1990), unpublished, 12.

<sup>258</sup> The inadequacy of this portrayal of the Indigenous societies of New Holland is acknowledged. For example, the temporal aspect of the Dreaming is difficult for the Euro-Australian to comprehend: it is both a long time ago and the present: see WEH Stanner, *White Man Got No Dreaming* (Australian National University Press, 1979), 23-40.

who had affiliations, either paternally or maternally, to a particular *country* or territory. It has been expressed, and gone into common usage, that it is not the people who owned their *country* but rather they belonged to their *country*.<sup>259</sup>

Along with many other indigenous peoples of the Earth,<sup>260</sup> no distinction was drawn between the natural and spiritual realms.<sup>261</sup> During the creation epoch, rules of conduct and practices were laid down with which the people must comply. Their continued existence depended on their adherence to these sacred rules, and the maintenance of this morally right order.<sup>262</sup> This 'Law' connects them to a *country*. And, because the *Law* is given rather than created by human agents, 'it is understood as a transcendent rather than a temporal phenomenon'.<sup>263</sup>

This relationship to *country* was as conceptually different from that of the European constructs of real property as the cultural diversity of humankind could allow. It was economic and physical, for their continuing livelihood depended on the natural resources of their *country*, yet the relationship was also spiritual and emotional. The attachment to their *country* is integral to

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<sup>259</sup> In one of the oddest examples of legal sophistry in Anglo-Australian jurisprudence, Judge Blackburn uses an aphorism as a rationale to hold that the Yolngu did *not* have an interest in their *country* which he could classify as 'proprietary' because, he wrote, 'it seems easier, on the evidence, to say the clan belongs to the land than that the land belongs to the clan': *Milirrpum*, 270-1. Based on this odd reasoning, the land had rights but the people did not.

<sup>260</sup> It is estimated that there are more than 250 million indigenous peoples spread around the globe, in North, Central and South America, Europe and Africa, the Arctic, Oceania, South and Southeast Asia, Australia and in Russia: see Paul Keal, *European Conquest and the Rights of Indigenous Peoples: The Moral Backwardness of International Society* (Cambridge University Press, 2003), 16.

<sup>261</sup> Robert Tonkinson, *The Mardudjara Aborigines: Living The Dream in Australia's Desert* (Rinehart and Winston, 1978).

<sup>262</sup> Kenneth Maddock, 'Aboriginal Customary Law', in Peter Hanks and Bryan Keon-Cohen (eds), *Aborigines and the Law: Essays in Memory of Elizabeth Eggleston* (George Allen and Unwin, 1984), 212.

<sup>263</sup> Rosemary Hunter, 'Aboriginal histories, Australian histories, and the law' in Bain Attwood (ed), *In the Age of Mabo: History, Aborigines and Australia* (Allen & Unwin, 1996) 1, 2.

their spiritual and cultural beliefs.<sup>264</sup> Survival of the group was the over-riding principle. This was achieved by maintaining harmony with their indifferent environment and their spiritual precepts. The metaphysical was (and remains) for these Indigenous peoples just as real as the physical.

These Indigenous peoples remained the only occupants of the vast 7.5 million square kilometres of continent known to the Europeans as New Holland, with only cursory and temporary contact with the peoples to the north and the various representatives of the European powers.

### **Sovereignties in the New Holland Peoples?**

On a Eurocentric version, it would seem that any 'sovereignty' of these indigenous societies over their respective *countries* was not human-made, along with the wellspring of their *Law* and the relationship with their particular *country*, but sprang from metaphysical origins in the creation epoch.

Whatever its source, it would seem that the international law of the epoch would respect these sovereignties because these small aboriginal societies were autonomous, not heteronomous. They could lawfully rest their territorial sovereignty on being first discoverers and occupiers under the rubric of Discovery/Occupation in international law. Moreover, at international law, they would have been able to assert a title based on Prescription, having been in immemorial possession of their respective *countries* without any known challenge for some tens of thousands of years. However, challenges to these individual sovereignties and societies over their *countries* began with the arrival of this First Fleet in January 1788.

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<sup>264</sup> The complexity of this aspect of the Indigenous relationship to land was realised in the drafting and the initial claims under the Commonwealth's *Aboriginal Land Rights (Northern Territory) Act 1976*. Australian lawyer and anthropologist Dr Maddock examined the interface in his study, Kenneth Maddock, *Anthropology, Law and the Definition of Aboriginal Rights to Land*, Publikaties Over Volksrecht (Instituut voor Volksrecht, Faculeit der Rechtsgeleerheid van de Katholieke Universiteit, Oranjesingel, 1980).

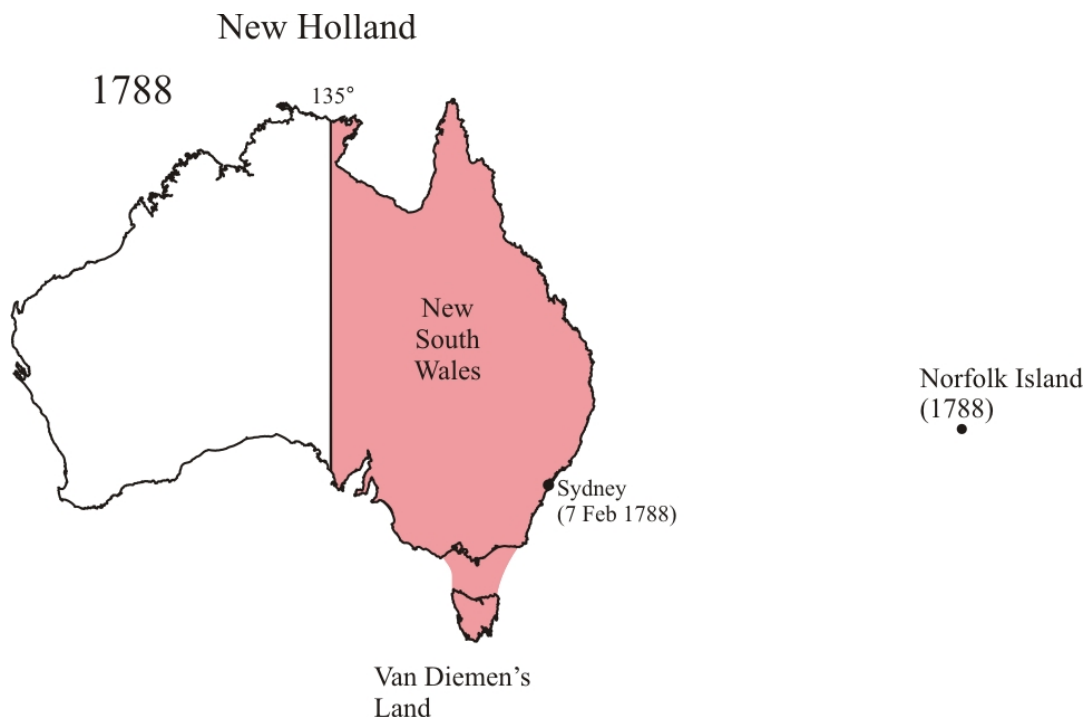


## The Orthodox Theory of British Sovereignty in New Holland

With the performance of the ceremony at Sydney Cove in 1788, the orthodox Anglo-Australian jurisprudential theory is that an instantaneous and overwhelming British 'sovereignty' swept across the whole 3 million square kilometres of eastern New Holland. It, however, met no other 'sovereigns' in that vast New Holland landscape. From Van Diemen's Land to York Cape, as it was then called, and west to the 135<sup>th</sup> degree of longitude, as shown in Figure II-1, purportedly became the sovereign territory of the English Crown. As explained in 1938 by Victor Windeyer, later a justice of the High Court:

The title of the British Crown to the continent of Australia in public international law arose by its acquisition as a territory not formerly part of the dominions of any civilised state. It was thus made a part of the British Empire by occupation, not by conquest or cession.<sup>265</sup>

**Figure II-1 Initial assertion of British sovereignty in 1788**



<sup>265</sup> Windeyer, above n 242.

## Norfolk Island

Within days of constructing a simple garrison at Sydney Cove, and following instructions to 'as soon as Circumstances may admit of it [...] to prevent its being occupied by the Subjects of any other European Power', Captain-General Phillip sent Lieutenant Ball and a party on the *Supply* to lay claim to Norfolk Island.<sup>266</sup> Norfolk Island had been visited and claimed by Cook in 1774, on his second voyage to the Pacific, and it was uninhabited.<sup>267</sup> Formal possession of the island was taken on 6 March 1788 and a complement of men and women under the command of Lieutenant Ball were left to establish a settlement. This, truly, then was an acquisition of uninhabited *terra nullius* under the classic Discovery/Occupation principles.

## Terra Incognita

However, on mainland New Holland, no Briton had penetrated further than a few kilometres into the hinterland.<sup>268</sup> The vast inland was unknown and, despite the prognostications of Sir Joseph Banks, it *was* inhabited by a large number of Indigenous societies. Even a decade after the founding of the Sydney Cove garrison, much of the vast expanse over which British sovereignty was claimed remained a *terra incognita*, unknown even in outline. Van Diemen's Land was not known to be an island until 1798, no exploration into what is now southern Queensland was attempted until 1799,<sup>269</sup> and it was not until the early years of the 20<sup>th</sup> century that any sustained contact whatsoever was initiated with the peoples of across the

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<sup>266</sup> See Watkin Tench's account, above n 244.

<sup>267</sup> It was inhabited by Melanesian peoples but was abandoned, thus becoming a *terra derelicti* and, again, *terra nullius*.

<sup>268</sup> See Tench, above n 244. Tench provides compelling accounts of the first forays into the adjacent hinterland by the First Fleeters.

<sup>269</sup> Ross Fitzgerald, Lyndon Megarrity and David Symons, *Made in Queensland: A New History* (University of Queensland Press, 2009), 10-11.

northern part of the continent.<sup>270</sup> Indeed, when Matthew Flinders charted the waters adjacent to Arnhem Land, named in 1623 by the Dutchman Willem van Colster after his vessel, he sighted more Macassans than Indigenes. Elizabeth Evatt, who began to examine these issues in 1968, searching for 'any slight evidence of sovereignty', concluded:

[B]eyond the areas of actual settlement inland exploration, there was scarcely any evidence of such activity, apart from the formal instruments of annexation and some coastal exploration it was not until after the rapid expansion between 1824 and 1851 that a reasonably strong case of effective occupation could be made out beyond the South-East area.<sup>271</sup>

### **Bremer's Extension of New South Wales**

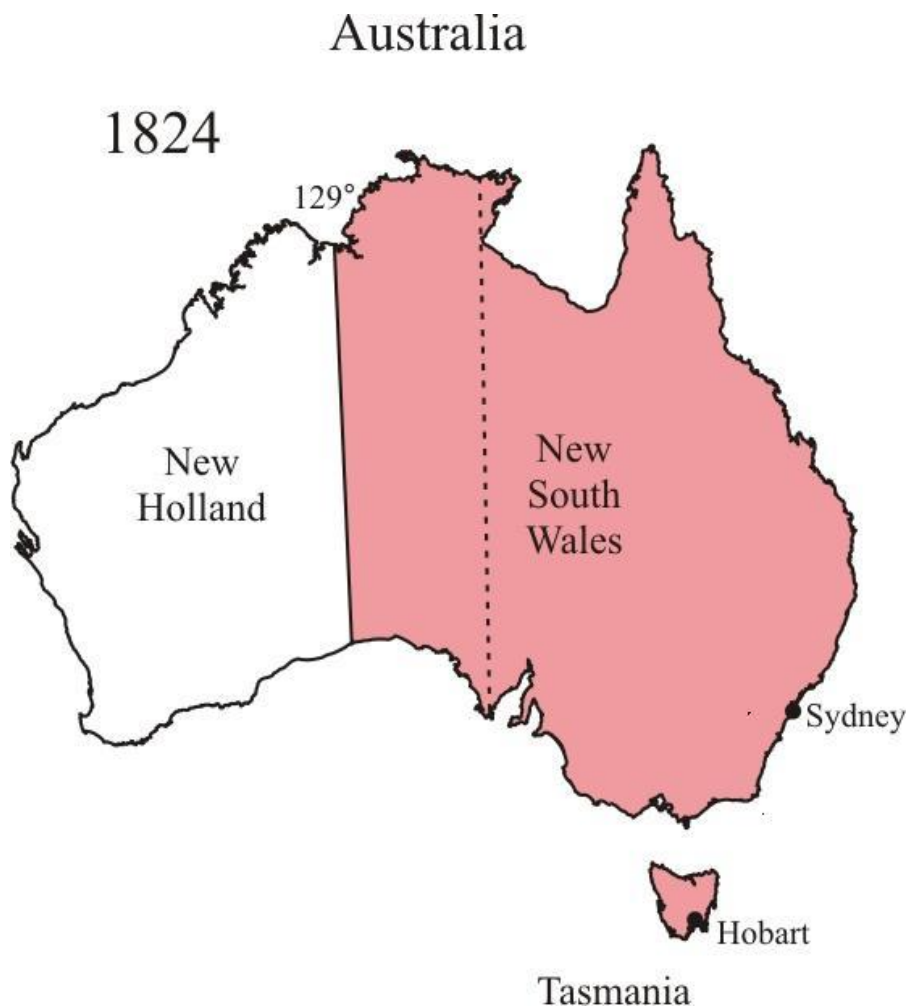
In late August 1824, Captain James Bremer sailed north from Sydney in the HMS *Tamar*, through the Torres Strait to the Cobourg Peninsula and there on 20 September claimed, on behalf of His Majesty, King George IV, the New Holland territory westward from the 135<sup>th</sup> to the 129<sup>th</sup> degree east. This extension of territory is shown in Figure II-2.

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<sup>270</sup> *Gumana v Northern Territory* (2005) 141 FCR 457, 463-4.

<sup>271</sup> Evatt, above n 231, 33.

Figure II-2 Extension of New South Wales in 1824



This extension, seemingly in vast excess of his instructions,<sup>272</sup> was again questionable in international law, as such territory had not been discovered by the British and was neither ceded nor conquered. Also, the settlements which purported to effectively control this extension of territory were short-lived, lasting only some years before being abandoned. It would more correctly be called an annexation.

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<sup>272</sup> Earl Bathurst, British Secretary for War and the Colonies, conveyed to the Lord Commissioners of the Admiralty:

My Lords, I am commanded to signify to you His Majesty's pleasure that a Ship of War should be dispatched without delay to the North West Coast of New Holland, for the purpose of taking formal possession, in the Name of His Majesty, of that part of the said Coast contained between the western Shore of Bathurst Island and the eastern side of Cobourg Peninsula, including the whole of Bathurst and Melville Islands, and the said Peninsula.

(HRA, 3, 5, 759)

## The Balance of the Continent

In 1829, fearing French activity in western New Holland, the assertion of territorial sovereignty over the balance of the continent of New Holland, now known as Australia, was purportedly made.<sup>273</sup> Captain James Stirling, having recently explored around the Swan River area in the 1820s, wrote to the Under Secretary for the Colonies that:

His Majesty's right to that country has never been declared, and as it is reported that the French Government contemplates the formation of a settlement in New Holland, the apprehension is that an expedition proceeding there might find, on its arrival, the best positions occupied and its aim defeated, to the total ruin of the property.

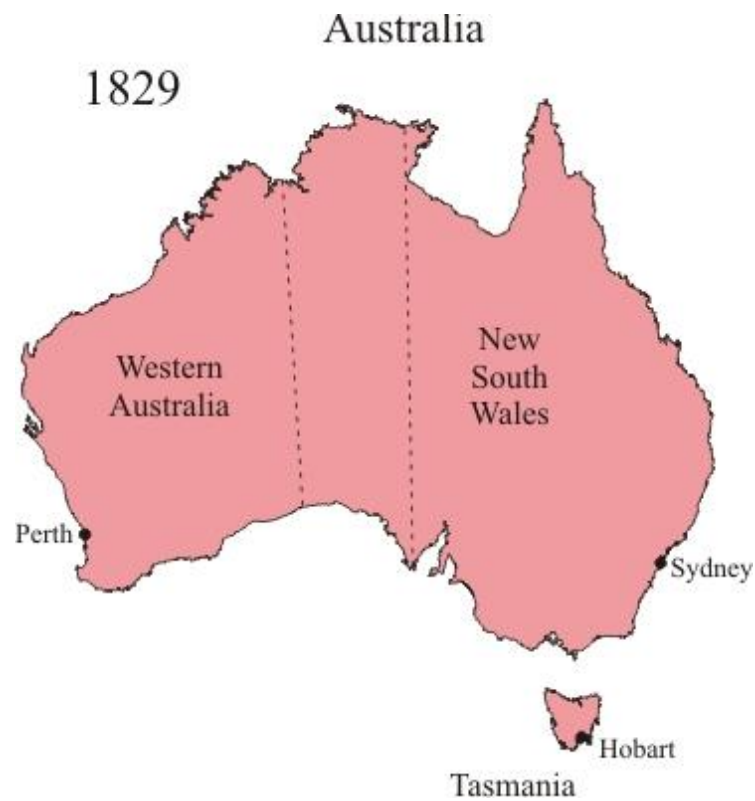
In November 1828, Sir George Murray, the Colonial Secretary, ordered the sending of the HMS *Challenger* to the west coast of New Holland, now branded as Australia, from the Cape Colony in Africa to take formal possession of the western New Holland with express instructions to maintain uninterrupted possession until notified further. On the morning of 2 May 1829, Captain Charles Fremantle and party landed and took formal possession of the balance of New Holland in the name of King George IV, and the Swan River Colony was founded in the following months.<sup>274</sup> This assertion of territorial sovereignty purportedly made the whole of the New Holland continent sovereign British territory; see Figure II-3.

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<sup>273</sup> A Frenchman, Louis Aleno de Saint Alouarn, claimed the western side of New Holland for his King on Dirk Hartog Island in 1772. Saint Alouarn died on the return journey and his findings were not presented to the French Court: see Noelene Bloomfield, *Almost a French Australia: French–British Rivalry in the Southern Oceans* (Halstead Press, 2012).

<sup>274</sup> Some debate surrounds the assertion of sovereignty, with 2 May 1829, 1 June 1829, 18 June 1829 or 4 March 1831 asserted as the relevant date: see the comments in *Western Australia v Commonwealth* (1995) 183 CLR 373, 429; *Daniel v Western Australia* [2003] FCA 666, [156]; *AB (Deceased) v Western Australia* (No 4) [2012] FCA 1268, [52] and *Banjima People v Western Australia* (No 2) [2013] FCA 868, [20]. *The Western Australia Day (Renaming) Act* 2012 names 1 June 1829 as Foundation Day.

**Figure II-3 Taking of entire continent**



Under the orthodox theory of British sovereignty over New Holland, on each of these occasions, in 1788, 1824 and 1829, the British Crown was purporting to acquire an absolute and original sovereignty in the territories claimed, irrespective that it was occupied in large part by Indigenous societies. Seemingly, it was the classical doctrine of Discovery/Occupation asserted, that is, that these territories claimed were discovered and, as uninhabited, could be acquired by Occupation.<sup>275</sup>

### **Reliance on Discovery/Occupation by Colonial Office**

For the first 30 years of the British presence in New Holland, through the commands of Captains-General Phillip, Hunter and King, all serving Royal

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<sup>275</sup> Cf Brennan J in *Mabo (No 2)* (1992) 175 CLR 1, 16.

Navy officers, the small penal establishment at Sydney Cove was, unarguably, a military autocracy.<sup>276</sup>

It was only when this penal colony was in transition to an 'open' settlement under Governor Macquarie that the basis of the British acquisitions in New Holland became an issue. In 1819, the Colonial Secretary, Lord Bathurst, sought advice from the Colonial Office on the status of the New South Wales colony. Senior lawyers from the Colonial Office responded that New South Wales had been occupied by the British Crown as a 'desert and uninhabited' territory.<sup>277</sup> In this first opinion, jointly that of the Attorney-General and the Solicitor-General, the Colonial Secretary was advised that it had been acquired not by conquest or cession, 'but taken possession of by him as desert and uninhabited'.

In a later 1822 opinion, James FitzJames Stephen, who would go on to head the Colonial Office, stated that New South Wales had been acquired 'neither by conquest nor cession, but by the mere occupation of a desert or uninhabited land'.<sup>278</sup>

The reference to 'desert' and 'uninhabited' (with the first opinion saying 'and' and the latter 'or') is from Blackstone's *Commentaries*, where in discussing the 'right of migration' Blackstone had endorsed 'the stocking and cultivation of desert uninhabited countries', as consonant with the law of nature.<sup>279</sup>

How these lawyers could portray New Holland as an 'uninhabited' territory is difficult to comprehend. However, it is clear that according to

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<sup>276</sup> See Bruce Kercher, *An Unruly Child: A History of Law in Australia* (Allen & Unwin, 1995). In 1938, Victor Windeyer described the Governor of New South Wales, from Phillip to Macquarie, as "an absolute autocrat": see Windeyer above n 242, 255.

<sup>277</sup> HRA, 4, 1, 330. Note that the authors have changed the Blackstonian "desart" to "desert", but nothing turns on the change.

<sup>278</sup> Quoted in Reynolds, *Aboriginal Sovereignty*, above n 124, 110.

<sup>279</sup> Blackstone *Commentaries*, above n 153, Book the Second, 7.

the official rendition by the Colonial Office,<sup>280</sup> the basis of the territorial acquisition of New South Wales was under the Discovery/Occupation mode: it was the occupation by Captain-General Phillip and party in 1788 of an uninhabited territory discovered by Lt Cook in 1770.

If these Colonial Office lawyers were building any case that the territories were inhabited but that the Indigenous peoples were readily abandoning their lands in the face of contestation by the British – as Banks had supposed to the Transportation Committee – it is not made.

As factually and legally unsound as this Colonial Office advice might presently appear, it is to be appreciated that these lawyers were in London, thousands of kilometres distant from New South Wales. They were also permanent civil servants in the service of Empire, not counsel giving independent legal advice. Sir James FitzJames Stephen, the Under-Secretary of the Colonial Office in the 1830s and 1840s, addressing Chief Justice Marshall's opinions in the early American decisions, candidly wrote:

Whatever may be the ground occupied by international jurists, they never forget the policy and interests of their own Country. Their business is to give to rapacity and injustice the most decorous veil which legal ingenuity can weave.<sup>281</sup>

Yet very little of this legal ingenuity was offered by the Colonial Office lawyers themselves to render New Holland uninhabited. Indeed, no discussion is entered upon. There is no flirtation with the concept that, whilst inhabited by these wandering families, it was nonetheless unoccupied in law. There is no assertion that though once occupied by these nomadic peoples, it was being deserted and thus could be occupied. Far from any legal sophistry, it was just unadorned misstatement.

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<sup>280</sup> This advice was repeated by the Colonial Office lawyers in 1822: see HRA 4, 1, 414.

<sup>281</sup> Quoted in Sidney L Harring, *White Man's Law: Native People in Nineteenth-Century Canadian Jurisprudence* (University of Toronto, 1998), 21.



Yet this convenient fiction restrained any further discourse. If this territory was uninhabited, Discovery/Occupation – the ancient and noble mode of acquisition of territory – could have application to the New Holland territories. All the complex issues concerning the *imperium* and the *plenum dominion*, or the need to employ another possible mode of acquisition, might conveniently be avoided by both the colonial and Imperial authorities. If the New Holland territories *were* uninhabited by indigenous populations, it negated the need to confront issues that were substantial for the Imperial and colonial administrators. Without inhabitants, there could not possibly be another sovereign in the territory, and therefore the asserted British *imperium* could be both an original and plenary sovereignty. Without any inhabitants, all real property in these territories was vacant and became the royal demesne of King George III, with an immediate assumption of legal and beneficial title, a full *plenum dominion*, in these lands. Without inhabitants, the English common law – the 'invisible and inescapable cargo' which 'fell from their shoulders and attached itself to the soil on which they stood'<sup>282</sup> – met no other laws upon its reception in the territory. Issues, too, such as whether the indigenes were subjects of the Crown, need not be confronted. And, on the best historical evidence, the Colonial Office lawyers opportunistically avoided these issues by the adoption of the ahistorical fiction that New South Wales was physically 'uninhabited'. Yet, this was no 'decorous veil': it was more unadorned fiction.

What is uncontested on the available historical evidence is that the Colonial Office, when first questioned in the early 19<sup>th</sup> century, relied upon the Discovery/Occupation mode to purportedly validate the British assertion of

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<sup>282</sup> Latham, above n 5, 517. Professor Reynolds has noted 'that in transit from the shoulders to soil the inescapable cargo struck the Aborigines such a severe blow that they have still not recovered from it'; Reynolds, *The Law of the Land*, above n 160, 1.

sovereignty over New South Wales in the international law of the era. No extension of the relevant international principles was argued or attempted to be argued. Rather, the objective reality was denied; the Indigenous peoples were simply imagined away and New South Wales was claimed to be uninhabited and therefore open to acquisition under the classical Discovery/Occupation principles.<sup>283</sup>

### **Any enlarged notion of *terra nullius*?**

There is no extant evidence, in the historical record or in the jurisprudence of the late 18<sup>th</sup> or early 19<sup>th</sup> century, of any assertion of an enlarged notion of *terra nullius* by Great Britain in defence of the acquisitions in New Holland. Following the Colonial Office's advice, in 1824, the Chief Justice of the fledgling New South Wales Supreme Court, Francis Forbes, echoed the opinions, stating in a judgment that New South Wales was 'an uninhabited country [...] discovered and planted by English subjects'.<sup>284</sup> And, as late as 1849, it was being asserted in the colonial Anglo-Australian jurisprudence that the expanses of New Holland were 'unpeopled territories'.<sup>285</sup>

### **No extension of Discovery/Occupation principles**

The relevant commentary of the period also confirms that there was no extension to the Discovery/Occupation in either international practice or the Imperial constitutional law. Circa 1788, Discovery/Occupation applied only to uninhabited territories.<sup>286</sup> Relevant post-Blackstone commentators on the Imperial constitutional law, such as Chitty the Elder, writing in 1820

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<sup>283</sup> The Admiralty was still issuing instructions consistent with Lt Cook's in 1800.

<sup>284</sup> *R v Magistrates* [1824] NSWSC 20, quoted in Bayne, above n 15, 117.

<sup>285</sup> *Wilson v Terry* (1849) 1 Legge 505, 508 per Stephen CJ for the Court comprised of Dickerson and Manning JJ.

<sup>286</sup> For an interesting argument concerning three uninhabited islands adjacent to Papua New Guinea, see Stuart B Kaye, 'The Torres Strait Islands: Constitutional and Sovereignty Questions Post-*Mabo*' (1994) 18 (1) *University of Queensland Law Review* 38.

in his *Treatise on the Law of the Legal Prerogatives of the Crown* gives no indication of any change, minor or major. Indeed, he echoes Blackstone very closely, stating that that there were two situations – that of Conquest/Cession and those of which 'our taking possession of, and peopling them, when we find them uninhabited'.<sup>287</sup>

Charles Clark, in his *A Summary of Colonial Law*, published approximately 15 years after Chitty, re-stated the classical principles of Discovery/Occupation, most particularly that the doctrine applied only to uninhabited territory, that is, classical *terra nullius*, stating:

[T]he king is bound in the colonies, as at home, to govern according to established law. It is necessary, therefore, to consider to what laws the colonies are subject.

In doing this, it will be necessary to distinguish the colonial possessions from each other, in reference to the manner of their acquisition by the parent state. They are acquired, 1, by *conquest*; 2, by *cession under treaty*; or 3, by *occupancy*, viz. where an uninhabited country is discovered by British subjects, and is upon such discovery adopted or recognized by the crown as part of its possessions.<sup>288</sup>

Likewise continental jurists, such as Jean Louis Klueber<sup>289</sup> and August Heffter<sup>290</sup> in the early to mid-1800s, did not note any extrapolation of the classical principles of Discovery/Occupation that would permit their application, by the British or any other European nations, to inhabited territories, not even, according to Klueber, if the inhabitants were 'savages or nomads'.<sup>291</sup>

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<sup>287</sup> Joseph Chitty, *Treatise on the Law of the Legal Prerogatives of the Crown: And the Relative Duties and Rights of the Subject* (J Butterworth and Son, 1820), 29.

<sup>288</sup> Charles Clark, *A Summary of Colonial Law* (S. Sweet, Chancery Lane, 1834), 4. Emphasis is in the original.

<sup>289</sup> Jean Louis Klueber, *Droit des Gens de Moderne de l'Europe* (J.G. Cotta, 1819), 193-4.

<sup>290</sup> August Wilhelm Heffter, *Das Europaische Volkerrecht* (EH Schroeder, 1844).

<sup>291</sup> Klueber, above n 289, 194.

## The Numbers (Again)

From the distance of London, Colonial Office lawyers might readily imagine the distant colony of New South Wales was uninhabited but it was not that straightforward at the frontier. Watkin Tench had recorded as early as 1789 that the colonists found 'the natives tolerably numerous', and 'more populous than Mr. Cook thought it'.<sup>292</sup>

As a striking proof, besides, of the numerousness of the natives, I beg leave to state, Governor Phillip, when on an excursion between the head of this harbour and that of Botany Bay, once fell in with the party, which consisted of more than three hundred persons, two hundred and twelve of whom were men.<sup>293</sup>

However, as to 'the interior parts of the continent', wrote Tench, echoing an earlier assumption, 'there is every reason to conclude from our researches, as well as the manner of living practised by the natives, to be uninhabited'.<sup>294</sup> As colonial explorers penetrated the *terra incognita* hinterland, it became apparent that this assumption was wrong, and that the interior of New Holland was inhabited. After 1813, when the Great Dividing Range was breached by the British explorers, it became very apparent that the interior of New Holland *was* inhabited by other societies of Indigenous peoples, with their own distinct laws, languages, mores and *countries*. Indeed, Tench had already observed that 'some of the Indian families confine their society and connections within their own pale'.<sup>295</sup>

Mapped classically, it would show something similar to Norman B Tindale's 20<sup>th</sup> century mapping as shown in Figure II-4.<sup>296</sup>

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<sup>292</sup> Tench, above n 244, 53. This is repeated when Tench wrote that New Holland was "more populous than it was generally believed to be in Europe at the time of our sailing", 90.

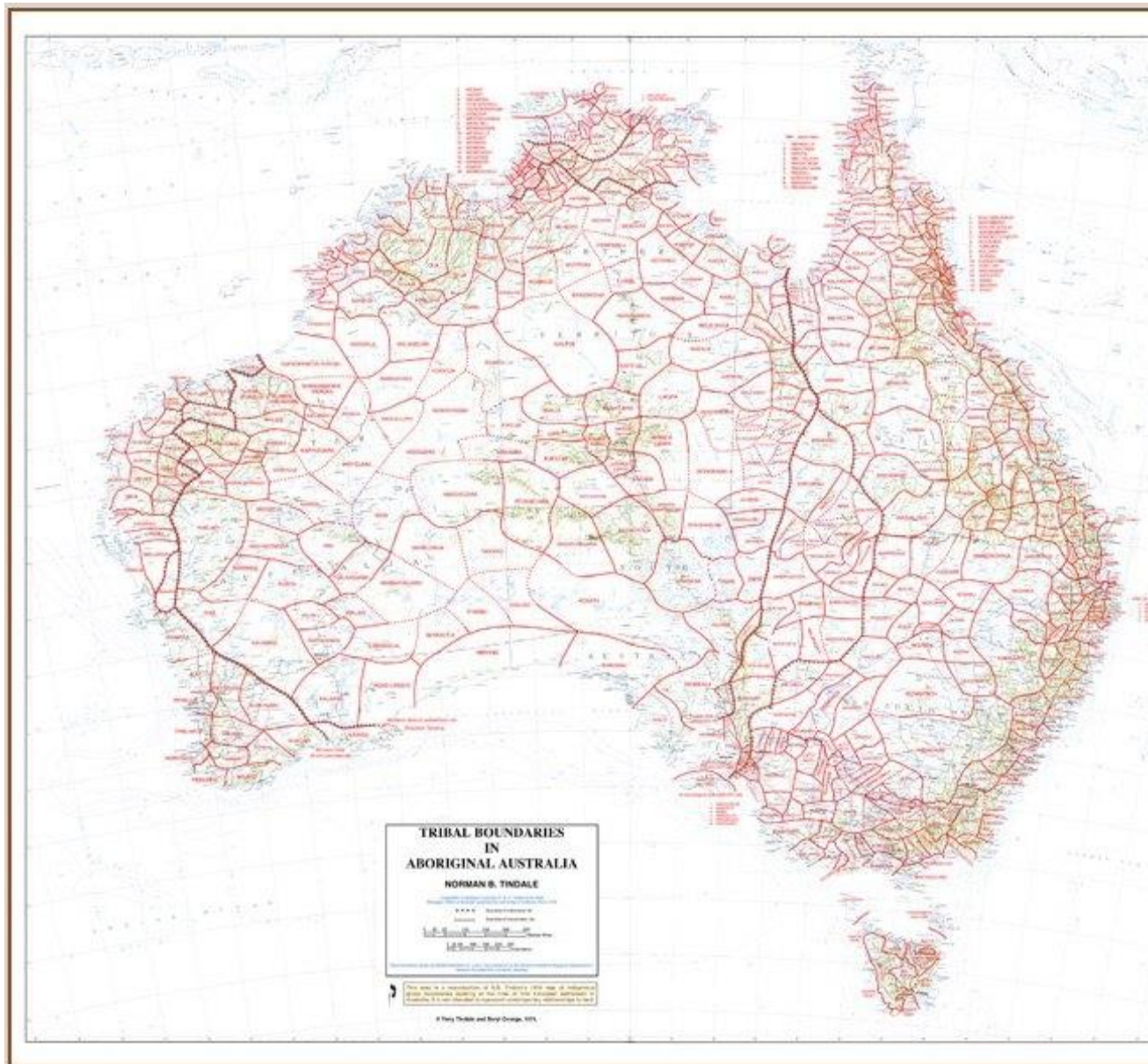
<sup>293</sup> Ibid 90-1.

<sup>294</sup> Ibid 90.

<sup>295</sup> Ibid.

<sup>296</sup> Norman B Tindale, *Aboriginal tribes of Australia: their Terrain, Environmental Controls, Distribution, Limits, And Proper Names* (Australian National University Press, 1974). This

Figure II-4 Norman B Tindale's territorial mapping



### The diminishing numbers

Yet the 'imagineering' that New Holland was uninhabited was not without some arguable force. It was certainly *becoming* uninhabited. The diseases unwittingly introduced to the Indigenous peoples by the British expedition

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map is an insert into the volume. See, for a comparative view on mapping 'tribes', Norman Etherington (ed), *Mapping Colonial Conquest: Australia and Southern Africa* (University of Western Australia Press, 2007) in particular Chapter 4, *Putting Tribes on Maps*.

devastated their populations. Within a few months of establishment, Watkin Tench wrote of the 'extraordinary calamity' that was 'now observed among the natives. Repeated accounts, brought by our boats, of finding bodies of Indians in all the coves and inlets of the harbour'.<sup>297</sup> Fifty years later, Bishop Broughton had testified to a Parliamentary Select Committee of the House of Commons in 1837:

They do not so much retire as decay; wherever Europeans meet with them they appear to wear out, and gradually to decay: they diminish in numbers; they appear actually to vanish from the face of the earth. I am led to believe that within a limited period, a few years, those who are most in contact with Europeans will be utterly extinct – I will not say exterminated – but they will be extinct.<sup>298</sup>

It was as if the territory surrounding the discrete penal settlement at Port Jackson was de-populating itself such that it did, in fact and law, it became *terra derelicti*, a deserted territory and therefore open to occupation as uninhabited.<sup>299</sup> However, this is not how the acquisition of New South Wales or the remainder of New Holland was theorised.

### **Exterminate and replace**

For Captain-General Phillip, the instruction to bring about an amicable intercourse between its 'old and new masters'<sup>300</sup> proved unsuccessful and it was openly lamented that 'that greater progress in attaching them to us has not been made'.<sup>301</sup> The Indigenous peoples lived quite separately from the English penal garrison for some years.

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<sup>297</sup> Tench wrote this in April and May of 1788: see Tim Flannery, *1788: A Narrative of the Expedition to Botany Bay and A Complete Account of the Settlement of Port Jackson* (Text Publishing (Reprint edited and introduced by Tim Flannery), 2009), 102.

<sup>298</sup> Parliamentary Select Committee, above n 20, 10-11.

<sup>299</sup> For a discussion of this circumstance and the relevant principles, see Lindley, above n 29, 48-51.

<sup>300</sup> UK Parliamentary Select Committee, above n 20, 53.

<sup>301</sup> *Ibid* 92.

However deeply held the belief of inevitable extinction of 'the Aborigines', there were survivors of the disease and dispossession similar to the description given by Chief Justice Marshall in the North American colonisation when he spoke of the advance of 'the Whites'. The 'Indian necessarily receded', he wrote, as the 'country in the immediate neighbourhood of agriculturists became unfit for them. The game fled into thicker and more unbroken forests, and the Indians followed.' This is similar to that complained of by the Indigenous peoples at Port Phillip when Protector Thomas wrote in his diary in 1841: 'The blacks this morning very dissatisfied, and talk much about "no good white men take away country, no good bush, all white men sit down, go go kangaroo"'.<sup>302</sup>

Although the earliest European writers may not have written of extinction of these Indigenous peoples of New Holland, by the 1830s the assumption that they 'were doomed to inevitable extinction' had entered the colonial imagination.<sup>303</sup> It was believed that, with time, 'the Australian Aboriginal' would be noticed only 'as a melancholy anthropological footnote' to the history of Australia.<sup>304</sup> Not peculiar to Australia, throughout the 19<sup>th</sup> century it was generally believed that the 'savage races' across the Earth were destined for extinction in the face of 'civilized' peoples. No less an authority than Charles Darwin, in his *Descent of Man*, wrote:

When civilized nations come into contact with barbarians the struggle is short, except where a deadly climate gives its aid to the native race. At some future period, not very distant as measured by

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<sup>302</sup> Quoted in Reynolds, above n 193, 14.

<sup>303</sup> Russell McGregor, *Imagined Destinies: Aboriginal Australians and the Doomed Race Theory, 1880–1939* (Melbourne University Press, 1997), 13.

<sup>304</sup> John La Nauze, a notable historian of his time, wrote in 1959 that 'the Australian Aboriginal' is noticed only 'as a melancholy anthropological footnote' to the history of Australia: see JA La Nauze, 'The Study of Australian History, 1929–1959' (1959) 9 (33) *Historical Studies* 1, 11.

centuries, the civilized races of man will almost certainly exterminate and replace throughout the world the savage races.<sup>305</sup>

There was, historian Russell McGregor wrote in his *Doomed Race Theory*, 'something irresistibly attractive' to the majority of colonial commentators in this theory.<sup>306</sup> However, in London, there was a measure of doubt. The Colonial Secretary, Lord Stanley, lamented in 1842, that 'no real progress' had been made towards 'civilisation of the Aborigines'. Yet he said that 'outrages of the most atrocious description involving sometimes considerable loss of life'

are spoken of with an indifference and lightness, which to those at a distance is very shocking. I cannot acquiesce in a theory [...] that their extinction before the advance of the white settler is a necessity.<sup>307</sup>

### **The early New South Wales situation**

At the coalface of the colonial venture in New Holland, however, the indigenous population could not be imagined away. Their presence threw up difficulties of considerable complexity, not least in the intersection of the varying modes of crime and punishment. In 1816, Captain-General Macquarie proclaimed:

That the practice hitherto observed amongst the Native Tribes of Assembling in large bodies or parties armed, and of fighting and attacking each other on the plea of Inflicting punishment on Transgressors of their own customs and manners at or near Sydney, and the principal Towns and settlements in the Colony shall be hence forth wholly abolished as a barbarous Custom repugnant to the British Laws, and strongly militating against the Civilisation of the Natives which is an object of the highest importance to effect if possible.<sup>308</sup>

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<sup>305</sup> Charles Darwin, *The Descent of Man* (John Murray, 1901), 241-2.

<sup>306</sup> McGregor, above n 303, 14. This *Doomed Race Theory* proved remarkably resilient in the face of the counter-factual evidence. It was not challenged until the 1930s, and was not wholly abandoned until the 1950s.

<sup>307</sup> Quoted in Bayne, above n 15, 118.

<sup>308</sup> Governor Macquarie's *Proclamation to the Aborigines*, 4 May 1816. Ford has made the case that in early New South Wales, authorities and settlers assumed that the Indigenes were governed by their own laws and only in exceptional circumstances touched by



What is abundantly clear from this gubernatorial declaration is that the 'customs and manners' of the Indigenous peoples living closest to the Sydney Cove garrison remained unaffected by the assertion of British sovereignty in 1788, and for at least 30 years afterwards. The 'customs and manners' of customary punishment had remained intact and were expressly acknowledged by the proclaimed outlawing. The sets of criminal laws and sanctions, and presumably other laws and customs of the *Indigenes*, existed side by side with that of the British.

Of interest also is that the proclamation made this customary practice a punishable disturbance of the peace not merely within the areas of British settlement but also in the 'places of resort' of these 'Native Tribes'.

The Black natives are therefore hereby enjoined and commanded to discontinue this barbarous custom not [only] at or near the British Settlements, but also in their own wild and remote places of resort.<sup>309</sup>

Plainly, at the coalface of this British colonisation, was acknowledged two zones: the 'towns and settlements' of the British and the 'wild and remote places of resort' of the 'Black natives'. It seems equally clear that the British colonists had no effective control – the international legal measure of assertions of territorial sovereignty – over these 'wild and remote places' to this point in time, but were now seeking to exercise some.

### **The 'most guilty and atrocious of the natives'**

The preamble to the 1816 Proclamation noted that 'Black Natives of this colony have for the last three years manifested a strong and dangerous spirit of animosity and hostility towards the British inhabitants residing in the interior and remote parts of the Colony'. The Proclamation also acknowledged that Governor Macquarie had

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British law: see Lisa Ford, 'Traversing the Frontiers of the History Wars: The Plurality of Settler Sovereignty in Early New South Wales' (Macquarie Law Working Paper No. 2008-1).

<sup>309</sup> Ibid.

sent out a Military force to drive away the hostile tribes from the British Settlements in the remote parts of the Country and to take as many of them prisoners as possible; in executing which services several Natives have been unavoidably killed and wounded in consequence of their not having surrendered themselves, on being called on so to do, amongst whom it may be considered fortunate that some of the most guilty and atrocious of the natives concerned in the last murders and robberies are numbered.<sup>310</sup>

In light of these accounts, it seems an utter legal nonsense to assert that the Indigenous peoples of New South Wales became British subjects in 1788. Indeed, the uncontested and corroborated account by Watkin Tench of the punitive party he was ordered to lead into the wilderness, for which he earned the dubious honour 'of being the first European ordered to carry out an officially sanctioned massacre of Aborigines',<sup>311</sup> indicated the British aegis of effective control did not even extend beyond a day's march from the Sydney Cove garrison.<sup>312</sup>

### **Subjects of the Crown?**

It has been confidently and authoritatively asserted that upon the acquisition of the radical title, the 'Aborigines' became instant subjects of the Crown.<sup>313</sup> However, there is substantial historical evidence that this was not the case. Lawyer and historian David Neal has stated:

The governors were instructed to conciliate and protect the Aboriginal natives. But that did not extend to the recognition of their right to the land they lived in. [...] The truth of it is that for the first fifty years the colonial legal system had trouble deciding whether the Aborigines should be treated as subjects of the Crown or foreign enemies who could be hunted down in reprisal raids and shot.<sup>314</sup>

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<sup>310</sup> Ibid. The disingenuousness of killing or wounding members of the 'hostile tribes', when they were called upon – presumably in English – to surrender so as to be taken prisoner, is seemingly lost on the author.

<sup>311</sup> Flannery, above n 297, 7.

<sup>312</sup> See Watkin Tench's accounts of the first forays into the hinterland, Tench above n 244, particularly the account of Governor Phillip's expedition at pages 104-5.

<sup>313</sup> *Mabo (No 2)* (1992) 175 CLR 1, 80, Deane and Gaudron JJ.

<sup>314</sup> David Neal, *The Rule of Law in a Penal Colony* (Cambridge University Press, 1991), 17.

## The Early Colonial Jurisprudence

Although the prospect of courts in New South Wales was entertained in the original Commissions of Phillip, it was not until the settlement was making the transition from a military garrison to a non-military settlement that colonial courts were established. Not surprisingly, some of the conflicts by and with the Indigenous inhabitants found their way into the criminal courts. However, surprisingly, the basis of the acquisition of the British sovereignty over New South Wales became a live issue in these very early proceedings.

### Dirty Dick's case (1829)

In *R v Dirty Dick*, an Indigene was accused of the murder of 'one of the original natives of this country, in the same state as himself – wandering around the country, and living in the uncontrolled freedom of nature'.<sup>315</sup> The circumstances were unknown but in 'some way or another he has caused the death of another wild savage'. The NSW Supreme Court, comprising Chief Justice Forbes and Dowling J,<sup>316</sup> discharged the prisoner for want of jurisdiction. Forbes CJ wrote:

Aggressions by British subjects, upon the natives, as well as those committed by the latter upon the former, have been punished by the laws of England where the execution of those laws have been found practicable. This has been found expedient for the mutual protection of both sorts of people; but I am not aware that British laws have been applied to the aboriginal natives in transactions solely between themselves, whether of contract, tort, or crime. Indeed it appears to me that it is a wise principle to abstain in this Colony, as has been done in the North American British Colonies, with the institutions of the natives which, upon experience will be found to rest upon principles of natural justice.<sup>317</sup>

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<sup>315</sup> TD Castles and Bruce Kercher (eds), *Dowling's Select Cases 1828–1844: Decisions of the Supreme Court of New South Wales* (The Francis Forbes Society for Australian Legal History, 2005), 3.

<sup>316</sup> Stephen J was apparently absent the day the prisoner was 'put to the bar': *ibid* 4.

<sup>317</sup> *Dowling's Select Cases 1828–1844*, above n 315, 3.

And:

But I know no principle of municipal or national law, which shall subject the inhabitants of a newly found country, to the operation of the laws of the finders, in matters of dispute, injury, or aggression between themselves.<sup>318</sup>

It is clear that, until this time, the Indigenes of New South Wales resided still within their own territories owing no allegiance to the military or civil authority of the British. Again, it is plain that the Indigenous population were clearly not treated as British subjects and the 'laws of England' did not extend to them. Dowling J wrote that 'it would be most unjust and unconscionable to hold the prisoner amenable to the law of England for an offence committed against one of his own tribe'.<sup>319</sup>

#### *R v Jack Congo Murrell (1831)*

In the case of *R v Jack Congo Murrell*,<sup>320</sup> the Indigenous defendant and a co-accused were convicted after a trial in the New South Wales Supreme Court of the murder of two indigenous men at Parramatta, a settlement then on the outskirts of Sydney. On appeal, counsel for Murrell submitted that the court had no jurisdiction to try his client. He argued that New South Wales was not a territory acquired by Discovery/Occupation, because it was already occupied by the Natives. And not being ceded, and not conquered because there had been no war declared on these Natives, it was, on his argument, a *sui generis* colony having its own manners and customs. Thus, the British authorities were bound by the extant Indigenous laws and

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<sup>318</sup> Ibid 4. Dowling J wrote that 'the observations which have fallen from his Honour the Chief Justice are consentaneous with reason and principle'.

<sup>319</sup> Ibid 5. Finnane makes the point plain when he wrote: 'For nearly 50 years after the first settlement in 1788 it was unclear whether colonial courts could exercise jurisdiction over Aborigines committing offences against settlers or their own'; Mark Finnane, 'The limits of jurisdiction: law, governance and Indigenous peoples in colonised Australia' in Shaunnagh Dorsett and Ian Hunter (eds), *Law and Politics in British Colonial Thought: Transpositions of Empire* (Palgrave, 2010) 149, 152.

<sup>320</sup> (1836) 1 Legge 72.

customs, and the NSW Supreme Court did not have jurisdiction to try the accused for the killings.

This issue was not addressed in the official report of the Court. However, in an unreported version, the Full Court, through Burton J, is recorded as stating:

Although it is granted that the Aboriginal natives of New Holland are entitled to be regarded by Civilized nations as a free and independent people, and are entitled to the possession of those rights which as such are valuable to them, yet the various tribes had not attained at the first settlement of the English people amongst them to such a position in point of numbers and civilisation and to such a form of Government and laws, as to be entitled to be recognised as so many sovereign states governed by laws of their own.<sup>321</sup>

Despite the doubt concerning the reportage, the sentiment expressed – that Indigenous societies of New Holland were so low on the scale of civilised society that they could not be regarded as sovereign or governed by their own laws – would become the legal orthodoxy. It is notable that, nearly 50 years after initial colonisation, this was seemingly the first expression in the Anglo-Australian colonial jurisprudence that the 'various tribes' were not entitled to be regarded as 'sovereign states' because, it was said, they had not attained 'a position in point of numbers and civilisation'.<sup>322</sup>

### ***Bonjon* decision (1841)**

The decision of *Bonjon*<sup>323</sup> challenges the earlier *Murrell* decision. A decision of Willis J, the Resident Judge of the Supreme Court of NSW at Port

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<sup>321</sup> Quoted by John Hookey, 'Settlement and Sovereignty' in Peter Hanks and Bryan Keon-Cohen (eds), *Aborigines and the Law: Essays in Memory of Elizabeth Eggleston* (George Allen & Unwin, 1984) 1, 4. Hookey draws from an unreported version of the Full Court decision, on his account longer and more coherent, loaned to him by LJ Priestley, Counsel for the Commonwealth in *Milirrpum*, *ibid* 8.

<sup>322</sup> The subsequent Parliamentary Select Committee on the Aborigines, above n 20, 53, seemingly adopted the position stated by His Honour.

<sup>323</sup> Papers relative to the 'Aborigines, Australian Colonies', 1844 British Parliamentary Papers, 146, quoted in Hookey, 'Settlement and Sovereignty', above n 321, 4-5.

Phillip,<sup>324</sup> *Bonjon* concerned the alleged unlawful killing by one indigene of another. The argument advanced for the accused was the same as that advanced in *Murrell*. Justice Willis accepted the argument and ruled that the New South Wales colony 'stands on a different footing from some others, for it was neither an unoccupied place, nor was it obtained by right of conquest and driving out the natives, nor by treaties'.<sup>325</sup>

*Bonjon* accepted that the colony of New South Wales was *sui generis*, having not being acquired by the accepted modes of acquisition of Discovery/Occupation, Conquest or Cession. However, like much of the early sovereignty discourse, this decision fell into desuetude in the Anglo-Australian jurisprudence. The decision is of more than antiquarian value because it establishes that a countervailing jurisprudence, informed largely by the post-Revolutionary decisions of the United States Supreme Court, was alive in argument in the colonial Anglo-Australian courts, and had found some acceptance in the New South Wales jurisprudence.

It was approximately at this time that the issue of whether the 'Natives' were subjects arose to be conclusively determined. Lord Glenelg, Secretary of State for the Colonies, wrote to Governor Bourke in 1837.

All the Natives inhabiting the territories (of every part of the continent of New Holland) must be considered as Subjects of the Queen and as within Her Majesty's allegiance. To regard them as Aliens with whom a War can exist, and against whom Her Majesty's troops may exercise belligerent right, is to deny that protection to which they derive the highest possible claim from the Sovereignty,

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<sup>324</sup> Justice Willis was a controversial figure who was later dismissed from his post by the Chief Justice but then re-instated on appeal to the Judicial Committee of the Privy Council. For a review of Willis's life, see HF Behan, *Mr. Justice J. W. Willis – First President Judge in Port Phillip – A Biographical Sketch (With Particular Reference to His Period as First Resident Judge in Port Phillip 1841–1843)* (Private Publication, 1979).

<sup>325</sup> Quoted in Hookey, 'Settlement and Sovereignty', above 321, 5, where he cites Papers relative to the Aborigines, Australian Colonies, 1844 British Parliamentary Papers, 52.

which has been assumed over the whole of their Ancient Possessions.<sup>326</sup>

*Attorney-General (NSW) v Brown (1847)*

In the decision of *Attorney-General (NSW) v Brown*,<sup>327</sup> the New South Wales Supreme Court held that, upon the assertions of British sovereignty, the Crown had acquired all colonial lands as a royal demesne. Sir Alfred Stephen, the Chief Justice, declared:

the territory of New South Wales, and eventually the whole of the vast island of which it forms a part, have [*sic*] been taken possession of by British subjects in the name of the Sovereign. They belong, therefore, to the British Crown.<sup>328</sup>

And:

[I]n a newly-discovered country, settled by British subjects, the occupancy of the Crown with respect to the waste lands of that country, is no fiction. If, in one sense, those lands be the patrimony of the nation, the Sovereign is the representative, and the executive authority of the nation, the 'moral personality' (as Vattel calls him, Law of Nations, book 1, chap 4), by whom the nation acts, and in whom for such purposes its power resides.<sup>329</sup>

There was, for these 'waste and unoccupied lands' of New South Wales, 'no other proprietor'.<sup>330</sup>

This declaration by the Supreme Court of NSW of exclusive and absolute Crown ownership of all land was accepted without cavil for nearly 150 years. It was declared to be authoritative a century later in *Randwick Corporation v Rutledge* where it was held that '[o]n the first settlement of New South Wales (then comprising the whole of eastern Australia), all the land in the colony became in law vested in the Crown'.<sup>331</sup> 'That originally the waste lands in the colonies were owned by the British Crown is not in

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<sup>326</sup> 26 July 1837, HRA, 19, 48.

<sup>327</sup> (1847) 1 Legge 312.

<sup>328</sup> Ibid 316.

<sup>329</sup> Ibid 317.

<sup>330</sup> Ibid 319.

<sup>331</sup> *Randwick Corporation v Rutledge* (1959) 102 CLR 54, 71 (Windeyer J).

doubt,' wrote Stephen J in 1975.<sup>332</sup> Even as late as 1988 – two centuries after the British arrival – Dawson J, adopting this chain of authority, wrote that the 'colonial lands which remained unalienated were owned by the British Crown'.<sup>333</sup>

During the period these cases were determined, two non-curial events shone some light on the questions to be determined, if not the answers. The first was John Batman's attempt to treat with the Natives and the second was a report of the House of Commons.

### **Batman at Port Phillip and in New Zealand (1835)**

The early colonial history also discloses some related matters which require to be canvassed.<sup>334</sup> The issue of the respective interests of the indigenous peoples and the Crown was raised in two controversies during the early Governorships of New South Wales. Both concerned the attempted purchase of land, without Crown approval, by private individuals from Indigenous peoples in the port Phillip District of New South Wales and New Zealand in 1835 and 1840 respectively.

The first in time concerned the entering upon of private compacts by John Batman, acting for the Port Phillip Association, for land from the Kurin people.<sup>335</sup> There is an element of the disingenuous in the explanation given by the entrepreneurial Batman, stating that he 'fully explained' to 'the Chiefs',

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<sup>332</sup> *New South Wales v Commonwealth* (1975) 135 CLR 337, 438.

<sup>333</sup> *Mabo v Queensland (No 1)* (1988) 166 CLR 186, 236.

<sup>334</sup> Sir Victor Windeyer, a High Court Justice, writing extra-judicially, issued a pertinent caveat saying: '[l]awyers who dabble in history may, I realize, go astray, as have some historians who have dabbled in law. But, accepting the risk ...'. He then proceeded to examine the early historical records: see Sir Victor Windeyer, 'A Birthright and Inheritance – The Establishment of the Rule of Law in Australia' (1962) 1 (5) (November 1962) *Tasmanian University Law Review* 635, 640.

<sup>335</sup> This event is treated most recently in Bain Attwood, *Possession: Batman's Treaty and the Matter of History* (The Miegunyah Press, 2010).



that the object of my visit was for me to purchase from them a tract of their country [...]. The Chiefs appeared most fully to comprehend my proposals and much delighted with the prospect of having me live among them.<sup>336</sup>

His proposal did not so delight Governor Bourke who, in a Proclamation less than three months later, declared possessors of lands held on the basis of privately treating with the 'Aboriginal natives' as trespassers against the Crown.<sup>337</sup> The preambular statement reads:

Whereas, it has been represented to me, that divers of His Majesty's subjects have taken possession of vacant Lands of the Crown, within the limits of this colony, under the pretence of a treaty, bargain, or contract, for the purchase thereof, with the Aboriginal natives: Now therefore [...]<sup>338</sup>

The lands inhabited by the 'natives' were regarded as 'vacant lands of the Crown'. The Proclamation continued to:

hereby proclaim and notify to all His Majesty's subjects and others whom it may concern, that every such treaty, bargain, and contract with the Aboriginal Natives as aforesaid, for the possession, title, or claim to any Lands lying and being within the limits of the Government of the Colony of New South Wales, [...], is void and of no effect against the rights of the Crown; and that all Persons who shall be found in possession of any such Lands as aforesaid, without the license or authority of His Majesty's Government, for such purpose, first had and obtained, will be considered trespassers, and liable to be dealt with in like manner as other intruders upon the vacant lands of the Crown within the said Colony.<sup>339</sup>

Clearly, the Crown had arrogated to itself not only sovereignty to the territory but all rights to the soil. Again, explicit in the Proclamation is the distinction between 'subjects' of the Crown and the 'Aboriginal Natives'.

The latter were not Crown subjects with attendant rights, yet neither were

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<sup>336</sup> Letter of John Batman to the Lieutenant Governor of Van Diemen's Land, 25 June 1835. It is set out in extract in CMH Clark, *Selected Documents in Australian History 1788–1850* (Angus & Robertson, 1955), 92.

<sup>337</sup> Proclamation of Governor Sir Richard Bourke dated 26 August 1835 and published in the *New South Wales Government Gazette* of 2 September 1835. The full text of the Bourke Proclamation is set out at Appendix IV.

<sup>338</sup> Ibid.

<sup>339</sup> Ibid.

they trespassers or intruders on the 'vacant lands of the Crown'.

Presumably these persons had some entitlement to possession of lands and occupied some middle echelon.<sup>340</sup>

The controversy surrounding the alleged purchases by the Port Phillip Association caused the issue to be focused upon and the opinion of London Counsel was sought by the purported purchasers as to the validity of the deeds, and of the respective interests of the Crown, themselves and the indigenous vendors. The first is the joint opinion of Messrs. William Burge and Thomas Pemberton, and Sir William Follett. This opinion was drafted by Burge, a foremost authority on Colonial Law, and concurred in by the other two barristers.<sup>341</sup> The second is the succinct opinion of Dr Stephen Lushington. Both opinions are set out at Appendix III.

Mr Burge, who draws on the early US Supreme Court precedents, outlines in reasonably clear terms the principles stated by that Court.

It has been a principle adopted by Great Britain as well as by the other European states, in relation to their settlements on the continent of America, that the title which discovery conferred on the Government, by whose authority or by whose subjects the discovery was made, was that of the ultimate dominion in and sovereignty over the soil, even whilst it continued in the possession of the Aborigines.<sup>342</sup> This principle was reconciled with humanity and justice towards the aborigines, because the dominion was qualified by allowing them to retain, not only the rights of occupancy, but also a restricted right of alienating those parts of the territory which they occupied. It was essential that the power of alienation should be restricted. To have allowed them to sell their lands to the subjects of

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<sup>340</sup> This perception that the indigenous holdings were 'waste' lands and thus vacant Crown land is entirely consistent with the views of Blackburn J expressed 135 years later in the *Milirrpum* decision. The status of the indigenous inhabitants was later argued in the *Mabo (No 2)* litigation to be that of licensees, the implied licence granted by the Crown at its absolute sufferance: see discussion in Chapter IV.

<sup>341</sup> He published the massive William Burge, *Commentaries on Colonial and Foreign Laws Generally in Their Conflict With Each Other, and the Law of England* (Saunders and Benning, 1838) soon after and this became a standard work on Colonial Law.

<sup>342</sup> There is in the text an internal reference to "Vattel, B.2. c.18", but it is hard to discern its relevance as that Chapter is entitled "Of Title by Forfeiture".

a foreign state would have been inconsistent with the right of the state, by the title of discovery to exclude all other states from the discovered country. To have allowed them to sell to her own subjects would have been inconsistent with their relation as subjects.

In Burge's opinion, the discovering Crown obtains the 'ultimate dominion' (or the 'radical' title), yet a qualified dominion *and* an allodial title resides with 'the Aborigines' with a right of pre-emption of that title to that Crown. Burge does not expand, however, on the latter interests of the Aborigines.

Throughout this opinion the distinction between sovereignty and this aboriginal title is maintained but the opening expressions suggest the distinction is not that clear. However, in his defence, he was not asked to advise on sovereignty issues, but on the respective real property rights. For our purposes, it is important to note that Burge and his fellow Counsel drew upon the American decisions, not the *Commentaries* of Sir William Blackstone or English authorities, and treated them as relevant and persuasive. Only one English case, tangentially relevant, is cited in Burge's opinion.<sup>343</sup>

The opinion of Lushington cites no authorities whatsoever. However, Dr Lushington places a question mark against the presumed sovereignty of the Port Phillip district. He says he does not think that 'the right to this territory is at present vested in the Crown'. The Opinion states that the temporary settlement at Port Philip had been abandoned, and that 'no act of ownership has since been exercised by the Crown'. It is also notable that Dr Lushington relies on the principles of the classical Discovery/Occupation mode, not any extension of those principles.

The second private compact in Australasia concerned the alleged purchase from Maori *iwi* of a vast holding in New Zealand. This controversial

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<sup>343</sup> The judgment of Lord Hardwicke in *Penn v Lord Poltimore* 1 Ves 454 is noted as supporting the view of the rights of the Crown and its grantees outlined in the opinion. As noted earlier, English authority on the issues was extremely sparse.

episode has been exhaustively treated elsewhere.<sup>344</sup> Interestingly for our purposes, Governor Gipps argued in the New South Wales Legislative Council that, as the very same principles applied in the colonies of New South Wales and New Zealand as in the British colonies in North America prior to the American Revolution, the *Johnson v M'Intosh* principles were relevant to the controversy.<sup>345</sup>

### **Select Committee of the House of Commons (1837)**

After the abolition of lawful slavery in Great Britain, there was great concern that the 'Aborigines' throughout the Empire might fall into some form of forced indenture at the frontiers if left unattended. In the House of Commons on 1 July 1834, Mister Buxton, Member for Weymouth and a leading Abolitionist, rose to speak of the state and condition of the aboriginal tribes in the colonies.

In every British Colony, without exception, the aboriginal inhabitants had greatly decreased, and still continue rapidly to dwindle away. This was the case in Australia and Africa and in North America, and as had been remarked by a Mister Hamilton, British brandy and gunpowder had done their work in thinning the natives. The hon. Member quoted several passages in illustration of his views from well-known writers. In South Africa it was considered the most meritorious action a European could perform, to shoot the natives. The introduction of civilisation, therefore, instead of proving a blessing, had proved a curse to the Aborigines of the different countries, into which we have carried what we called the blessings of civilisation.<sup>346</sup>

Member Buxton went on to say it was 'high time that some measures were adopted, with the view of arresting the rapid decrease which is taking place

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<sup>344</sup> This episode is fully treated in several works in the New Zealand literature, notably and comprehensively in Geoffrey Lester and Graham Parker, 'Land Rights: the Australian Aborigines Have Lost a Legal Battle, But ...' (1973) 11 *Alberta Law Review* 189.

<sup>345</sup> Governor Gipps also cited the joint opinion of Messrs Burge, Pemberton and Follett as buttressing this view. This interesting chapter in Australian legal history is developed in Hookey, 'Settlement and Sovereignty', above n 321, 8-9.

<sup>346</sup> House of Commons, 1 July 1834, 1061-2.

among native inhabitants of the colonies'.<sup>347</sup> Secretary for the Colonies Rice replied that should his Honourable friend think it proper to bring forward a motion for a committee of enquiry in the next session he would 'most willingly' support it.<sup>348</sup> Secretary Rice is reported as stating:

There must be evils to a certain extent, consequent on the introduction of civilisation into a savage country, and these evils, though he could not hope that they could be done away with altogether, he would use every exertion to reduce.<sup>349</sup>

A Select Committee was subsequently formed to investigate the state and condition of aboriginal tribes in the Empire's colonies and it reported in 1837. As for New Holland,<sup>350</sup> it stated that the British colonists there had had contact with 'the least-instructed portion of the human race'

so entirely destitute are they even of the rudest forms of civil polity, that their claims, *whether as sovereigns or proprietors of the soil*, have been utterly disregarded.<sup>351</sup>

### **'As if it were'**

In 1886, there was a formal shift from positing the classical Discovery/Occupation mode of occupying an uninhabited territory as the basis upon which British sovereignty was asserted over New Holland. The 'Aborigines', though depopulated by disease and dispossession, had not become extinct as predicted. It was seemingly increasingly implausible to continue to maintain that New Holland was uninhabited and acquired under Discovery/Occupation. The 'various tribes' could no longer be convincingly imagined gone when the colonial administration was actively devoted to 'mopping up' the remaining Indigenous peoples to offer them a

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<sup>347</sup> Ibid 1062.

<sup>348</sup> Ibid.

<sup>349</sup> Ibid.

<sup>350</sup> The appellation New Holland was used as late as 1837 in official correspondence between London and Sydney: see Letter from Secretary of State for the Colonies to Governor of NSW, 23 July 1937, HRA 19, 48.

<sup>351</sup> Quoted in Lindley, above n 29. Emphasis added.

measure of 'protection'. If the objective reality could no longer be manipulated to fit the extant theory as to the acquisition of the continent of New Holland, then that theory would need to be re-crafted to suit that reality. The rationalisation – the weaving of a somewhat more 'decorous veil' – belatedly began a century after the event.

In a prosecution of persons trading on a Sunday,<sup>352</sup> Holroyd J stated:

In determining that the restrictive law before mentioned was reasonably capable of being applied in New South Wales in 1828, I have altogether put out of mind the aboriginal inhabitants. The Imperial Parliament was not thinking of them. From the first the English have occupied Australia *as if it were* an uninhabited and desert country. The native population were [sic] not conquered, but the English Government and afterwards the colonial authorities, assumed jurisdiction over them as if they were strangers who had immigrated into British territory [...].<sup>353</sup>

The assertion that New Holland was uninhabited was thus abandoned. It gave way to the metaphorical: it was now *as if it were* uninhabited and desert. There was now a 'native population' and, with an inglorious irony, who were treated 'as if they were strangers who had immigrated into British territory'. Thus the Indigenous peoples of New Holland became visible to the Anglo-Australian jurisprudence but were 'strangers' in their own lands.

### ***Cooper v Stuart* (1889)**

*Cooper v Stuart*<sup>354</sup> is the only decision in the Imperial constitutional law which directly addressed, albeit in disjuncted *dictum*, the basis upon which the territorial sovereignty over New South Wales had been asserted. This decision was given in 1889 by the Judicial Committee of the Privy Council,

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<sup>352</sup> *M'Hugh v Robertson* (1886) 11 VLR 422.

<sup>353</sup> *Ibid* 431. Similarly, in New Zealand, in *Wi Parata v Bishop of Wellington* (1877) 3 NZ Jur (NS) SC 72, the Chief Justice Prendergast ruled that the Treaty of Waitangi, having been signed by 'primitive barbarians', was simply a nullity.

<sup>354</sup> (1889) AC 286 (JCPC).

then the supreme judicial tribunal of the British Empire, on appeal from the Supreme Court of NSW.<sup>355</sup> The concern was whether a floating reservation in a Crown grant of land at Cumberland in 1823 was void for being contrary to the rule against perpetuities. The reception of this common law rule, if at all, into the law of the colony of NSW was at issue. In discussing the reception of English law into British colonies, Lord Watson, on behalf of himself and his fellows,<sup>356</sup> wrote:

The often-quoted observations of Sir William Blackstone (1 Comm. 107) appear to their Lordships to have a direct bearing upon the present case. He says:

It hath been held that, if an uninhabited country be discovered and planted by English subjects, all the English laws then in being, which are the birthright of every English subject, are immediately there in force (Salk. 411, 666).<sup>357</sup> But this must be understood with very many and very great restrictions. Such colonists carry with them only so much of the English law as is applicable to the condition of an infant colony; such, for instance, [...].<sup>358</sup>

The Privy Council stated that the manner of introduction of English law into a British colony, and its extent, must necessarily vary according to the circumstances. 'There is', wrote their Lordships,

a great difference between the case of a Colony acquired by conquest or cession, in which there is an established system of law, and that of a Colony which consisted of a tract of territory, practically unoccupied, without settled inhabitants or settled law, at the time

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<sup>355</sup> *Cooper v Stuart* (1886) NSWLR 7 (Equity Reports). It was tried at first instance in the New South Wales Supreme Court by Sir William Manning, and in the Appeal Court composed by Sir J Martin CJ, Faucett and Sir G Innes JJ.

<sup>356</sup> The full complement of this Judicial Committee was Lords Watson, FitzGerald, Hobbhouse and Macnaghten, and Sir William Grove.

<sup>357</sup> This citation to the 1694 decision of *Blankard v Galdy* is misleading. This decision is the foremost authority on the law to be applied in conquered territories. Lord Holt CJ was there concerned to uphold the opinion that all laws in force in England were immediately in force in a conquered territory.

<sup>358</sup> (1889) AC 286, 291 (JCPC).

when it was peacefully annexed to the British dominions. The Colony of New South Wales belongs to the latter class.<sup>359</sup>

Their Lordships made the leap from the 'uninhabited country' addressed by Sir William Blackstone to the 'practically unoccupied' territory of New South Wales but did not pause to explain this extrapolation. The opinion stated:

Their Lordships have not been referred to any Act or Ordinance declaring that the laws of England, or any portion of them, are applicable to New South Wales. *There was no land law or tenure existing in the Colony at the time of its annexation to the Crown*; and, in that condition of matters, the conclusion appears to their Lordships to be inevitable that, as soon as colonial land became the subject of settlement and commerce, all transactions in relation to it were governed by English law, in so far as that law could be justly and conveniently applied to them.<sup>360</sup>

The Board continued to conclude that the rule against perpetuities was inapplicable to the circumstances of the colony in 1823. The argument was dismissed and, ultimately, the appeal.<sup>361</sup>

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<sup>359</sup> Ibid. Although uncited, there is some strength to the view that the Judicial Committee may have been influenced by the New Zealand decision of *Wi Parata v Bishop of Wellington* where it was stated

the Crown was compelled to assume in relation to the Maori tribes, and in relation to native land titles, these rights and duties which, *jure gentium*, vest in and devolve upon the first civilised occupier of a territory thinly peopled by barbarians without any form of law or civil government.

(1877) 3 NZ Jur (NS) SC 72, 77.

<sup>360</sup> (1889) 14 AC 286, 292 (JCPC). Emphasis added.

<sup>361</sup> It is of interest that the decisions of *St Catherine's Milling and Lumber Company v The Queen* (1889) 14 AC 46 (JCPC) and *Cooper v Stuart* were handed down by the Judicial Committee within months of each other in late 1888 and early 1889 respectively. The former is the seminal decision for the recognition of aboriginal title in the Anglo-Canadian jurisprudence; the latter the denial of inhabitation of New Holland by the Indigenous peoples in Anglo-Australian jurisprudence. Lord Watson delivered the Advices in both decisions. Canadian and English counsel argued the *St Catharine's Milling* appeal before the Committee whereas solely English counsel argued the Australian matter. Sir Horace Davey QC, later Lord Davey, and Haldane, later Viscount Haldane, appeared in both appeals. Both, in their later judicial roles, featured in aboriginal title cases from Africa and New Zealand.



## Reliance on Blackstone's *Commentaries*

The Board's reliance on Blackstone's *Commentaries* as authority for the extrapolation of principle from the 'uninhabited' to the 'practically unoccupied' is also most tenuous. The passage from the *Commentaries* upon which the Privy Council drew is lifted from Book the First. It is entitled *Of Persons*, and in Section IV, *Of the Countries Subject to the Laws of England*, opens with this introduction.

The Kingdom of England, over which our municipal laws have jurisdiction, includes not, by the common law, either Wales, Scotland, or Ireland, or any other part of the king's dominions, except the territory of England only. And yet the civil laws and local customs of this territory do now obtain, in part or in all, with more or less restrictions, in these and many other adjacent countries; of which it will be proper first to take a review, before we consider the kingdom of England itself, the original and proper subject of these laws.<sup>362</sup>

Blackstone then proceeds to deal *seriatim* with Wales, Scotland and Ireland in turn and in detail. Then he moves on to the islands adjacent to England. The Isle of Man 'is a distinct territory from England, and is not governed by our laws; neither doth any act of parliament extend to it, unless it be particularly named therein'. He then deals with the islands of Jersey, Sark, Alderney, and their appendages which 'were parcel of the duchy of Normandy'

and were united to the Crown of England by the princes of the Norman line. They are governed by their own laws, which for the most part the ducal customs of Normandy, being collected book of very great authority, entitled, *le grand Coustumier*.<sup>363</sup>

The context from which the passage quoted by Lord Watson was taken will now be obvious. Blackstone was addressing the issue of the reception and application of English laws, and in particular legislation, to those places over which British sovereignty *already* extended. Blackstone was not

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<sup>362</sup> Blackstone, *Commentaries*, above n 153, Book the First, 93.

<sup>363</sup> *Ibid* 104.

relevantly concerned in this Section VI of Book the First with the modes of acquiring of territory but with an issue subsequent to acquisition, the reception of English law. In this context appears the passage which the Judicial Committee quoted. The relevant paragraph opens:<sup>364</sup>

Besides these adjacent islands, our more distant plantations in America, and elsewhere, are also in some respect subject to the English laws. Plantations or colonies in distant countries, are either such where the lands are claimed by right of occupancy only, by finding them desert and uncultivated, and peopling them from the mother country; or where, when cultivated, they have been either gained by conquest, or ceded to us by treaties.

Sir William Blackstone was contrasting two 'species' of colony, the first where uninhabited lands are claimed 'by right of occupancy only, by finding them desert and uncultivated, and peopling them from the mother country', and the second, a colony gained by conquest or cession. Having drawn the distinction in the species, he continues:

And both these rights are founded upon the law of nature, or at least upon that of nations. But there is a difference between these two species of colonies, with respect to the laws by which they are bound.<sup>365</sup>

Then appears the passage upon which Lord Watson seized, and which was asserted by their Lordships to have 'direct bearing'.

It hath been held that, if an uninhabited country be discovered and planted by English subjects, all the English laws then in being, which are the birthright of every English subject, are immediately there in force.

This is a wholly uncontroversial principle under the Occupation doctrine. If a newly-discovered territory was uninhabited, it could not have any extant system of laws in the territory and if settled by Englishmen, who by right of birth carried the English law with them, the English law would

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<sup>364</sup> Ibid.

<sup>365</sup> Ibid.

enter as the *lex loci* into this lawless vacuum, but only to the extent necessary for the infant plantation.

Sir William Blackstone did not address in Section VI, Book the First of the *Commentaries*, the circumstances of English law applying to territories already inhabited by New World peoples. Blackstone was addressing the application of English law to *uninhabited* territories, not those 'practically unoccupied'.<sup>366</sup> Blackstone's *Commentaries* did not, as their Lordships claimed, have any 'direct bearing' on the issue in *Cooper v Stuart*<sup>367</sup> because Blackstone was not relevantly addressing the 'species' of colony. The species of colony that New South Wales was accorded by the Privy Council is not a species known to Blackstone's *Commentaries*. It is not Sir William Blackstone who elides an 'uninhabited' territory with one that is 'practically unoccupied'; it is the Privy Councillors who, from a great distant, created what is truly a third 'species' of colony. This third species has a human population with no settled habitations, no settled law and although inhabiting the land, do not 'occupy' it, and whose territories can be annexed without any compensation or process by the Crown. With this act of speciation, wholly crafted by the Privy Councilors, any antecedent interests and titles, sovereigns or laws of the Indigenous inhabitants were wholly denied by law. Under this JCPC speciation, a jural sub-class of Indigenes was created – not unlike that of the earlier slaves of the Empire – who became not subjects but property, human beings *owned* by the Empire but without rights at general law.<sup>368</sup>

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<sup>366</sup> That is a far more complex scenario involving a conflict of laws on manifold levels.

<sup>367</sup> *Contra* Lumb, above n 45, where the author claims that the asserted Blackstonian doctrine 'was almost etched in stone', yet, oddly in this author's opinion, 'the court refused to adopt the Blackstonian conclusion on which the Australian precedents were based': 86-7. Plainly Lumb was wrong and, as Brennan J noted in *Mabo (No 2)* (1992) 175 CLR 1 at 35, Blackstone's *Commentaries* stated no such conclusion.

<sup>368</sup> See, for example, the pamphlet of Rev. Father Duncan McNab in 1881, which states: 'Although the Aborigines are British subjects they are practically without a Government

However, the Privy Council glossators of Blackstone's text, and more contemporary authority, have contended that Sir William Blackstone, in using the term 'desart and uncultivated', was purporting to stretch the principles of Occupation from the classical position, applying only to uninhabited territory, to another position in which those principles applied to an inhabited but *uncultivated* territory, not merely speaking to the reception of English law to distant colonial situations.

Blackstone was mindfully writing in the wake of the *Royal Proclamation* of 1763 issued by King George III following the cession of the French territories in the Treaty of Paris earlier that year (consequent upon their loss in the French and Indian Wars (1756–63)), the purpose of which was to consolidate Great Britain's (old and newly-won) colonial possessions in North America and to stabilise relations with Amer-Indian peoples. The *Royal Proclamation* acknowledged the rights of the 'several nations or tribes of Indians' under his protection to their 'hunting grounds' but claimed an ultimate dominion over these hunting grounds. A procedure was settled whereby Indians could voluntarily alienate their land to Crown representatives. In the light of this recent *Royal Proclamation*, it seems implausible that Sir William Blackstone would abstractly assert a completely contrary view from the Imperial constitutional law embedded in the *Royal Proclamation* without any authoritative foundation or reference whatsoever.<sup>369</sup>

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[and] beyond the protection of the laws even in the settled portions of the Colony [of Queensland]. They have no rights, or they are generally ignored. When they suffer wrong they have no redress as their evidence is not received in Court': quoted in Raymond Evans, Kay Saunders and Kathryn Cronin, *Race Relations in Colonial Queensland* (University of Queensland Press, 3<sup>rd</sup> ed, 1993), 383.

<sup>369</sup> See, generally, Thalia Anthony, 'Blackstone on Colonialism: Australian Judicial Interpretations' in Wilfred Prest (ed), *Blackstone and his Commentaries* (Hart Publishing, 2009), 129.

Sir William Blackstone was certainly aware of and writing of 'our more distant plantations in America and elsewhere', but at the time he was drawing the distinction between his two species of colonies between 1765–69, the east coast of New Holland had yet to be charted by Cook and the penal establishment at Sydney Cove was years into the future. He was abreast of the writings of his contemporary and fellow natural law lawyer, Emmerich de Vattel, and of the continental discourse. He, too, upheld the ancient principles of Occupation, what he calls the 'right of occupancy', as consonant with both natural law and the law of nations. Yet, as Blackstone also wrote, this right was restricted. This 'right of occupancy' extended only to the sending of English colonists to find new habitations in 'desert, uninhabited countries':

And, so long as it was confined to the stocking and cultivation of desart uninhabited countries, it kept strictly within the limits of the law of nature. But how far the seizing of countries already peopled and driving out and massacring the innocent and defenceless natives, merely because they differed from the invaders in language, in religion, in customs in government or in colour; how far such a conduct was consonant to nature, to reason, or to Christianity, deserved well to be considered by those, who have rendered their names immortal by thus civilizing mankind.<sup>370</sup>

There is an easy appreciation from this passage from Book the Second, where Sir William Blackstone is fully discussing the modes of acquisition of territory and sovereignty, that the elision from the 'uninhabited' species to the 'practically unoccupied' species made in his name by the Judicial Committee of the Privy Council in *Cooper v Stuart*, was unprecedented and lacking principled authority. Textually, contextually, and historically, it is a difficult argument to sustain when Sir William Blackstone plainly states his position in the *Commentaries* and rails against 'the seizing of countries already peopled' and 'the driving out and massacring the innocent and

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<sup>370</sup> Blackstone *Commentaries*, above n 153, Book the Second, 7.

defenceless natives'.<sup>371</sup> Far from supporting the annexation of whole territories populated by the 'defenceless natives', Blackstone passionately inveighed against the seizing of countries already peopled. Sir William Blackstone was thus ill-served by the Judicial Committee in *Cooper v Stuart*. Blackstone's text was extrapolated far beyond anything for which the *Commentaries* provide support. Lord Watson's interpretation was an artless mondegreen, beyond Blackstone's *Commentaries* and lacking any precedent in the Imperial constitutional law.

At its highest, the assertions by the Judicial Committee that the colony of New South Wales was 'a tract of territory, practically unoccupied, without settled inhabitants or settled law,' when 'peacefully annexed' to the British Crown, was merely unsupported *dicta*. A similar claim over the Western Sahara made in 1884 has been condemned in the international law as not consistent with state practice of that era.<sup>372</sup>

Remembering Jennings's caveat, as to what role law plays, and despite its doubtful validity, both legally and historically, until the *Mabo (No 2)* decision, *Cooper v Stuart* was regarded as unquestionably authoritative of the legal basis of the British acquisition of the territory of New South Wales.<sup>373</sup>

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<sup>371</sup> The quaintly named, Book the First, of Blackstone's *Commentaries* was published in November 1765, Book the Second the following October: see Wilfred Prest, *William Blackstone: Law and Letters in the Eighteenth Century*, Oxford, Oxford University Press, 2008, 219. This argument will be addressed below in the discussion of *Milirrpum v Nabalco Pty Ltd*, where in eliding from 'uncultivated' to 'uninhabited', the arguments of the jurist Vattel enter the discourse.

<sup>372</sup> *Advisory Opinion on the Western Sahara* [1975] ICJ Reports 12 (ICJ).

<sup>373</sup> Lord Bingham has recently noted his concurrence with Lord Reid's statement in 1972, saying

the quality of single Privy Council judgments has on the whole been inferior from the point of view of developing the law to the more diverse opinions of the House. A single lapidary judgment buttressed by four brief concurrences can give rise to continuing problems of interpretation

With this *dictum*, the jurisprudential underpinning relating to the acquisition of New Holland fundamentally and formally changed. The Imperial constitutional law now accepted the reality that New Holland was inhabited. However, it amended the theory so that although inhabited by humans, these humans did not legally 'occupy' their territories and they did not inherently possess rights to territory in the international law, or real property or governance at common law. In this the cavalier assertion, the Imperial constitutional law dispossessed the Indigenous peoples of New Holland of any rights whatsoever, consigning them to a lesser form of humanity.

The Anglo-Australian jurisprudence thus formally evolved from '*Nobody's there*' to '*Somebody's there but they have no cognizable rights in the international, Imperial constitutional law or in the Anglo-Australian common law*'. These inhabitants had no tenure, no title and no law. The Imperial constitutional law admitted into its jurisprudence the principle that the inhabitants of New Holland were of a lesser juridical class than other subjects of the British Crown, a category Italian philosopher Giorgio Agamden has termed *Homo sacer*.<sup>374</sup> The subject is human, but humans which are not rights-bearing.<sup>375</sup>

Effectively, in the Anglo-Australian jurisprudence, the statements of the Privy Councilors in *Cooper v Stuart* reversed the philosophical and juridical thrust of the Papal Bull *Sublimis Deus* – that the peoples of the New World

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which would have been at least reduced if the other members had summarised, however briefly, their reasons for agreeing.

See Lord Bingham, 'The Rule of Law' (Paper presented at the (Sixth) Sir David Williams Lecture, Centre for Public Law, Faculty of Law, University of Cambridge, 2006), 8.

<sup>374</sup> See Giorgio Agamden, *Homo Sacer: Sovereign Power And Bare Life* (Daniel Heller-Roazen trans., Stanford University Press, 1998).

<sup>375</sup> This was stated more elegantly by Ron Castan QC as 'saying that those persons, although manifestly physically present and live, are not worthy of being treated as 'people' at all [...]; see R. Castan, 'Land, Memory and Reconciliation', (1999) *Without Prejudice* 3, 4.

were human and rights-bearing – which had been accepted 350 years earlier. Indeed, whether the Indigenous persons were treated as subjects or as aliens, it seems to be contrary to a long line of precedent mentioned by Lord Scarman in *Ex parte Khawaja*:<sup>376</sup>

He who is subject to English law is entitled to its protection. This principle has been in the law at least since Lord Mansfield freed ‘the black’ in *Sommerset’s Case* (1772) 20 St. Tr. 1. There is nothing here to encourage in the case of aliens or non-patrials the implication of words excluding the judicial review our law normally accords to those whose liberty is infringed.<sup>377</sup>

*Cooper v Stuart* resurrected in the Imperial constitutional law the notion that, like the Infidel of the Middle Ages, the ‘Black natives’ of New Holland were not to be accorded rights. Contrary to the assertion of Las Casas, all the peoples of mankind were not human, the Indigenous peoples of New Holland were, to the Imperial constitutional law, a subordinate class to which the international legal principles of the day did not apply, and which the common and constitutional laws of England did not protect.<sup>378</sup>

Reversing a central tenet of the Age of Discovery, the original Indigenous inhabitants of New Holland thus became a lesser juridical class of humanity in the Age of Empire. This was the fragile legal discourse for the dispossession by the British Crown of the Indigenous peoples of New Holland. However, this almost-disassociated dictum fell from the most august judicial tribunal of Empire, and the arbiter of the Imperial constitutional law, and would remain unchallenged, and virtually unchallengeable – falling as it did from the most senior judges in the British Empire – in the Anglo-Australian jurisprudence for the next 100 years.

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<sup>376</sup> *R v Secretary of State for the Home Department, Ex p Khawaja* [1984] AC 74.

<sup>377</sup> *Ibid* 111-2.

<sup>378</sup> A less discussed aspect of the *Mabo (No 2)* result is that the Court divided 4:3 in deciding that Indigenous peoples were, until the *Racial Discrimination Act 1975 (Cth)*, not entitled to compensation for the acquisition of their territories.



In his *Commonwealth and Colonial Law*, Sir Kenneth Roberts-Wray warned of the perils of the decisions in this realm of the Imperial constitutional law:

The Courts have, from time to time, made broad statements of law which appear to take no account of distinctions which were not before them, and one may have to accept with caution the validity of a dictum so far as it extends beyond the circumstances of a particular case.<sup>379</sup>

Yet these representative statements of Lord Watson in 1889 were inherently fragile. The decision has been roundly criticised because the issue had not been argued fully before the Privy Council (or earlier in the appeal process), was open to historical challenge,<sup>380</sup> and disregards earlier principles set out in *Anonymous* in 1722.

Sir Kenneth might well have been directing his remarks to the Board in *Cooper v Stuart*. Professor Simpson has written that the *Cooper v Stuart* opinion of Lord Watson represents the beginning of

the series of elisions and slippages that came to characterise Australian judicial pronouncement on acquisition, and to provide the tools for a series of artificial and purely formal reconciliations of law, politics and history.<sup>381</sup>

Yet it was not merely in law that the scales of civilisation concept held sway. Russell cites Sir John Seeley, Regius Professor of History at Cambridge, lecturing in 1883 that 'the Australian race' are 'so low in the ethnological scale that it can never give the least trouble'.<sup>382</sup>

Notably, near to the same time in North Africa, Spain purported to annex the territories of Rio de Oro and Sakiet El Hamra in the Western Sahara as *terra nullius*. It was claimed that this territory was inhabited only by nomadic Bedouin peoples and thus could be deemed vacant and unoccupied in the international law. The Bedouin peoples having no

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<sup>379</sup> Roberts-Wray, above n 43, *viii-ix*.

<sup>380</sup> See, for example, Henry Reynolds, *The Law of the Land* (Penguin, 1987).

<sup>381</sup> Simpson, above n 15, 200.

<sup>382</sup> Russell, above n 51, 114.

cognisable social or political organisation, it was argued that the territories were claimable as *terra nullius* under an enlarged mode of Occupation.

The principal consequences of regarding New South Wales as 'without settled inhabitants or settled law' were that there was no sovereign(s) possible, it was a jural vacuum and the lands under no proprietorship.<sup>383</sup>

There were humans in this landscape but, to the common law of England, the Imperial constitutional law, and to the Anglo-Australian jurisprudence, they were not visible.

The central tenet of the *Cooper v Watson* assertion held sway in the Privy Council for nigh 30 years. As late as 1919, in *Re Southern Rhodesia*,<sup>384</sup> this position was reinforced in the Imperial constitutional law with Lord Sumner, writing on behalf of the Board:

The estimation of the rights of aboriginal tribes is always inherently difficult. Some tribes are so low in the scale of social organization that their usages and conceptions of rights and duties are not to be reconciled with the institutions or the legal ideas of civilized society. Such a gulf cannot be bridged.<sup>385</sup>

However, whilst this attitude was soon after quashed in the Imperial constitutional law in large part,<sup>386</sup> for the Anglo-Australian jurisprudence, however, the *Cooper v Stuart* decision remained the centrepiece of the

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<sup>383</sup> Rosita Henry, 'The Road from Mabo: Towards Automony' (1993) 18 (1) *Alternative Law Journal* 12, 15.

<sup>384</sup> *Re Southern Rhodesia* [1919] AC 211 (JCPC). This 'unbridgeable gulf' concept, however, found little acceptance and was cauterised from the Imperial Constitutional law in *Amodu Tijani v Secretary for Southern Nigeria* [1921] 2 AC 399 (JCPC). It was thoroughly repudiated in *Adeyinka Oyekan v Musendiku Adele* [1957] 2 All ER 785 (JCPC) where the Privy Council comprised of Earl Jowett, and Lords Cohen and Denning, stated (at 788):

Whilst, therefore, the British Crown, as Sovereign can make laws enabling it compulsorily to acquire land for public purposes, it will see that proper compensation is awarded to everyone of the inhabitants who has by native law an interest in it; and the courts will declare the inhabitants entitled to compensation according to their interests, even though those interests are of a kind unknown to English law.

<sup>385</sup> (1971) 17 FLR 141, 233-4. Blackburn J, in *Milirrpum*, refused to accept a similar argument concerning the Yolngu: (1971) 17 FLR 141, 265-8.

<sup>386</sup> *Amodu Tijani v Secretary for Southern Nigeria* [1921] 2 AC 399 (JCPC).

orthodox theory of the acquisition of territorial sovereignty of New Holland and its peoples. For the next century, the Anglo-Australian jurisprudence on the issues amounted to little more than judicial flourishes,<sup>387</sup> the most rhetorical being the claim made judicially by Issacs J in 1913 that it was 'unquestionable' from the time Captain-General Phillip received his First Commission that the whole of the lands of New Holland were already in law the property of the King of England. His Honour was firmly, but wrongly, of the opinion that the British Crown became the absolute legal and beneficial owner of the whole of New Holland on 12 October 1768!<sup>388</sup>

### ***Australian Constitution Act 1901 (UK)***

The issue was largely silent and even the federation of the Anglo-British colonies in Australia, federated in 1901, retained the orthodoxy. The United Kingdom legislation giving effect to that federation, the *Australian Constitution Act 1901 (UK)*, referred to the Indigenous peoples in two provisions. In the first, the 'Aborigines' were not to be counted in any census of residents, thus cementing their 'invisibility'.

And in Section 51, which delineated the legislative powers between the now 'States' and the newly-created 'Commonwealth of Australia', placitum (xxvi) gave the Commonwealth power to make laws 'for any race *other than for the Aboriginal race*'. This ensured that the power to legislate for 'Aborigines' remained with the former colonial legislatures. Both references were removed in 1967, after successful referenda. 'Aborigines'

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<sup>387</sup> See *Williams v Attorney-General of New South Wales* (1913) 16 CLR 404; *Randwick Corporation v Rutledge* (1959) 102 CLR 54. It has been observed that there was no Indigenous contradictor in the proceedings. The most telling criticism is that of Deane and Gaudron JJ, in their *Mabo (No 2)* opinion, where they stated that it, and indeed the earlier cases, was 'little more than bare assertion': *Mabo (No 2)* 175 CLR 1, 103-4.

<sup>388</sup> *Williams v Attorney-General of New South Wales* (1913) 16 CLR 404. Isaacs J was a former Attorney-General of Victoria and the Commonwealth. He was Sir Isaac Isaacs, Chief Justice of the High Court, when he was appointed Governor-General of Australia in 1931.

would thereafter be able to be counted in censuses and by removing the restriction that the Commonwealth could not legislate 'for the Aboriginal race' allowed the legislative power to be shared with the Commonwealth. This so-called shared 'race power'<sup>389</sup> presently allows that not only beneficial legislation can be enacted for the 'Aboriginal race' but also legislation which can be detrimental.<sup>390</sup>

One of the unfortunate aspects of the delineation of powers denominated by race is that the discourse remains retarded by the language of the original framers at a time when it was, as one commentator stated, 'saturated with white racism'.<sup>391</sup> It has cemented in the Anglo-Australian jurisprudence the 19<sup>th</sup> century colonial view that the manifold and varied Indigenous peoples of the New Holland continent are a 'race' of 'Aborigines', although such a view is scientifically discredited.

For the Anglo-Australian jurisprudence, however, the *Cooper v Stuart* decision remained the centrepiece of the orthodox theory of the acquisition of territorial sovereignty of New Holland. And it remained uncontested in the Anglo-Australian law until 1971 in the arguments surrounding the Indigenous land claim made in *Milirrpum v Nabalco Pty. Ltd.*<sup>392</sup>

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<sup>389</sup> The other 'race' power in the Australian Constitution allows the States to disenfranchise persons on the basis of race (*Australian Constitution* s 25). Effectively neutered since 1975 by the *Racial Discrimination Act 1975 (Cth)*, it remains part of the constitutional framework.

<sup>390</sup> *Katinyeri v Commonwealth* (1998) 72 ALJR 722.

<sup>391</sup> Russell, above n 51, 11. Famously, Prime Minister Alfred Deakin, spelt it out explicitly in the House of Representatives in 1901, when he said: 'We have the power to deal with people of any and every race within our borders, except the Aboriginal inhabitants of the continent, who remain in the custody of the states. There is that single exception of a dying race; if they be a dying race, let us hope that in their last hours they will be able to recognise not simply the justice, but the generosity of the treatment which the white race, who are dispossessing them and entering into their heritage, are according them': see Sally Warhaft (ed), *Well May We Say ... The Speeches That Made Australia* (Black Inc., 2004), *The Commonwealth of Australia shall mean a "white Australia"*, 12 September 1901, Speech to the House of Representatives, 216, 218.

<sup>392</sup> (1971) 17 FLR 141.

### CHAPTER III 'NOT PURELY OF LAW'

The most comprehensive account in the modern Anglo-Australian jurisprudence of the legal basis upon which the British asserted territorial sovereignty over the colony of New South Wales is found in the decision of *Milirrpum v Nabalco Pty. Ltd.*<sup>393</sup> In this decision, the Peaceful Settlement doctrine stated by the Privy Council in *Cooper v Stuart* 80 years earlier is expanded as a eugenicist notion – that the 'more advanced peoples' might dispossess the 'less advanced' of their territories as necessity demanded – is accepted into Anglo-Australian law. This decision is analysed in depth in this Chapter.

#### *Milirrpum v Nabalco Pty. Ltd.*

The issue was whether the Yolngu People of north-eastern Arnhem Land in the Northern Territory had a proprietary interest in their traditional lands which was cognisable to the Anglo-Australian common law. It arose for determination at first instance before Judge Blackburn<sup>394</sup> of the Northern Territory Supreme Court in 1971. There were seemingly no previous attempts to assert inherent property rights residing with the indigenous peoples in Australia. This 154-page judgment was the leading decision,<sup>395</sup> and the only exposition, on the legal basis upon which the colony of New

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<sup>393</sup> (1971) 17 FLR 141.

<sup>394</sup> At the time of the judgment, Northern Territory judges were known as Judge, not Justice. Judge Blackburn was appointed a Justice of the Australian Capital Territory Supreme Court later in 1971, already an Officer of the Military Order of the British Empire, and was made a Commander of the Order of St John of Jerusalem in 1981 and Knight Bachelor in 1983: see <http://www.supremecourt.nt.gov.au/about/judges/former/blackburn.htm>, accessed 27 January 2013.

<sup>395</sup> This trial decision was not appealed. An understanding of this situation can be gleaned from Woodward's background paper on the litigation: see AE Woodward, 'Three Wigs and Five Hats' (Paper presented at the Eric Johnston Lecture (4th), State Reference Library of the Northern Territory, 10 November 1989), 6.

South Wales was acquired in the Anglo-Australian jurisprudence until the 'judicial revolution' of *Mabo (No 2)*.

The Gove Peninsula, on the northeastern coast of Arnhem Land, is inside the territory that was claimed as 'Our Territory of New South Wales' which the Commissions to Governor Phillip were intended to extend. It thus theoretically became part of the colony of New South Wales on 7 February 1788. However, it was not until a century later, after this territory was annexed to the Colony of South Australia that the first purported alienation of any land occurred. Pastoral leases were granted over the relevant lands. Then, in 1931 a large tract of this Northern Territory which included the subject land, was reserved and called 'the Arnhem Land reserve', for the 'use and benefit of the aboriginal native inhabitants of the Northern Territory'. And it was not until Methodist missionaries set up at Yirrkala in 1935 that there was a permanent European presence near the contested lands.

Large deposits of commercially-viable bauxite had been found and mineral leases granted over an area near Yirrkala had been excised from the land reserved for the Yolngu. They had not been consulted and had expressed their opposition to the increasing development for some five years, including presenting to the Commonwealth Parliament a bark petition requesting the cessation of these activities.<sup>396</sup> Losing the political and cultural battle, in December 1968 the Yolngu commenced an action in the Northern Territory Supreme Court<sup>397</sup> claiming a traditional proprietary

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<sup>396</sup> A classic text which surveys the Yolngu people is Nancy M Williams, *The Yolngu and their Land: A System of Land Tenure and the Fight for its Recognition* (Australian Institute of Aboriginal Studies, 1986).

<sup>397</sup> An action before a single Justice of the High Court of Australia was contemplated but declined because Senior Counsel was not confident of a reasonable hearing from some members of the Sir Garfield Barwick-led court: see Edward Woodward, *One Brief Interval: A Memoir* (Miegunyah Press, 2005), 99. Woodward had some Imperial connections: his

interest in the excised land. The Yolngu alleged that they had been in continuous use of the land for an indefinite and indeterminable period of time, ancestral beings connecting them to their lands *time out of mind*. They sought declarations and an injunction against Nabalco and the Commonwealth to stop the mining and ancillary operations and, after interlocutory proceedings in which the Commonwealth sought summary judgment alleging that the proceedings showed no cause of action and failed,<sup>398</sup> the matter proceeded to trial.

In these proceedings, there was no direct challenge to the assertion of British sovereignty over the relevant lands in Arnhem Land. The argument made on the Yolngu's behalf was, in essence, that 'sovereignty' over and the ultimate (or radical) title to their traditional lands became vested in the British Crown by reason of what Captain-General Phillip did in pursuance of his Commissions at Sydney Cove in early 1788.<sup>399</sup> From that time, the common law of England applied to all subjects of the Crown in New South Wales, including the forebears of the plaintiff Yolngu, and

at common law the rights, under native law or custom, of native communities to land within territory acquired by the Crown, provided that these rights were intelligible and capable of recognition by the common law, and were rights which persisted,

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father, Lieutenant General Sir Eric Woodward, was New South Wales's longest-serving Governor and Woodward himself accepted a knighthood in 1982.

<sup>398</sup> Reported as *Mathaman v Nabalco Pty Ltd* [1969] 14 FLR 10.

<sup>399</sup> But see the *Blue Mud Bay* decision at first instance (*Gumana v Northern Territory* (2005) 141 FCR 457), where Selway J placed some reservation on this, stating: 'In the reasons of McHugh J and of Callinan J in the High Court in *Commonwealth v Yarmirr* (2001) 208 CLR 1 (*Yarmirr HC*) at 70-71 and 148-150 both of their Honours refer to the extension of the territory of New South Wales in 1824 to include the remaining part of what is now the Northern Territory to the west of the 135<sup>th</sup> degree of east longitude. It may be that there is an implication that their Honours were of the view that the area of north-east Arnhem land had not been claimed by the British Crown before 1824. Nevertheless, it is clear (and was accepted by all parties) that the area that is the subject of the current proceedings (leaving aside the "bays and gulfs") was claimed by the British Crown as from January, 1788.'

and must be respected by the Crown itself and by its colonizing subjects, unless and until they were validly terminated.<sup>400</sup>

Their argument was one of communal native title, that the English law in migrating to New Holland carried with it principles which respected the occupation of indigenous peoples. If such property rights were respected in the event of conquered lands, then surely such rights would be respected when territory such as New South Wales was, according to the Privy Council in *Cooper v Stuart*,<sup>401</sup> 'peacefully annexed' to the British Crown.

The Yolngu arguments failed in almost every major respect. After a trial of over 50 days, Judge Blackburn determined that the communal native title claimed was not recognised, and had never been recognised, by the common law of Australia. Blackburn J concluded that the attribution of a colony in the nomenclature was a matter of law which, having been decided by the Judicial Committee of the Privy Council in *Cooper v Stuart*, was not open to reconsideration based on historical considerations.<sup>402</sup> It is, he stated, 'beyond the power of this Court to decide otherwise than that New South Wales came into the category of a settled or occupied colony'.<sup>403</sup> Yes, the law of England had arrived in NSW in 1788 but it knew no doctrine of communal native title that would recognise and render support to any allodial rights to or interests in land by its Indigenous inhabitants.<sup>404</sup>

Essentially, the decision rests on a factual finding. Blackburn J found he could not be satisfied that the Yolngu plaintiffs presently had the same

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<sup>400</sup> (1971) 17 FLR 141, 149.

<sup>401</sup> (1889) AC 286.

<sup>402</sup> (1971) 17 FLR 141, 202-3.

<sup>403</sup> *Ibid* 244.

<sup>404</sup> Many academic commentators subsequently focused in on and challenged this conclusion: see, for example, John Hookey, 'The Gove Rights Land Case: A Judicial Dispensation for the Taking of Aboriginal Land in Australia' (1972) 5 *Federal Law Review* 83 (Hookey, 'The Gove Rights Land Case'), and Bryan Keon-Cohen and Bradford Morse, 'Indigenous Land Rights in Canada and Australia' in Peter Hanks and Bryan Keon-Cohen (eds), *Aborigines and the Law: Essays in Memory of Elizabeth Eggleston* (Allen & Unwin, 1984) 74.



links to the contested land as those which their predecessors had in 1788. It is thus clear that the expression of principles underpinning the judgment is strictly *obiter dicta*.

### **'Certain wide principles'**

Yet there can be little doubt that Judge Blackburn clearly understood the magnitude of the task before him in addressing the issue of whether the Yolngu possessed the interest in land claimed. At the outset of his judgment he stated:

There are great and difficult moral issues involved in the colonization by a more advanced people of a country inhabited by a less advanced people. These issues, though they were rightly dealt with as relevant to the matters before me, were not treated as at the foundation of the plaintiffs' case. Had they been so treated, the case would have involved an examination, not merely of some aspects of the dealings of some European people with some aboriginal races over the last four hundred years (as it did), but of much of the history of mankind.<sup>405</sup>

In addressing the Yolngu claims, Judge Blackburn sets out what he calls the *Principles applied to the acquisition of colonial territory*. His Honour stated that there are 'certain wide principles, not purely of law, which must be set out as a necessary background to a statement of the law applicable to colonial possessions'.

The first of these 'wide principles' bears quotation in full as the balance of the judgment rests wholly on it.

The first is a principle which was a philosophical justification for the colonization of the territory of the less civilized peoples; that the whole earth was open to the industry and enterprise of the human race, which had the duty and the right to develop the earth's resources; the more advanced peoples were therefore justified in dispossessing, if necessary, the less advanced. Kent explains this principle shortly (*Commentaries on American Law*, vol. III, p. 387): he mentions its earlier expression by Vattel, but as a philosophical doctrine it no doubt had a longer pedigree. The Puritans of

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<sup>405</sup> (1971) 17 FLR 141, 149.

Massachusetts looked upon it as the application of a command given by God at the Creation: Kent's *Commentaries*, vol. III, p. 388, note (a).<sup>406</sup>

Thus, Blackburn's first principle is that more civilised peoples are justified in dispossessing the less civilised, if necessary, in the furtherance of the duty and the right to develop the earth's resources.

This is a 'philosophical justification', of doubtless ancient pedigree, he states, yet not a principle of law. For this pedigree his Honour relies upon the fundamentalist beliefs of the Massachusetts Bay Puritans of the early 17<sup>th</sup> century (that is, commands from their God), the 18<sup>th</sup> century work of Emmerich de Vattel and the venerable work of Chancellor James Kent's *Commentaries on American Law* in the early 19<sup>th</sup> century. Needless to state, these were unusual, rather quixotic, sources for an Australian judge of the era. Yet Blackburn J states that these sources evince both the expression and application of his first 'wide' principle. In focusing on Kent's *Commentaries*, each of these sources will be drawn out.

### **Reliance on Chancellor Kent's *Commentaries***

The citation of an American jurist, particularly a post-Revolutionary one of the early 19<sup>th</sup> century, was a rare, perhaps then unprecedented, event by an Australian court, and more so for the source of a 'philosophical justification' centrally relevant to the British acquisition of New Holland. The reliance on Chancellor James Kent's *Commentaries on American Law*<sup>407</sup> by Judge Blackburn, given the reverence in which the Chancellor is held in the jurisprudence of the United States and the sheer breath of the *philosophical* expression attributed to Kent, deserves investigation, and in focusing on Kent's *Commentaries*, each of the other sources will be attended.

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<sup>406</sup> (1971) 17 FLR 141, 200.

<sup>407</sup> James Kent, *Commentaries on the American Law* (Clayton, 1<sup>st</sup> ed, 1828) ('Kent's *Commentaries*').

Chancellor Kent (1763–1847) published six editions of his *Commentaries on American Law* during his lifetime.<sup>408</sup> Although originally intended to be a single volume, the first edition ran to four volumes, as did all subsequent editions in his lifetime. The first edition volumes were published over the period 1826 to 1830.

Blackburn J cites Volume III of the Kent's *Commentaries on American Law* but neglects to nominate which edition he was placing reliance in his judgment. He does mention that Chancellor Kent was writing between 1826 and 1830.<sup>409</sup> This would strongly indicate that it was to the first 1<sup>st</sup> edition of Volume III, published in 1828, from which he was drawing his references.<sup>410</sup>

The year in which the retired Chancellor<sup>411</sup> was writing is of no slight importance. During the first decades of the 19<sup>th</sup> century, the then-fledgling United States Supreme Court was asserting its place in the post-Revolutionary constitutional framework, and in particular developing the principles of the jural relationship between the expanding United States of America<sup>412</sup> and the Indigenous peoples within its boundaries.

In the 1<sup>st</sup> edition of Volume III, Chancellor Kent discusses in Part VI the law relating to real property in the United States. The opening subject, in

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<sup>408</sup> Chancellor Kent prepared all editions through to the 6<sup>th</sup> edition. However, the 6<sup>th</sup> edition was not published until early 1848, after his death in the December of 1847.

<sup>409</sup> (1971) 17 FLR 141, 202. This point will be developed fully below.

<sup>410</sup> The first edition of Volume III was in 1828, the second in 1832, and successively in 1836, 1840, 1844 and the sixth and last under his authorship in 1848. The Special Collections of the Law Library of Columbia University holds all six editions of Kent's *Commentaries* in the original. The pagination referenced by Judge Blackburn is different from the 1828 edition of Volume III, but this can be explained if he were using a facsimile copy of the original volume.

<sup>411</sup> Kent retired as Chancellor of Equity of New York in 1823, and immediately was appointed Professor of Law at Columbia College.

<sup>412</sup> For example, the fledgling United States doubled in size with the purchase of the Louisiana Territory in 1803. An external sovereignty had yet to be fully established to the West Coast, to manifest their destiny, until the Annexation of Texas and the subsequent Treaty of Gaudalupe Hildago (1848), which ended the Mexican-American War. The US was ceded Alta California, Nevada, Utah, New Mexico, most of Colorado and Arizona and parts of present-day Wyoming, Oklahoma, Kansas and Texas.

Lecture L, is *Of the Foundation of Title to Land*. Chancellor Kent notes the continued adherence to the theory of feudal tenure, 'that the king was the original proprietor of all the land in the kingdom, and the true and only source of title'.<sup>413</sup> This theoretical foundation of land title in the United States is deeply familiar to all throughout the common law world. However, this feudal theory was undergoing a fundamental re-working in the incipient jurisprudence of the United States because the doctrine sat uncomfortably with that of indigenous peoples in North America, where it was acknowledged the aboriginal titles did not flow from an English King. Two US Supreme Court decisions prior to the Chancellor's first edition of Volume III, *Fletcher v Peck*<sup>414</sup> and *Johnson v M'Intosh*<sup>415</sup> (which decisions are discussed above), made challenges to this pure feudal theory.

In his writings, Chancellor Kent upholds the continued adherence to the theory of feudal tenure, even with respect to 'Indian reservation lands',<sup>416</sup> of which the Indians still retain the occupancy. Kent notes that the validity of a patent (land grant) had not hitherto been permitted to be challenged on the basis that the Indian right and title had not been extinguished.<sup>417</sup> Kent then explains that the claims of European nations to the sovereignty of lands in North America, and to 'ultimate dominion' over the Indian tribes, had been accepted by the American courts. The 'solidity' of those claims, Kent wrote, had been 'to a qualified extent, explicitly asserted by the courts of justice in this country'. Kent then discusses the recent leading decision of *Johnson v M'Intosh*, which he paraphrases:

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<sup>413</sup> Kent's *Commentaries*, above n 407, 307.

<sup>414</sup> (1810) 6 Cranch 87, 2 Peters 308 (USSC).

<sup>415</sup> (1823) 8 Wheaton 543 (USSC).

<sup>416</sup> The term Indian reservation lands is here to be construed broadly as including all lands occupied by Indian Nations at this point in time and not merely referring to formal reservations of land to them.

<sup>417</sup> Kent's *Commentaries*, above n 407, 308.

The European nations which respectively established colonies in America, assumed the ultimate dominion to be in themselves, and claimed the right to grant a title to the soil, subject only to the Indian right of occupancy. The practice of Spain, France, Holland, and England, proved the very general recognition of this principle. The United States adopted the same principle, and their exclusive right to extinguish the Indian title by purchase or conquest, and to grant the soil, and exercise such a degree of sovereignty as circumstances required, has never been judicially questioned.<sup>418</sup>

He then discusses the basis of European sovereignty over the Indians and their lands, asserting the practicality and justice of this 'qualified dominion over the Indian tribes'. Addressing the grander question of the ultimate (or radical) title, he does justice to the 1823 decision which he is analysing by unequivocally asserting:

But while the ultimate right of the American governments to all the lands within their jurisdictional limits, and the exclusive right of extinguishing the Indian title by possession, is not to be shaken; it is equally true, that the Indian title by possession is not to be taken from them, or disturbed, without their free consent, by fair purchase, except it be by force or consent.<sup>419</sup>

This 1<sup>st</sup> edition of Volume III in 1828 continues on to state:

*If the settled doctrine on the subject of Indian rights and title was now open to discussion, the reasonableness of it might be strongly vindicated on broad principles of policy and justice, drawn from the right of discovery; from the sounder claim of agricultural settlers over tribes of hunters; and the loose and frail, if not absurd title of wandering savages to an immense continent, evidently designed by Providence to be subdued and cultivated, and to become the residence of civilized nations.*<sup>420</sup>

The 'doctrine' to which the chapeau refers is the so-called doctrine of aboriginal rights that the Supreme Court in *Johnson v M'Intosh* had endorsed unanimously. The 'If' is explained by the fact that the Court, led by the Chief Justice John Marshall, had stated this doctrine to be the settled law of the United States. Unfortunately for Chancellor Kent, the Supreme

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<sup>418</sup> Ibid 309.

<sup>419</sup> Ibid 311-12.

<sup>420</sup> Ibid 312. Emphasis added.

Court had rested its enunciated principles on quite another basis than that which he believed to be both 'sounder' and 'evidently designed by Providence'. The 'loose, frail, if not absurd title' of these 'wandering savages' now had been vindicated in the nation's Supreme Court. The doctrinal basis of the 'Indian rights and title', for the retired Chancellor, was no longer 'open to discussion'.<sup>421</sup>

A good sense of the temper, and the influence, of Vattelian argument on the early American discourse can be gleaned from the Chancellor's next passage in which his alternative doctrine is argued.

Erratic tribes of savage hunters and fishermen, who have no fixed abode, or sense of property, and are engaged constantly in the chase or in war, have no sound or exclusive title either to an indefinite extent of country, or to seas and lakes, merely because they are accustomed, in search of prey, to roam over the one, or to coast the shores of the other. Vattel had just notions of the value of these aboriginal rights of savages, and of the true principles of natural law in relation to them. He observed that the cultivation of the soil was an obligation imposed by nature upon mankind, and that the human race could not well subsist, or greatly multiply, if rude tribes, which had not advanced from the hunter state, were entitled to claim and retain all the boundless forests through which they might wander. If such people will usurp more territory than they can subdue and cultivate, they have no right to complain, if a nation of cultivators puts in a claim for a part.<sup>422</sup>

For Chancellor Kent, borrowing from the latter-day Vattelian advocate, the Scottish annalist George Chalmers, the 'aboriginal savages' had 'no fixed abodes', no 'sense of property' and 'no sound or exclusive title' to territory they merely roamed over.<sup>423</sup>

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<sup>421</sup> It must be said in Chancellor Kent's defence that much of what the US Supreme Court stated in *Johnson v M'Intosh*, though unanimous, was *dicta*, so Chancellor Kent had room to continue to urge an alternative basis. He also had Chalmers's writings to add some weight to his views.

<sup>422</sup> *Ibid* 313. Emphasis added.

<sup>423</sup> Traces of the *Cooper v Stuart* justification of the annexation of New Holland by the Judicial Committee of the Privy Council 50 years later can be gleaned. In New Holland, for the Privy Councillors in 1889, the Indigenous peoples were 'without settled

However, it needs to be perfectly understood that these post-curial arguments by Chancellor Kent are both belated and bested; the Chancellor's adopted argument had already been vanquished. The passage is a faithful and passionate rendition of Vattel's 'just notions' in relation to the 'value of aboriginal rights of savages', albeit engorged by Chambers, but was not of a statement of any extant legal principle in American law. It is a patently fruitless dialogue with the incipient US Supreme Court *ex cathedra* by the eminent jurist in chambers. The John Marshall-led Supreme Court did not accept or translate the abstracted philosophical arguments of Vattel, or Chalmers' surfeited rendition of the British North American experience, into its jurisprudence. It repudiated them. Far from disregarding the 'aboriginal rights of savages', the US Supreme Court had upheld the aboriginal title, albeit one which could only be alienated to the United States Government.<sup>424</sup>

### **The 'just notions' of Vattel**

Despite favouring the 'just notions' of Vattel over the alternative doctrine favoured by the Supreme Court, Chancellor Kent's scholarship cannot be impugned. He clearly stated the law as declared by the US Supreme Court in *Johnson v M'Intosh* and then passionately argues an alternative theoretical basis founded on the writings of Vattel and more recent expression of these arguments by George Chalmers in his *Political Annals*.<sup>425</sup>

And, importantly for both Chancellor Kent at the time and Judge Blackburn a century and a half later, the US Supreme Court had not yet finished developing the doctrine. Between the publication of the first edition of

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habitations', or 'settled law' and did not relevantly 'occupy' their territories in any sense known to the international or English law.

<sup>424</sup> In essence, this upheld one of the central tenets of the *Royal Proclamation of 1763*.

<sup>425</sup> George Chalmers, *Political Annals of the present United Colonies from their Settlement to the Peace of 1763* (Private Publication, 1780).

Volume III in 1828 and its second edition in 1832, the important decisions of *Cherokee Nation v Georgia*<sup>426</sup> and *Worcester v Georgia*<sup>427</sup> were decided by the US Supreme Court. For Chancellor Kent, revision was less a task than an inveterate habit<sup>428</sup> and these decisions are faithfully rendered in detail, with a generous commentary, in the 2<sup>nd</sup> edition of Volume III.<sup>429</sup> Lecture L of the 1<sup>st</sup> edition becomes Lecture LI in the 1832 edition and, given the activity of the USSC, almost doubles in size.<sup>430</sup> Having set out the *Johnson v M'Intosh* decision in this 2<sup>nd</sup> edition, Kent adopts an ominous tone in introducing the newer decisions of the United States Supreme Court.

This is the view of the subject which was taken by the Supreme Court in the elaborate opinion [of *Johnson v M'Intosh*] to which I have referred. The same court has since been repeatedly called upon to discuss and decide great questions concerning Indian rights and title; and the subject has of late become exceedingly grave and momentous, affecting the faith and character, if not the tranquillity and safety, of the government of the United States.<sup>431</sup>

The Chancellor's language is guarded for it is not to be doubted that the issue was politically explosive at the time of his writing in 1832. It is evidenced, perhaps apocryphally, by the famous rejoinder of President Andrew Jackson, who was an 'old Indian fighter',<sup>432</sup> when he learned that the State of Georgia had defied the ruling of the US Supreme Court in

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<sup>426</sup> (1831) 5 Peters 1 (USSC). This was the first case with an indigenous party.

<sup>427</sup> (1832) 6 Peters 515 (USSC).

<sup>428</sup> See John Theodore Horton, *James Kent: A Study in Conservatism 1763–1847* (D. Appleton-Century Co., 1969).

<sup>429</sup> Subsequent editions during Chancellor's Kent's lifetime (1763–1847) hold fast to the format and content of this 2<sup>nd</sup> edition of Volume III. Editions subsequent to the 2<sup>nd</sup> edition in 1832 parenthesise the pagination of this 2<sup>nd</sup> edition.

<sup>430</sup> This Lecture was 13 pages in the 1<sup>st</sup> edition, expanding to 24 pages in the 1832 2<sup>nd</sup> edition.

<sup>431</sup> Kent, *Commentaries*, Volume III, 2<sup>nd</sup> edition, 381.

<sup>432</sup> So called in Joseph C Burke, 'The Cherokee Cases: A Study in Law, Politics, and Morality' (1969) 21 (3) *Stanford Law Review* 500, 503. Jackson had famously created an international incident in countering Seminole attacks from Spanish Florida by entering into Spanish territory and capturing and destroying Negro Fort.



*Worcester v Georgia* in March 1831: 'John Marshall has made his decision; now let him enforce it.'<sup>433</sup>

Chancellor Kent chronicles that a majority of the Supreme Court in *Cherokee Nation v Georgia* held that the Cherokee nation was not a *foreign* state:

But it was admitted that the Cherokees were *a state*, or distinct political society, capable of managing its own affairs, and governing itself, and that they had uniformly been treated as such since the settlement of our country. The numerous treaties made with them by the United States, recognise them as a people capable of maintaining the relations of peace and war, and responsible in their political capacity. Their relation to the United States was nevertheless peculiar. They were domestic dependent nations, and their relation to us resembled that of a ward to his guardian; and they had an unquestionable right to the lands they occupied, until that right be extinguished by a voluntary cession to our government.<sup>434</sup>

The second decision, that of *Worcester v Georgia*, Chancellor Kent discusses in greater detail, stating that the Court 'reviewed the whole ground of controversy, relative to the character and validity of Indian rights within the territorial dominions of the United States'.<sup>435</sup> Kent concludes that the *Worcester* decision 'was not the promulgation of any new doctrine' because 'the several local [colonial] governments, before and since our revolution, never regarded the Indian nations within their territorial domains as subjects, or members of the body politic, and amenable individually to their jurisdiction':

They treated the Indians within their respective territories as free and independent tribes, governed by their own laws and usages, under their own chiefs, and competent to act in a national character, and exercise self-government and while residing within their own territories, owing no allegiance to the municipal laws of the whites.<sup>436</sup>

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<sup>433</sup> Quoted in Cohen, 'Original Indian Title', above n 195, 41.

<sup>434</sup> Kent's *Commentaries*, above n 407, 382.

<sup>435</sup> *Ibid* 383.

<sup>436</sup> *Ibid* 384-5.

### 'Loose opinions' and 'latitudinary doctrines'

Then, importantly for our purposes, the discussion as to an alternative theoretical basis is wholly discarded in Chancellor Kent's 2<sup>nd</sup> edition. The purportedly-souder theory 'evidently designed by Providence' and 'just notions' elaborated by Vattel are edited out. The basis of the European acquisition of the territorial sovereignty, what Chancellor Kent styles the 'ultimate dominion', over the Indian nations and their respective territories in North America changes dramatically.

The US Supreme Court, in what was now a chain of relevant decisions, had definitely put paid to any alternative theory. Indeed, *Worcester* stated that it was 'difficult to comprehend the proposition' that the Europeans could have 'rightful original claims of dominion'<sup>437</sup> over Indian nations, or over the lands they occupied; or of the proposition that 'the discovery of either by the other should give the discoverer rights in the country discovered which annulled the pre-existing rights of its ancient possessors'.<sup>438</sup>

Instead, these two *Cherokee Nation* cases continued to substantially develop the aboriginal title doctrine and to enunciate the broad principles by which the incipient and still acquisitive American nation would juridically accommodate these indigenous peoples within the expanding United States. Chancellor Kent clearly acknowledges this in his discussion of these newer cases, but particularly so in this passage.

The original English emigrants came to this country with no slight confidence in the solidity of such doctrines, and in their right to possess, subdue, and cultivate the American wilderness, as being, by the law of nature and the gift of Providence, open and common to the first occupants in the character of cultivators of the earth. The great patent of New-England, which was the foundation of the subsequent titles and subordinate charters in that country, and the opinions of grave and learned men, tended to confirm that

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<sup>437</sup> (1832) 6 Peters 515 (USSC).

<sup>438</sup> *Ibid* 515.

confidence. According to Chalmers, the practice of the European world had constituted a law of nations, which sternly disregarded the possession of the aborigines, because they had not been admitted to the society of nations. *But whatever loose opinions might have been entertained, or latitudinary doctrines inculcated, in favour of the abstract right to possess and colonize America, it is certain that in point of fact the colonizers were not satisfied, or did not deem it expedient, to settle the country without the consent of the aborigines, procured by fair purchase, under the sanction of the civil authorities.*<sup>439</sup>

The overwhelming import of Kent's revised Lecture LI. of 1832 is the complete abandonment of Vattelian/Chalmers argument, characterised now after the Supreme Court rulings as 'loose opinions' or 'latitudinary doctrines'. Chancellor Kent may have felt able to argue an alternative position from the earlier *dicta* of the Supreme Court in his 1<sup>st</sup> edition but the Court has now scarified that alternative. Textual support for the philosophical or legal principle that 'more advanced peoples were therefore justified in dispossessing, if necessary, the less advanced' is not to be found in this 2<sup>nd</sup> edition of Volume III of Chancellor Kent's *Commentaries on American Law*.

Despite advocating such an alternative theory in his original Volume III, Chancellor Kent dismisses these 'loose opinions' and 'latitudinary doctrines' as lacking any legal credence in this 2<sup>nd</sup> edition, his confidence in their solidity lost. Chancellor Kent again explains the justification, notes the credence it once held among learned men, including Chalmers, and then abandons it absolutely. So completely does Chancellor Kent adopt the doctrine adopted in the earlier jurisprudence and affirmed in the newly-discussed cases that he, in evincing that the Supreme Court decisions disclose no novel doctrine, cites the practices of the British colonial and post-Revolutionary local governments to show respect for the inherent Indian title and provides manifold examples of consensual land acquisition

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<sup>439</sup> Kent's *Commentaries*, above n 407, 387-9. Emphasis added.

from the Indians based on these principles. Of the Great Patent of 1620 of King James I to the New England Puritans, Chancellor Kent states:

The pretensions of the patent of King James were not relied upon, and the prior Indian right to the soil of the country was generally, if not uniformly, recognized and respected by the New-England Puritans.<sup>440</sup>

Kent continues on to cite practice in Massachusetts, Pennsylvania, Maryland, Virginia, Georgia and New York (both Dutch and English practice), amongst others.

### **An error of scholarship**

Judge Blackburn, in adopting his first principle of justification from Chancellor Kent's 1<sup>st</sup> edition of Volume III, erroneously adopts the 'loose opinions' and 'latitudinary doctrines' expressly abandoned by Chancellor James Kent in his 2<sup>nd</sup> edition of Volume III in the wake of being wholly repudiated by the US Supreme Court. There is thus difficulty in accepting Judge Blackburn's assertion in the *Milirrpum* decision that Chancellor Kent's *Commentaries on American Law* provide both expression and support for his first principle of acquisition, the philosophical justification that the civilised could dispossess the uncivilised, if necessary. The scholarship of the *Milirrpum* judgment on this fundamental point is deeply flawed.

### **Blackburn's Second Principle of Acquisition**

Related to his first wide principle of acquisition, for Judge Blackburn, who now enters the international law, was 'the doctrine that discovery was a root of title in international law: the sovereign whose subjects discovered new territory acquired title to such territory by the fact of such discovery'.<sup>441</sup>

As elucidated in Chapter I, stated as baldly as it is, this statement has no credence in the international law of the late 18<sup>th</sup> and early 19<sup>th</sup> centuries, or

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<sup>440</sup> Kent's *Commentaries*, above n 407, 389.

<sup>441</sup> (1971) 17 FLR 141, 200.

indeed earlier. Discovery, *ipso facto*, did not suffice as a vesting of lawful 'title' to territory. The fundamental principle of the law of nations was that for newly-discovered uninhabited territory, discovery created a mere inchoate right, which unless followed by actual occupation, was soluble. If Judge Blackburn was correct, the Dutch would have acquired 'title' to the vast majority of the land mass of New Holland prior to Cook's claim in 1770. Judge Blackburn cites Chalmers' *Political Annals*, Chief Justice John Marshall, and Kent's *Commentaries* in support of this proposition. Simply stated, His Honour is in substantial error in proposing this alleged principle.

What his Honour understands by the term *title* is also left open to ambiguity. Additionally, his Honour does not distinguish between inhabited and uninhabited territories in his statement. In either case, however, his stated proposition is certainly contrary to established principle and practice.

It is almost certainly wrong, too, in the Imperial constitutional law. Of this Professor Herbert E Smith in his *Great Britain and the Law of Nations* makes the observation:

During the period covered by the present work, it may safely be said that the government of Great Britain has neither advanced any territorial claims of its own, nor admitted any opposing claims on the mere fact of discovery unsupported by any acts of effective occupation and possession.<sup>442</sup>

And almost contemporaneously with the settlement of New South Wales, Great Britain almost went to war to resist Spain's claim that the mere fact of discovery of territory provided a lawful title in the international law.

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<sup>442</sup> HA Smith, *Great Britain and the Law of Nations* (PS King & Son, Limited, 1935), Volume II, 1. The period to which Professor Smith refers is from the late 1700s (circa 1789) to the mid-19th century. This is based on his statement that his study would not 'not be earlier than the period of the French Revolution', in Volume I, Preface, *viii*, and be 'in the past century and a half', in Volume I, Preface, *ix*.

Known as the Nootka Sound Controversy,<sup>443</sup> it centred on an insignificant trading post on the western shore of Vancouver Island, in what is now British Columbia. In 1789, an English expedition out of India coincided with a Spanish expedition sailing from Mexico, each with the intention of establishing a trading colony at Nootka Sound. The Spanish arrived first and claimed possession, but did not begin to 'occupy'. When the English arrived their vessel and crew were seized and the crew imprisoned. The Spanish Court complained to the British that their territorial sovereignty had been violated. The British expressly rejected the Spanish claim to sovereignty, arguing that mere discovery was insufficient in the law of nations to give a title.<sup>444</sup> This, then, is Blackburn J's second wrongly-stated and improbable principle of acquisition.

### **Blackburn's Third Principle of Acquisition**

Related again, for Judge Blackburn, is the right of pre-emption to the sovereign. Here he speaks to newly-discovered territories occupied by aboriginal populations. Subjects of the sovereign have no power to acquire for themselves title to land from aboriginal persons whether the actions of the subject amounted to conquest, or treaties or private bargains entered. 'Another way' asserted His Honour, 'of expressing the same rule was to say that only the Crown, or the sovereign, had power to extinguish native title'.<sup>445</sup> This is the third principle of acquisition. The concept of 'native title', that the inhabiting population had some form of tenure, is presumed although the nature of this 'title' is, again, left undefined.<sup>446</sup>

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<sup>443</sup> William Ray Manning, *The Nootka Sound Controversy* (Argonaut Press, 1966), 83-85.

<sup>444</sup> *Ibid.*

<sup>445</sup> (1971) 17 FLR 141, 201.

<sup>446</sup> It is unstated whether this extinguishment of this native title could be without the consent of the indigenous inhabitants and/or without compensation.

### 'beyond doubt'

The principles of the application of English law to the overseas possessions of the British Crown, according to Blackburn J, were settled 'beyond doubt' by 1788. For His Honour, the *Commentaries* of Blackstone and *Campbell v Hall*<sup>447</sup> were the sources of these principles. The alleged Blackstonian dichotomy between settled colonies and conquered/ceded colonies for the reception of English law is set out. This passage is quoted *in extenso* because it represents the core of His Honour's doctrinal reasoning.

There is a distinction between settled colonies, where the land, desert and uncultivated, is claimed by right of occupancy, and conquered or ceded colonies. *The words 'desert and uncultivated' are Blackstone's own; they have always been taken to include territory in which live uncivilized inhabitants in a primitive state of society.* The difference between the laws of the two kinds of colonies is that in those of the former kind all the English laws which are applicable to the colony are immediately in force there upon its foundation. In those of the latter kind, the colony already having law of its own, that law remains in force until altered. Blackstone cites several cases, forming a chain of authority which goes back to *Calvin's Case*. The whole doctrine was clear, though its application in any given case often caused difficulty, particularly the question whether a particular English law applied in a particular colony. The great case of *Campbell v Hall*, where the law of a ceded colony was in question, treats the doctrine as stated by Blackstone as settled beyond doubt, and in my opinion it was settled beyond doubt in 1788 and is so at this day, for settled colonies.<sup>448</sup>

From his earlier rendition of principle, his Honour has made two bounds of reasoning. The first – an internal bound – is that physical occupation is now needed to establish 'title' in the discoverer. This might perhaps be read as a mere correction to his earlier mis-stated second principle of acquisition.

The other important leap of principle relates to the habitation of the newly-discovered territories. He opines that Sir William Blackstone had endorsed

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<sup>447</sup> [1558–1774] All ER Rep 252.

<sup>448</sup> (1971) 17 FLR 141, 201. Emphasis added. Internal footnoting is omitted.

the above principles of acquisition. Yet, as already established, Blackstone's *Commentaries* did not address the modes of acquisition of inhabited territories other than to expressly censure 'the seizing of territories' from the 'defenceless natives'. As seen, Blackstone's *Commentaries* did not address the issue of the reception of English law to inhabited territories other than those acquired by conquest or cession.<sup>449</sup> This was because, as shown in Chapter II, at the time of Blackstone's writing the discourse was seminal on these issues, and what little case law there was in the Imperial constitutional law, such as *Campbell v Hall*, spoke principally to Conquest scenarios.

### **'desert and uncultivated'**

In Blackburn's judgment, any distinction between the acquisition of inhabited territories, as opposed to the uninhabited, is glossed by an explanation of Sir William Blackstone's use of the words '*desert and uncultivated*'. For Blackburn J, these words 'have always been taken to include territory in which live uncivilized inhabitants in a primitive state of society'.

His Honour's assertion is not self-evident. He does not go to the text of Blackstone's *Commentaries*, provide any other citation to buttress his assertion, nor does he trace the historical meaning of these words which 'have always been taken to include' the territories of 'uncivilized inhabitants living in a primitive state of society'. The relevant paragraph, from which the passage to which great credence is stored by Judge Blackburn, opens thus:

Besides these adjacent islands, our more distant plantations in America and elsewhere, are also in some respect subject to the English laws. Plantations or colonies in distant countries, are either such where the lands are claimed by right of occupancy only, by

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<sup>449</sup> Brennan J iterates this point in *Mabo (No 2)* (1992) 175 1, 35.



finding them desert and uncultivated, and peopling them from the mother country; or where, when cultivated, they have been either gained by conquest, or ceded to us by treaties.<sup>450</sup>

As has been argued in Chapter II, the textual placement detracts from the contention that Sir William Blackstone was, in any sense, addressing the question of the acquisition of territory. In this quoted-from Section, entitled Section IV, *Of the Countries Subject to the Laws of England*, of Volume I of the *Commentaries* Blackstone was self-evidently dealing with the question of the reception of English laws to those territories over which British sovereignty extended and, in particular, addressing the application of English laws to newly-discovered uninhabited territories. If a newly-discovered territory was uninhabited it would not have a system of laws in place and, upon settlement by English colonists, the *lex loci* would thus be English law. However, the reception of laws enquiry is to be predicated on a preliminary enquiry as to the method of acquisition asserted over such new-found territory. The basis upon which English sovereignty is grounded is *not* canvassed by Blackstone. But because the issue of the reception of English law depends on the mode of acquisition of the territory, the classification is still needed as a preliminary enquiry in determining this question. But the mode of acquisition of territory and the reception of English law in that territory remain separate and distinct enquiries.<sup>451</sup>

Yet with this finding, Blackburn J invoked the false proposition that the phrase 'desert and uncultivated', as used in Sir William Blackstone's *Commentaries on the Law of England*, had 'always been taken to include

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<sup>450</sup> Blackstone *Commentaries*, above n 153, Book the First, 104. Note that Sir William Blackstone clearly draws a distinction between the two enquiries, the antecedent as to the mode of acquisition, and then the secondary question as to the reception of English laws.

<sup>451</sup> This point has been made in the New Zealand context by Paul McHugh, *Aboriginal Societies and the Common Law* (Oxford University Press, 2004).

territory in which live uncivilized inhabitants in a primitive state of society'.

### **The broader picture**

This technical, black-letter reading obscures the broader picture. This can be best appreciated by juxtaposing the two statements to which we have referred. Following the above-quoted passage, the *Commentaries* continue:

For it hath been held that, if an uninhabited country be discovered and planted by English subjects, all the English laws then in being, which are the birthright of every English subject, are immediately there in force (Salk. 411, 666). But this must be understood with very many and very great restrictions. Such colonists carry with them only so much of the English law as is applicable to the condition of an infant colony; [...].<sup>452</sup>

In Book the Second, *Of Things*, the *Commentaries* state:

Upon the same principle was founded the right of migration, of sending colonies to find new habitations, when the Mother Country was overcharged with inhabitants which was practiced by the Phoenicians and Greeks, as the Germans, Scythians, and other northern people. And, so long as it was confined to the stocking and cultivation of desert uninhabited countries, it kept strictly within the limits of the law of nature. But how far the seizing of countries already peopled and driving out and massacring the innocent and defenceless natives, merely because they differed from the invaders in language, in religion, in customs in government or in colour; how far such a conduct was consonant to nature, to reason, or to Christianity, deserved well to be considered by those, who have rendered their names immortal by thus civilizing mankind.<sup>453</sup>

There is a ready appreciation that the two passages are inconsistent unless the former is read down, *as is stated*, to refer to 'desert uninhabited' territories. Far from 'always been taken to include territory in which live inhabitants in a primitive state of society', it is clear that the text itself does not support this view that the phrase 'desert and uncultivated' had always been construed to include indigenous societies deemed 'primitive' or

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<sup>452</sup> Blackstone *Commentaries*, above n 153, Book the First, 107.

<sup>453</sup> *Ibid*, Book the Second, 7. Emphasis added.

'uncivilised'. Quite to the contrary, Blackstone upholds a humanist view that even though these peoples might differ 'in language, in religion, in customs in government or in colour', their rights to property and territory were to be respected. Judge Blackburn's assertion that Blackstone's words have always been taken to mean what he states is without foundation within Blackstone's text and clearly wrong in the exposition.

However, other than this unembellished statement, Judge Blackburn did not pause in his judgment to worry any distinction between those territories without inhabitants and those territories 'in which live uncivilized inhabitants in a primitive state of society'. The separate enquiries he is to make is lost on his Honour. For Judge Blackburn two problems lie with this doctrine; the characterisation, in the nomenclature, of a particular colony; and having settled that question, whether a particular English law applied in a given circumstance. The preliminary enquiry requires other considerations. For his discussion of this enquiry he again goes to Blackstone's *Commentaries* and the characterisation of the American plantations. As a preamble, he notes:

One would have thought that the question depended on matters of plain fact; and that had there been any doubt there would have been an express pronouncement either by the government at home or by the authorities in the colony, making clear what the basis of law in the colony was.<sup>454</sup>

Judge Blackburn continued on to state that this did not always happen in the administration of the colonies and it was sometimes a matter of debate, into which particular class a colony fell, as in early New South Wales. Blackstone is cited again in relation to the class to which particular colonies might belong, the relevant quotation being:

Our American plantations are principally of this latter sort, being obtained in the last century either by right of conquest in driving out

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<sup>454</sup> (1971) 17 FLR 141, 202.

the natives (with what natural justice I shall not at present enquire)  
or by treaties.<sup>455</sup>

As mentioned earlier, of more than mere antiquarian interest is the curious  
parenthesised moral disclaimer of Blackstone.

Blackburn J then states that the acquisition of those American colonies  
which later became the original states of the United States (with the  
exception of New York), was by way of 'peaceful' Occupation, with  
organised military activity rare. Yet, incongruously for Blackburn J, Sir  
William Blackstone had nonetheless characterised these American colonies  
as being acquired by Conquest 'in driving out the natives' or acquired by  
Cession by virtue of entering treaties. Judge Blackburn explains the  
dissonance between the Blackstonian classification of these colonies as  
being conquered and the peaceful occupation asserted by Chalmers, by  
stating that: 'Blackstone *perhaps* had in mind the island colonies [in the  
Caribbean] as well as those of the North American continent'.<sup>456</sup>

As to the latter peaceful Occupation, Blackburn J quotes the annalist  
Chalmers,<sup>457</sup> '*as writing more accurately*' in his 1780 *Political Annals*:

No conquest was ever attempted over the aboriginal tribes of  
America: their country was only considered as waste, because it was  
uncultivated, and therefore open to the occupancy and use of other  
nations. Upon principles which the enlightened communities of the  
world deemed wise, and just, and satisfactory, England deemed a  
great part of America a desert territory of her Empire, because she  
first discovered and occupied it.<sup>458</sup>

Thus, in the opinion of George Chalmers as expressed in the quoted work,  
North America had been acquired by Great Britain not by Conquest but  
under the principles of an enlarged Occupation doctrine. The lands of the

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<sup>455</sup> Blackstone, *Commentaries*, above n 153, Book the Second, 105.

<sup>456</sup> (1971) 17 FLR 141, 202.

<sup>457</sup> Chalmers, above n 425, Book I, 28. Although this work is styled Book I and said to be  
part of a volumed history, no further volumes appeared. Chalmers, a Loyalist, returned to  
Great Britain after the defeat by the American colonists.

<sup>458</sup> *Ibid.*

'Aboriginal tribes of America' were 'waste, because it was uncultivated, and therefore open to the Occupancy and use of other nations', the latter being 'enlightened communities'.<sup>459</sup> For Judge Blackburn, the opinion of the annalist Chalmers in 1780 was to be favoured over Sir William Blackstone writing in 1768 or the contra-indications from the seminal United States Supreme Court. Yet, the passage quoted by Blackburn J from Chalmers' *Political Annals* is of doubtful historical and legal veracity.<sup>460</sup> The decisions of the US Supreme Court certainly conflict with the historiography and the jurisprudential views expressed by Chalmers. In *Johnson v M'Intosh*, the US Supreme Court had said:

[T]he rights of the original inhabitants were, in no instance, entirely disregarded; but were necessarily, to a considerable extent, impaired. They were admitted to be the rightful occupants of the soil, with the legal as well as just claim to retain possession of it, and to use it according to their own discretion; but their rights to complete sovereignty, as independent nations, were necessarily diminished, [...].<sup>461</sup>

But for Blackburn J this divergence of 'historical fact' meant that the answer must be found elsewhere. At page 202, he then states that Chancellor James Kent wrote in his *Commentaries* that the practice of entering upon treaties with the Indians 'was founded on',

the pretension of converting the discovery of the country into a conquest; and it is now too late to draw into discussion the validity of that pretension, or the restrictions that it imposes. It is established by numerous compacts, treaties, laws and ordinances, and founded on immemorial usage. The country has been colonized and settled, and is now held by that title. It is the law of the land, and no court of justice can permit the right to be disturbed by speculative reasoning on abstract rights.<sup>462</sup>

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<sup>459</sup> It is seemingly a restatement of his Honour's first principle of acquisition that the *civilised* will determine what is 'wise, and just and satisfactory' for the *uncivilised*.

<sup>460</sup> Of interest is the use of both the terms desert and uncultivated. Desert, as used by Chalmers, means uncultivated.

<sup>461</sup> *Worcester v State of Georgia* (1832) 6 Peters 515, 593 (USSC).

<sup>462</sup> Kent's *Commentaries*, above n 407, Volume III, 2nd edition, 381.

If this quote has been correctly used, it is curious indeed that, as Kent was writing this passage, the US Supreme Court had already embarked on such a course of 'speculative reasoning on abstract rights' of the indigenous peoples of North America. 'Chancellor Kent, writing between 1826 and 1830', wrote Judge Blackburn, 'is aware that what is important is the legal theory, and that for this purpose historical fact may give place to legal fiction'.<sup>463</sup> On his Honour's construction, pretence was the answer for Chancellor Kent. It was a panoramic drama where compacts, treaties, laws and ordinances, and an apparent acceptance of legal rights based on immemorial usage was but a vast fraud practiced on Amer-Indian populations by the immigrant Britons to dispossess them of their territories. The Supreme Court of the United States, in its seeming acceptance of a special place for the Indigenous peoples in the national framework, was playing its role in this drama.

His Honour's construction is of dubious plausibility and of even more doubtful merit because of the changes in the editions of Kent. Yet Judge Blackburn does have cause, at this juncture, to pause and summarise his judgment.

The important point for the purposes of this case is not to which class any particular colony belonged, but the fact that the doctrine itself – the distinction between the two classes of colonies and the basis of law applicable to each class is clearly established law, and that, *as Kent suggests*, the attribution of a colony to a particular class is a matter of law, which becomes settled and is not to be questioned upon a reconsideration of the historical facts.<sup>464</sup>

This suggestion attributed to Chancellor James Kent is barely assertable.

The learned Chancellor had witnessed the changes at an intimate distance – and with some personal involvement in the arguments – and paid ever

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<sup>463</sup> (1971) 17 FLR 141, 202-3. Oddly, the historical analysis which Blackburn J adopts and applies to New Zealand is inconsistent with his rejection of any 'reconsideration of the historical facts' surrounding New Holland, in favour of the doctrinal: *ibid* 203.

<sup>464</sup> (1971) 17 FLR 141, 202-3. Emphasis added.

close attention to the pronouncements of the US Supreme Court while it crafted theory in this realm which was consonant with the historical facts. To assert that it did the reverse – and moreover that Chancellor Kent *endorsed* this view – is wholly wrong.

### **To which species did New South Wales belong?**

It is well to pause and review where the *Milirrpum* judgment has so far led. In determining into which class a particular colony might fall, legal fiction is to prevail over historical fact and the attribution of a colony to a class is a question of law which cannot thereafter be controverted on a reconsideration of the historical facts. Doubtful sources and dubious reasoning led to this juncture.

His Honour then asked into which class the colony of New South Wales fell. Here he felt bound under *stare decisis* by the Privy Council in *Cooper v Stuart*,<sup>465</sup> where their Lordships had made a final determination of law, that New South Wales was a 'settled or occupied' colony.

The law of England thus flowed into New South Wales, but it did not carry any doctrine of communal native title. Any such native title had to be explicitly recognised by the incoming Crown before it could be enforced under the common law.<sup>466</sup> No such recognition had been made, and His Honour thus dismissed the Yolngu claim to any title or rights whatsoever to the claimed lands.

### **Subsequent treatment of the *Milirrpum* decision**

The *Milirrpum* decision was a trial decision of the Supreme Court of the Northern Territory. All that was stated by his Honour concerning the

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<sup>465</sup> (1889) AC 286 (JCPC).

<sup>466</sup> Judge Blackburn was roundly criticised for this finding, a Canadian judge stating that Blackburn's 'acceptance of the proposition that after conquest or discovery the native peoples have no rights at all except those subsequently granted or recognized by the conqueror or discoverer ... is wholly wrong': see [1973] SCR 313, 416 (SCC), per Hall J.

acquisition of sovereignty was strictly *obiter dicta*. It is surprising that, despite being a single-judge decision of an inferior court, it was never appealed.<sup>467</sup> Senior Counsel for the Yolngu advised against any such appeal because he feared that the conservative High Court of Australia, then led by Chief Justice Sir Garfield Barwick, would not readily entertain the arguments and may reverse the finding that the Yolngu possessed a system of laws.<sup>468</sup> It was perhaps unfortunate that the plaintiffs accepted that advice because the lack of a robust debate on the issues meant that the decision rested on what the judge himself admitted was the 'philosophical' principle that more advanced peoples, such as the British, were justified in dispossessing, if necessary, the less advanced, such as the Indigenous peoples of Australia.<sup>469</sup>

### **Contrary *dicta* from Australian courts**

Nevertheless, the more general principles of acquisition enunciated in the decision remained steadfastly in place and good law in the Anglo-Australian jurisprudence. However, this decision moved the jurisprudence from the mainstream in the international law into a veritable no-man's land.

Implicit doubt was cast on the decision in subsequent cases in the High Court of Australia. In the *PNG v Daera Guba* decision,<sup>470</sup> an appeal from Papua and New Guinea, Barwick CJ made a remark seemingly inconsistent

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<sup>467</sup> Twenty years on, a retired Sir Edward Woodward QC explained: 'I had no confidence that the High Court, as it was then constituted, would produce any better result for the Aboriginal people than had already been achieved. Indeed, I was afraid that doubts might be cast on Justice Blackburn's findings about Aboriginal law. I therefore advised against an appeal': see Woodward, above n 395, 6. Woodward was more confident of a result at the political level and advised his clients accordingly: see Woodward, above n 397, 106.

<sup>468</sup> See Woodward, above n 395, 6.

<sup>469</sup> (1971) 17 FLR 141, 200. The decision did give political momentum to the cause of Indigenous land rights and a land scheme was legislated for the Northern Territory.

<sup>470</sup> *Papua and New Guinea v Daera Guba* (1973) 139 CLR 353.



with the notion that the doctrine of communal native title was unknown to the common law. Referring to the restriction on indigenous title-holders to alienation by private treaty and the concomitant right of pre-emption to the Crown, the Chief Justice said:

[N]one of this activity on the part of the Crown was inconsistent with the traditional result of occupation or settlement, namely, that though the indigenous people were secure in their usufructuary title to land, the land came from the inception of the colony into the dominion of Her Majesty. That is to say, the ultimate title subject to the usufructuary title was vested in the Crown. Alienation of that usufructuary title to the Crown completed the absolute fee simple in the Crown.<sup>471</sup>

This statement, made in full awareness of the *Milirrpum* decision,<sup>472</sup> recognised that although an ultimate or radical title vested in the Crown, it was subject to a 'secure', 'usufructuary title' in the indigenous peoples. The Crown therefore did not obtain absolute ownership merely by acquisition by 'occupation or settlement'; an aboriginal title was respected yet restricted in its alienation. Here Barwick CJ, and the concurers McTiernan and Menzies JJ, place Papua New Guinea in the 'settled colony' class which, according to Blackburn J's analysis, would consequently and inexorably render any rights or titles in the indigenous populations nugatory. To the contrary, their Honours state that 'the traditional result of occupation or settlement' is that 'the indigenous people were secure in their usufructuary title to land' with an overarching radical title vested in the dominating Crown. This theoretical position is far distant from Blackburn J's conclusion, and close indeed to that of the early 19<sup>th</sup> century US Supreme Court.

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<sup>471</sup> Ibid 397. Justices McTiernan and Menzies concurred with the Chief Justice.

<sup>472</sup> His Honour referred to the *Milirrpum* decision at the same page of his judgment (397) and both Counsel for the Commonwealth and Respondent referred to the decision in argument (pages 356 and 357 respectively).

Then in *Gerhardy v Brown*,<sup>473</sup> a Racial Discrimination Act case, Justice Deane stated that

almost two centuries on, the 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. If that view of the law is 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 [...].<sup>474</sup>

The inference is heavy in this *dictum* that there is a patent anomaly in the extant common law of Australia. The '1823' reference is to the US Supreme Court decision in *Johnson v M'Intosh*.

### **'wholly wrong'**

The *Milirrpum* decision has also been the subject of more direct critical assessment in subsequent Canadian decisions, in particular from the decision in *Calder*<sup>475</sup> on appeal to the Supreme Court of Canada. The decision of the Court of Appeal of British Columbia was rendered in 1970, some months before the *Milirrpum* decision in April of 1971. Judge Blackburn relied upon the Court of Appeal's reasons for judgment as weighty, though not binding, authority for two propositions, namely:

1. In a settled colony<sup>476</sup> there is no principle of communal native title except such as can be shown by prerogative or legislative act, or in a course of dealing.
2. In a settled colony a legislative and executive policy of treating the land of the colony as open to grant by the Crown, together with the

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<sup>473</sup> *Gerhardy v Brown* (1985) 57 ALR 472.

<sup>474</sup> *Ibid* 532.

<sup>475</sup> *Calder v Attorney-General of British Columbia* [1973] SCR 313, 316 (SCC).

<sup>476</sup> A 'settled' colony, Brennan J explains in *Mabo (No 2)*, is an inhabited territory where the indigenous peoples 'were thus taken to be without laws, without a sovereign and primitive in their social organization' (*Mabo (No 2)* (1992) 175 CLR 1, 36). Emphasis is added. Who took the Indigenous peoples of New Holland to be without laws, sovereigns and primitive in their social organisation is left unstated.

establishment of native reserves, operates as an extinguishment of aboriginal title, if that [title] ever existed.<sup>477</sup>

When that appeal decision was further appealed to the Supreme Court of Canada, one of the leading judgments, written by Justice Hall,<sup>478</sup> rebutted both of these propositions. It held that the aboriginal title was inherent in the indigenous peoples and cognisable to the common law of Canada, yet it was vulnerable to extinguishment by the Crown. Hall J cited the two propositions adopted by Blackburn J and, in language far less circumspect than the Australian judicial references to the *Milirrpum* decision, his Lordship stated that the first proposition put by Blackburn J was 'wholly wrong'.<sup>479</sup> In reviewing the Australian decision his Lordship stated:

It will be seen that he [Blackburn J] fell into the same errors as did Gould J and the Court of Appeal. The essence of his concurrence with the Court of Appeal judgment lies in his acceptance of the proposition that after conquest or discovery the native peoples have no rights at all except those subsequently granted or recognized by the conqueror or discoverer. That proposition is wholly wrong as the mass of authorities previously cited, including *Johnson v. M'Intosh* and *Campbell v. Hall*, establishes.<sup>480</sup>

This blunt condemnation placed an undeniable strain on the exposition of Blackburn J of the relevant principles from the shared Imperial constitutional law of both jurisdictions. Indeed six of their Lordships in *Calder* accepted the existence of an inherent aboriginal title in the Canadian common law, the title arising by reason of immemorial possession of the Nishga indigenous inhabitants, and not dependent on any subsequent legislative or executive recognition by the Crown. The Court did divide

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<sup>477</sup> (1971) 17 FLR 141, 219.

<sup>478</sup> Laskin and Spence JJ concurred in this judgment.

<sup>479</sup> [1973] SCR 313, 416 (SCC).

<sup>480</sup> *Ibid.* The decision of *R v Sparrow* arguably endorsed the Hall J judgment giving greater credence to this criticism.

evenly, however, on whether subsequent colonial legislation had extinguished this Nishga aboriginal title.<sup>481</sup>

### ***Hamlet of Baker Lake decision***

Then, in the Federal Court of Canada the *Hamlet of Baker Lake* decision,<sup>482</sup> the *Milirrpum* judgment of Blackburn J was argued in support of the proposition that the claimed Barrens Inuit aboriginal title was not recognised at common law without endorsement by statute, prerogative act or treaty. Justice Mahoney stated that it was

clear in that portion of the judgment dealing with Australian authorities, pages 242 to 252, that Blackburn, J, found himself bound to conclude that the doctrine of communal native title had never, from Australia's inception, formed part of its law. If I am correct in my appreciation of the Calder decision, that is not the law of Canada. The Calder decision renders untenable, insofar as Canada is concerned, the defendants' arguments that no aboriginal title exists in a settled, as distinguished from a conquered or ceded, colony and that there is no aboriginal title unless it has been recognized by statute or prerogative act of the Crown or by treaty having statutory effect.<sup>483</sup>

### **The Academic Commentary**

Academic commentators, both Australian and otherwise, generally have been less accepting of the *Milirrpum* decision than the judicial treatment, principally on the narrow point that Blackburn J had denied the doctrine of

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<sup>481</sup> Both Justices Judson and Hall, the authors of the leading opinions, relied heavily on the chain of decisions of the US Supreme Court in the early 19<sup>th</sup> century for the conceptual underpinnings of their respective judgments. The doctrine of aboriginal title has been upheld in all subsequent decisions of the Supreme Court of Canada and the construct is buttressed by a number of very important principles. There has been no retreat from this basal position and the decisions of this Court on aboriginal title subsequent to *Calder*, including *Sioui* and *Sparrow*, are all inconsistent with the position arrived at by Blackburn J. Mr Justice Pigeon held that without the Lieutenant-Governor's fiat the Court had no jurisdiction to grant the declaration sought and dismissed the appeal. He did not comment on the merits of the Nishga claim. As the judges led by Judson J also came to the conclusion that as this procedural defect vitiated the action, the Nishga claim was disallowed on this ground.

<sup>482</sup> *Hamlet of Baker Lake v Minister of Indian Affairs and Northern Development* (1979) 3 CNLR 25 (FCC).

<sup>483</sup> *Ibid* 45.

communal native title had been accepted in the Imperial constitutional law or had not been accepted in other common law jurisdictions.<sup>484</sup> Few commentators, other than Dr John Hookey, have questioned the broader principles of acquisition upon which Judge Blackburn rested the sovereignty aspects of his analysis. The first critical assessment by Hookey came in the year following the decision where he dissected the judgment of Blackburn J and criticised it on two fronts.<sup>485</sup> He argued, first, that the judgment wrongly construed the Privy Council decision of *Amodu Tijani v Secretary for Southern Nigeria*,<sup>486</sup> Blackburn J stated that indigenous rights were required to have been first recognised by statute before they could be enforced.<sup>487</sup> Hookey asserted that their Lordships 'went to considerable pains to show that this recognition rested on a non-statutory basis'.<sup>488</sup> He quotes the Board advising that 'no evidence that this kind of usufructuary title of the community was disturbed in law, either when the Benin Kings conquered Lagos or when the cession to the British Crown took place in 1861'.<sup>489</sup>

Secondly, Hookey argued that the construction placed on another Privy Council decision of *Ojekan v Adele* <sup>490</sup> by Blackburn J was incorrect. This decision, Hookey asserts, was cogent and binding authority for a

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<sup>484</sup> See, for example, Lester and Parker, above n 344; Brian Slattery, *Ancestral Lands, Alien Laws: Judicial Perspectives on Aboriginal Title*, Studies in Aboriginal Rights (Native Law Centre, University of Saskatchewan, 1981) 12-13 and 36; BA Keon-Cohen, 'Native Justice in Australia, Canada and the U.S.A.' (1981) 7 *Monash University Law Review* 250; Barbara Hocking, 'Colonial Laws and Indigenous Peoples: Past and Present Law Concerning the Recognition of Human Rights of Indigenous Native Peoples in British Colonies with Particular Reference to Australia' in Barbara Hocking (ed), *International Law and Aboriginal Rights* (Law Book Company, 1983) 3; Keon-Cohen and Morse, above n 404; and McNeil, above n 18, 290-97.

<sup>485</sup> Hookey, 'The Gove Rights Land Case', above n 404.

<sup>486</sup> *Amodu Tijani v Secretary for Southern Nigeria* [1921] 2 AC 399 (JCPC).

<sup>487</sup> (1971) 17 FLR 141, 231.

<sup>488</sup> Hookey, 'The Gove Rights Land Case', above n 404, 104.

<sup>489</sup> [1921] 2 AC 410 (JCPC).

<sup>490</sup> *Adeyinka Oyekan v Musendiku Adele* [1957] 2 All ER 785 (JCPC).

'presumption of recognition and continuance of existing customary rights in land following a change of sovereignty'. Blackburn J had distinguished this 1951 decision written by Lord Denning on the dual grounds that this decision related to a ceded, not settled, colony, and that he found it '*impossible to believe*' that their Lordships were asserting that compulsory acquisition by the Crown of 'land from natives' vested a common law right in the natives to receive compensation.<sup>491</sup> Yet their Lordships had unequivocally stated that

the British Crown, as Sovereign can make laws enabling it compulsorily to acquire land for public purposes, it will see that proper compensation is awarded to every one of the inhabitants who has by native law an interest in it; and the courts will declare the inhabitants entitled to compensation according to their interests, even though those interests are of a kind unknown to English law.<sup>492</sup>

Blackburn J could not comprehend that the phrase 'every one of the inhabitants who has by native law an interest in it' applied to 'natives'!

Both of these Privy Council decisions are African-sourced authorities forming part of the Imperial Constitutional law, which decisions were have binding on all Australian courts at the time Blackburn J was giving judgment. Hookey asserts that these cases, *inter alia*, establish the doctrine of communal native title in the Imperial constitutional law, and which doctrine was cognisable and enforceable in the English common law.<sup>493</sup>

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<sup>491</sup> (1971) 17 FLR 141, 233.

<sup>492</sup> [1957] 1 WLR 876.

<sup>493</sup> The divergence of the Australian common law position from the other common law jurisdictions has been argued by Hocking in her 1971 thesis *Native Land Title*. Hocking states: 'It has always been the accepted British practice to uphold any pre-existing native title in newly acquired colonies, that there are Privy Council decisions laying down the nature of the title so upheld and that there are principles laid down by which the native tenures have been accommodated within the various legal systems concerned': Barbara Hocking, *Native Land Rights* (Master of Laws Thesis, Monash University, 1971), 5-6.

LJ Priestley,<sup>494</sup> lead counsel for Nabalco Pty Ltd in the *Milirrpum* litigation, answered the Hookey article in a subsequent volume of the *Federal Law Review*.<sup>495</sup> Artfully using the advocate's tool of restricting a judgment to its particular facts, he argued that *Johnson v M'Intosh* was to be narrowly construed as applicable only to the circumstances of Virginia. For reasons internal to the judgment of *Johnson v M'Intosh*, Priestley fails to be persuasive because the US Supreme Court clearly rested its reasoning on British colonial practice and principles in British North America in the pre-Revolution epoch. Those principles and that practice were to be sourced in the Imperial constitutional law. Being part of the Imperial constitutional law meant that the principles extended, with necessary adaption, to all the colonies in British North America. That is, the principles it enunciates pre-date the Revolution and have their roots firmly in the British-American Colonial Law. This is the firm view expressed by Justice Strong in *St Catherine's Milling* in the Supreme Court of Canada in 1889 when he wrote:

The value and importance of these [US Supreme Court] authorities is not merely that they show that the same doctrine as that already propounded regarding the title of the Indians to unsundered lands prevails in the United States, but, what is of *vastly greater importance*, they without exception refer its origin to a date anterior to the Revolution and recognize it as a continuance of the principles of law or policy as to Indian titles then established by the British government, and therefore identical with those which have also continued to be recognized and applied in British North America.<sup>496</sup>

Additionally, the *Johnson v M'Intosh* decision has travelled widely throughout the common law world. It was accepted and adopted by both

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<sup>494</sup> As he was then. Mr Priestley was elevated to the Court of Appeal of New South Wales in 1983.

<sup>495</sup> LJ Priestley, 'Communal Native Title and the Common Law: Further Thoughts on the Gove Land Rights Case' (1974) 6 *Federal Law Review* 150.

<sup>496</sup> *St Catherine's Milling and Lumber Company v The Queen* (1887) 13 SCR 577 (JCPC), 610 (SCC). Emphasis added. This decision was affirmed on appeal to the Privy Council: see *St Catherine's Milling and Lumber Company v The Queen* (1889) 14 AC 46 (JCPC).

judicial camps in *Calder* in the Supreme Court of Canada<sup>497</sup> in the 20<sup>th</sup> century and in decisions subsequent,<sup>498</sup> and alluded to and implicitly endorsed by the Supreme Court of New Zealand in the late 19<sup>th</sup> century<sup>499</sup> and, as we have seen, utilised by senior barristers in London writing opinions concerning colonial New South Wales.

These jurisdictions, the United States, Canada and New Zealand, are the formerly-British jurisdictions where the issue of the mode of acquisition of territorial sovereignty has not been clearly answered in the Imperial colonial law and the doctrines relating to indigenous peoples enunciated by the US Supreme Court have relevance and, potentially, an application. In the same edition of the *Federal Law Review*, Hookey replied to Priestley's argument.<sup>500</sup> There Hookey asserted that the principles applied in *Johnson v M'Intosh* come from a variety of sources, 'mainly international law rules applicable to European colonization, American colonial conveyancing practice, and British constitutional law'.<sup>501</sup> The decision may emanate from Virginia but the principles enunciated by the US Supreme Court have found acceptance far beyond Virginia's boundaries.

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<sup>497</sup> (1973) 34 D.L.R. (3d) 145 (SCC)

<sup>498</sup> So completely have the early American decisions been incorporated into modern Canadian jurisprudence that the Federal Court of Canada declared in 1979: 'The value of the early American decisions to a determination of the common law of Canada as it pertains to aboriginal rights is so well established in Canadian courts, at all levels, as not now to require rationalization': *Hamlet of Baker Lake v Minister of Indian Affairs and Northern Development* (1979) 3 CNLR 25 (FCC).

<sup>499</sup> *R v Symonds* (1847) NZPCC 387 (NZSC).

<sup>500</sup> John Hookey, 'Chief Justice Marshall and the English Oak: A Comment' (1974) 6 *Federal Law Review* 174.

<sup>501</sup> *Ibid* 175.



## McNeil's thesis

Numerous other commentators have continued to criticise the legal reasoning of the decision.<sup>502</sup> These repeat the essential arguments outlined above but the criticism forwarded by Kent McNeil merits individual mention. Professor McNeil's straightforward but brilliant thesis in his *Common Law Aboriginal Title*<sup>503</sup> was that the application of English property law principles is sufficient to vest a presumptive estate in fee simple in the indigenous peoples in possession of land in newly-acquired territories at the moment of acquisition by the British Crown. He argued that upon the assumption of sovereignty by the British Crown, the indigenous peoples became subjects of the British Crown.<sup>504</sup> Therefore, under basic English common law property principles, occupation of their territories is thus to be respected.<sup>505</sup> His argument is encapsulated in the following passage.

The doctrine of common law aboriginal title is based on the presumptions arising in English law from occupation of land. A person in factual occupation is first of all presumed to have possession. From this conclusion of law other consequences follow, for seisin is presumed from possession, and the person seised is presumed to have a fee simple estate. Moreover, possession not shown to be wrongful is presumed to be rightful. An occupier of land is therefore presumed to have not only a fee simple estate, but a valid title as well.<sup>506</sup>

In the absence of a customary system of land tenure in a colony acquired by the Crown by settlement, these presumptions would be

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<sup>502</sup> See, for example, Barbara Hocking, 'Colonial laws and indigenous peoples: Past and present law concerning the recognition of human rights of indigenous native peoples in British colonies with particular reference to Australia' in Hocking, Barbara (ed), *International Law and Aboriginal Rights* (Sydney: Law Book Company Limited, 1988), 3; Bryan Keon-Cohen and Bradford Morse, 'Indigenous Land Rights in Canada and Australia', in Hanks and Keon-Cohen, above n 262, 74; and BA Keon-Cohen, 'Native Justice in Australia, Canada and the U.S.A.' (1981) 7 *Monash University Law Review* 250.

<sup>503</sup> McNeil, above n 18.

<sup>504</sup> Note that this thesis argues that whatever the theoretical position, the historical position is that upon the assertion of British sovereignty over eastern New Holland in 1788, the 'Aborigines' were not perceived or treated as subjects: see Chapter II.

<sup>505</sup> McNeil, above n 18, 298.

<sup>506</sup> Each presumption is rebuttable in appropriate circumstances.

applicable to indigenous people as well as to settlers, as part of the general body of English law which flowed into such colonies the moment they were acquired. Where indigenous peoples were in occupation of lands at the time, they would be presumed to have possession, and therefore to be seized for estates in fee simple. They would also be presumed to have title.<sup>507</sup>

Resort to colonial or international principles, in McNeil's line of argument, is thus unnecessary. As a property law argument, McNeil is largely unconcerned with the issue of territorial sovereignty. If a colony's law is English law, it did not matter how it was introduced; the presumption of an estate in fee simple flowed to those already in occupation of those lands. As to the title acquired by the Crown, he draws a distinction between *territories*, those lands wholly vacant and uninhabited, and *occupied lands*, those lands possessed by indigenous peoples. For *territories*, immediately upon occupation, absolute property is vested in the British Crown. For *occupied lands* a presumptive estate in fee simple, albeit rebuttable, is vested in those in possession of such lands. Professor McNeil thus refutes the *Milirrpum* judgment as being fundamentally flawed in its basic understanding of English property law principles.<sup>508</sup> In his argument, the doctrine of tenure, not being applicable, could not displace the presumptive title which indigenous subjects in possession are seized. On the contrary argument, possession, that hallowed pillar of English and other European legal systems, would amount to nought.

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<sup>507</sup> McNeil, above n 18, 299.

<sup>508</sup> Ibid 294-5. McNeil also argues that the Blackburn conclusions on the legal principles from the other colonial jurisdictions are unsustainable. He maintains, contrary to the conclusion of Blackburn J, that customary law has been a cognisable source of title in the dominant legal system irrespective of recognition of aboriginal title by statute or executive act: see McNeil, *ibid* 161-92 and 293-4.

## **The respective Doctrines of Communal Native Title and Aboriginal Rights**

The meeting of real property principles and the colonial law aspects raises an issue which has plagued the commentary and confused the jurisprudence. Indeed, the doctrine of communal native title and the doctrine of aboriginal title have generally been equated in the judicial and academic treatment, and any difference is taken to be merely one of terminology. It is submitted, however, that the distinction is not merely terminological and that they are distinct doctrines serving different applications and purposes.<sup>509</sup> They will be respectively outlined to evince their differences.

### **Doctrine of Communal Native Title**

The doctrine of communal native title, the essence of what Professor McNeil was arguing, in its simplest expression, is a rebuttable presumption of law which holds that a change of territorial sovereignty, effected either by Conquest, Cession or Domination,<sup>510</sup> does not disturb the property rights of inhabitants, indigenous or otherwise. The presumption is firmly rooted in ancient English real property principles,<sup>511</sup> where the possession of lands is respected. Analogously, McNeil argued, indigenous populations should be likewise treated and a presumptive title or estate should be accorded. It is a common law doctrine which has transmuted into the Imperial

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<sup>509</sup> Maddock, above n 264, hints at the different emphasis the Australian courts have taken from the other colonial courts. He states that 'in Australia, unlike say Canada, questions about the relation to land of the native population are posed more in terms belonging to the law of property than in terms of international or constitutional law'. It is the distinction between the doctrine of aboriginal rights and the doctrine of communal native title which makes this emphasis understandable. Instead, he quotes the Blackstone passages and so perpetrates the misapplication of the Blackstonian principles, at 4.

<sup>510</sup> Occupation is not relevant as it is predicated on a territory being uninhabited, the doctrine of communal native title thus having no application. The case for Domination, as a distinct and internationally-accepted mode of territorial acquisition, will be made below.

<sup>511</sup> McNeil, above n 18, Chapter 7.

constitutional law and applied to Indigenous populations under the name of doctrine of communal native title. Its primary application is in cases of inhabited lands where the mode of territorial acquisition is clear, incontrovertible and not at issue.<sup>512</sup>

The doctrine of communal native title was enunciated, and is called into play, to answer the specific question as to the continued application of customary land holdings in conquered or ceded lands. The leading Privy Council decisions of *Amodu Tijani v The Secretary, Southern Nigeria*<sup>513</sup> and *Adeniyinka Oyekan and Ors v Musendiku Adele*,<sup>514</sup> where the doctrine of communal native title finds its clearest exposition, are examples where the territorial sovereignty was gained by conquest and cession respectively. In *Amodu Tijani* their Lordships were essentially concerned with the doctrine of communal native title.

In the light afforded by the narrative, it is not admissible to conclude that the Crown is generally speaking entitled to the beneficial ownership of the land as having so passed to the Crown as to displace any presumptive title of the natives. In the case of *Oduntan Onisiwo v. Attorney-General of Southern Nigeria*, decided by the Supreme Court of the colony in 1912, Osborne C.J. laid down as regards the effect of the cession of 1861, that he was of the opinion that "the ownership rights of private landholders, including the families of the Idejos, were left entirely unimpaired, and as freely exercisable after the cession as before." In this view their Lordships concur. A mere change in sovereignty is not to be presumed as meant to disturb rights of private owners; and the general terms of a cession are prima facie to be construed accordingly. The introduction of the system of Crown grants which was made subsequently must be regarded as having been brought about

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<sup>512</sup> In the case of uninhabited lands, that is those truly *terra nullius*, there is no question as to territorial sovereignty for with no inhabitants the land was *res nullius*. The question of which legal system is to apply is a simple matter of deeming the law of the settling nation to be the *lex loci*. This very simple issue was the issue that Blackstone was addressing in his much abused passage as to settled lands.

<sup>513</sup> [1957] 1 WLR 876.

<sup>514</sup> [1921] 2 AC 399 (JCPC).

mainly, if not exclusively, for conveyancing purposes, and not with a view to altering substantive titles already existing.<sup>515</sup>

Their Lordships then went on to consider 'the legal reality' of the 'communal usufructuary title' of the inhabitants, stating that this title 'may be so complete as to reduce any radical right in the Sovereign to one which only extends to comparatively limited rights of administrative interference'.<sup>516</sup> In questioning whether this communal title was rebutted by any evidence to the contrary, the Board stated there was no evidence that the usufructuary title of the community was disturbed in law, 'either when the Benin Kings conquered Lagos or when the cession to the British Crown took place in 1861'.

The general words used in the treaty of cession are not in themselves to be construed as extinguishing subject rights. The original native right was a communal right, and it must be presumed to have continued to exist unless the contrary is established by the context or circumstances. There is, in their Lordships' opinion, no evidence which points to its having been at any seriously disturbed or even questioned.<sup>517</sup>

Thus, a change in territorial sovereignty, and in this case the Judicial Committee referred to both the conquest of Lagos by the Benin Kings in 1790 and the act of cession to the British 70 years later, is presumed not to disturb rights of the 'natives'. On the contrary, a legal presumption is raised that indigenous titles are to survive and be respected unless rebutted by contrary evidence of the context or circumstances.<sup>518</sup>

The modern expression of this doctrine can be seen in the Privy Council decision of *Adenyinka Oyekan and Ors v Musendiku Adele*.<sup>519</sup> Their Lordships,

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<sup>515</sup> Ibid 407-8.

<sup>516</sup> Ibid 409-10.

<sup>517</sup> Ibid 410.

<sup>518</sup> Importantly, and of later relevance to the discussion of the Australian authorities, the subsequent introduction of a system of Crown grants is not to be regarded as altering extant indigenous titles.

<sup>519</sup> [1957] 1 WLR 876.

Earl Jowitt, and Lords Cohen and Denning, wrote that there is 'one guiding principle' in recognising what are existing rights. 'It is this', they stated, '[t]he Courts will assume that the British Crown intends that the rights of property of the inhabitants are to be fully respected.'<sup>520</sup> In this context the Board was referring specifically to an interest in land held by the last Oba (or King) of Lagos in the Royal Palace.

In effect, the doctrine of communal native title is the modern expression of the ancient maxim that the conqueror leaves well enough alone, assuming only the property of the displaced sovereign and respecting private property interests.

### **Doctrine of Aboriginal Rights**

The doctrine of aboriginal rights, unlike the doctrine of communal native title, is without direct analogy to a common law doctrine. This doctrine is a creature of the Imperial constitutional law, formulated to deal with emergent Age-of-Discovery situations for which there were no common law doctrines to provide any direct guidance. It goes beyond real property issues and addresses the manifold issues which confront the Indigenous and the European. Professor Brian Slattery, speaking in the Canadian context, places the doctrine thus:

The doctrine of aboriginal rights is a basic principle of Canadian common law that defines the constitutional links between the Crown and aboriginal peoples and regulates the interplay between Canadian systems of law and government (based on English and French law) and native land rights, customary laws, and political institutions. It states the original terms upon which the Crown assumed sovereignty over native peoples and their territories.<sup>521</sup>

Those rules collectively known as the doctrine of aboriginal rights formed, in turn, part of the special branch of British law that governed the Crown's

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<sup>520</sup> Ibid 880.

<sup>521</sup> Slattery, 'Understanding Aboriginal Rights', above n 17, 732.

relationship with its far-flung imperial colonies.<sup>522</sup> This branch was called Imperial constitutional law or, more commonly, the Colonial Law.<sup>523</sup>

Slattery states:

The legal principles concerning aboriginal peoples developed at the same time as other doctrines of colonial law and shared essentially the same juridical character. Many of the basic tenets can be discerned as early as the seventeenth century in British practice in the American colonies. They emerge more fully developed during the next century and are reflected, if only partially, in the major Indian document of this era, the Royal Proclamation of 1763. Just as the eighteenth century colonial law harboured rules governing such matters as the constitutional status of colonies, the relative powers of the Imperial Parliament and local assemblies, and the reception of English law, it also contained rules concerning the status of native peoples living under the Crown's protection, and the position of their lands, customary laws, and political institutions. These rules form a body of unwritten law known collectively as the doctrine of aboriginal rights.<sup>524</sup>

The doctrine was *not* part of the English common law, in the narrow sense of the term, but it was and is part of the Anglo-Australian common law. Unwritten, generated largely by practice, it formed as integral a part of the colonial law as any other of the fundamental constitutional doctrines.

This [colonial] law was inherited by the United States and Canada upon independence, although it assumed variant forms in the two countries due to differences in the constitutional structure. It now forms part of their basic common law. Since imperial constitutional law applied not only in North America but also to other British possessions, the same basic principles were arguably incorporated in the basic law of such Commonwealth nations as New Zealand and Australia. In effect, I suggest, the body of inter-societal law that developed on the Atlantic seaboard in the period 1600–1800 makes up the core of the law of aboriginal rights, which in Canada has received explicit constitutional recognition.<sup>525</sup>

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<sup>522</sup> Ibid 737.

<sup>523</sup> Slattery, *Land Rights*, above n 150, 35-6.

<sup>524</sup> Slattery, 'Understanding Aboriginal Rights', above n 17, 737.

<sup>525</sup> Brian Slattery, 'Aboriginal Sovereignty and Imperial Claims: Reconstructing North American History' (1991) 29 *Osgoode Hall Law Journal* 681, 702-3.

Thus, the doctrine of aboriginal rights, grounded in international norms and legal principles, concerns the acquisition of territorial sovereignty and its consequences, and the doctrine of aboriginal title, concerned primarily with indigenous territories, is subsumed under the general doctrine.

### **The distinct application in Anglo-Australian jurisprudence**

We will now place the doctrine of aboriginal rights, having identified and become familiar with it, within a general theoretical framework in the Anglo-Australian context.<sup>526</sup> This is no easy task, with conflicting, confusing and confused principles abounding, and the Anglo-Australian situation is absent many of the fundamental *indicia* of this doctrine of aboriginal rights to which Professor Slattery refers. There are no treaties with the Indigenous peoples,<sup>527</sup> no equivalent of the *Royal Proclamation* of 1763 and only scant recognition, in the early years of colonial settlement, of any Indigenous legal institutions or customs. This is of little consequence as the Imperial Constitutional law carried the doctrine to the colonial situations where it was relevant but it was developed differently in each jurisdiction according to the relationship between the aboriginal peoples and the Crown. The general content of the doctrine is a body of largely unwritten law dealing with customary laws and titles, the constitutional principles addressing the relationship between the indigenous peoples and the Crown, any fiduciary or guardian role in the Crown, and allodial self-government powers.<sup>528</sup>

This body of Colonial Law was received upon the Crown's presence in New Holland, and indeed preceded any reception of English law. This is

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<sup>526</sup> The mantle of assembling a coherent legal construct has fallen to Professor Brian Slattery. In a number of works starting with his ground-breaking thesis (Slattery, *Land Rights*, above n 150), he has sought to make sense of this body of principle.

<sup>527</sup> The abortive private compacts of John Batman are discussed in Chapter III.

<sup>528</sup> Slattery, 'Understanding Aboriginal Rights', above n 17, 737.



because it was the Imperial constitutional law principles that were the vehicle that carried the English common law to New Holland. The basal principles of the doctrine of aboriginal rights were received in New Holland but the embryo was frozen in the misbegotten belief that the doctrine of aboriginal rights had no application to the Indigenous inhabitants of New Holland. Howsoever that position was maintained previously – by claiming that they were not there, that they were uncivilised or unchristian or did not live in settled habitations or were not settled inhabitants – seems no longer tenable.

### **In the Wake of *Milirrpum***

Professor RD Lumb, arguably one of the foremost Australian constitutional authorities of his time, on issues of Australian colonial and constitutional law, summarised the orthodox theory in the pre-*Mabo (No 2)* jurisprudence as:

from the time of settlement, the British Crown had a full title to the land; no native rights survived unless recognised by legislation or executive act of the Crown or by a course of dealing. That this was the legal position in the eighteenth century, and the legal understanding of most judges and jurists is well-established. Cases from *Attorney-General (N.S.W.) v. Brown* to *Cooper v. Stuart* to *Rutledge's case* to *William's case* and finally to *Milirrpum*, all accepted this concept of British law. The thesis is expressed in this way. The Crown acquired a radical title to land in the territory which it had occupied by settlement from the time of settlement. It could reserve the land for a public purpose, or it could alienate the land in fee simple or by lease. There was no attribution of native beneficial ownership to land, which had become Crown land and was referred to as waste lands of the Crown or vacant Crown Land. Any right to occupancy of Aborigines could be protected by way of reservation [by the Crown] of the land to the use and enjoyment of Aborigines.<sup>529</sup>

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<sup>529</sup> Lumb, 'The Mabo Case' above n 12, 10-11.

It is notable that Professor Lumb uses the terms 'occupied' and 'settled' interchangeably, but this occurs regularly in the discourse.<sup>530</sup> Lumb earlier states that *Cooper v Stuart* and the *Milirrpum* decision both 'accept that settlement was an appropriate method of colonising Australia', because the country lacked 'settled inhabitants'.<sup>531</sup> Professor Lumb states, somewhat equivocally for a nation-bearing statement, that

*it appears* that settlement was regarded as a practicable method of acquiring territory in the eighteenth and nineteenth century over Australia and parts of the African continent.<sup>532</sup>

This *appearance* of a 'practicable method' that departed from the general principles of the Imperial constitutional law applied in North America, New Zealand and Africa, is unconvincing. Of this departure, Professor Lumb wrote in 1992:

The problem of the Australian Aborigines is that their groupings did not amount to an organised society and because of their mobility it was, from a practical point of view, very difficult to make agreements with them. Where such arrangements were made, as in the 1930s [sic] by Batman, they were overruled by Government. For Australia to have been ceded, it would have been necessary for agreements to have been made with a great number of tribes/clans in a piecemeal manner. On occasions, it would not have been clear to the early authorities that the elders of the tribe had sufficient authority to make the cession and if so, over what boundaries. The territorial system was therefore distinguishable from an area such as the Sahara which was desert country where tribes could be more readily identified.<sup>533</sup>

Dissembling of this nature, that either:

- the 'groupings' were not organised,
- their 'mobility' made it very difficult to make agreements,
- 'great number of tribes/clans' would mean that agreement would need be made in a 'piecemeal manner',

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<sup>530</sup> This was noted by the International Court of Justice in 1974.

<sup>531</sup> Ibid 7.

<sup>532</sup> Ibid 9.

<sup>533</sup> Lumb, 'The Mabo Case' above n 12, 8-9.

- it was not clear to the early authorities who had the authority to deal, and over which areas, or
- the Saharan desert tribes were in some manner more 'distinguishable' than the New Holland tribes;

are all attempts to obscure the issue. Ironically, the grasping at *any* potential justification, however implausible, draws into focus the inadequacy of the claimed basis of acquisition of the New Holland territories.

### **'Peaceful Settlement'?**

And what exactly is this 'Settlement' of which Professor Lumb speaks? 'Settlement', according to Lumb, is a mode of acquisition of territory utilised by Great Britain over New Holland and parts of the African continent in the 18<sup>th</sup> and 19<sup>th</sup> centuries. Seemingly, it was a peaceful process, as no mention is made of any conflict between the aboriginal inhabitants and the colonial representatives of Great Britain.

Acquiring by this 'practicable', so-called 'Peaceful Settlement' method, method, the consequences were:

- the British Crown acquired both the radical title to the territory at the time of settlement and an absolute beneficial title to all the land;
- any land held under any native title or in their possession were 'waste lands of the Crown' or vacant Crown land from the time of settlement;
- any right to occupancy in the indigenes could be protected by way of reservation by the Crown of land for their use;
- no native rights or title survived unless recognised by legislation or executive act of the Crown or by a course of dealing, and

- the natives become nominal British subjects at the time of settlement but no lawful process or compensation applied to dispossessing the natives of any land or thing.<sup>534</sup>

In Figure III-1, this mode is contrasted with Occupation.

**Figure III-1 Occupation contrasted with 'Peaceful Settlement'**

Mode	Inhabited	Sovereignty	Laws	Land title
Occupation	No	Original <i>Imperium</i>	Law of the discoverer is the <i>lex loci</i> (as the only law)	An immediate <i>plenum dominion</i>
Peaceful Settlement (aka enlarged Occupation)	Yes	Change of <i>Imperium</i> and no internal sovereignty would be recognised in the Indigenous peoples	The overarching legal order would 'recognise' only certain laws and rights	Crown acquires a <i>plenum dominion</i> , with the Indigenes rendered nominal Crown subjects, whose personal and property rights can be extinguished without any process or compensation.

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<sup>534</sup> This proposition has been rejected in the Imperial constitutional law (see *Adeyinka Oyekan v Musendiku Adele* [1957] 2 All ER 785, 788 (JCPC)) where the Court said:

Whilst, therefore, the British Crown, as Sovereign can make laws enabling it compulsorily to acquire land for public purposes, it will see that proper compensation is awarded to everyone of the inhabitants who has by native law an interest in it; and the courts will declare the inhabitants entitled to compensation according to their interests, even though those interests are of a kind unknown to English law.

This 'Peaceful Settlement' is the method, it appears to one of the foremost constitutional lawyers, by which British sovereignty was extended over New Holland. He also asserts that 'parts of Africa' had been likewise acquired by Occupation despite being inhabited. However, Professor Lumb does not identify in his paper the African territories so acquired under this Peaceful Settlement mode nor does he provide any citation. It would seem that Lumb may not have appreciated fully that the term 'occupation' was also used more broadly in the post-1880s discourse, particularly after the Berlin *Afrikakonferenz*. As Dr Lindley explained in 1926:

Upon the whole, it appears legitimate to say that, although at the [Berlin] Conference the method of acquiring territory in Africa was referred to generally as 'Occupation', the term was used with a broad meaning equivalent to 'Acquisition' or 'Appropriation' and was not confined to Occupation in the strict sense which only applies to *territorium nullius*.<sup>535</sup>

When these British 'acquisitions' in Africa are investigated, they become most elusive. Professor Wallace-Bruce notes:

For present purposes, it is important that whatever one's perception of these [non-centralised] political systems, their lands, as a general rule, were not regarded as *terra nullius*. The British who acquired Iboland, (later Biafra and now divided into states in the eastern parts of Nigeria) did not settle it as an *occupatio* despite the fact that the Ibos did not have kings and queens. The Tallensi of what is today Northern Ghana, the Kikuyu of Kenya, the Nuer of Sudan, the Tiv of West Africa, and many others who had no centralized political systems did not lose their lands on the ground that these lands were ownerless.<sup>536</sup>

Wallace-Bruce proceeds to state: 'A number of examples can be cited from various parts of the world to buttress the point', and then proceeds to cite

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<sup>535</sup> Lindley, above n 29, 34. Dr Lindley went on to state: 'This view is supported by the fact that the assumption of protectorates was dealt under the General Act under the heading of *New Occupations*, since at that time a protectorate generally implied a State or Government to be protected.'

<sup>536</sup> Wallace-Bruce, above n 15, 104.

Canadian, American and New Zealand examples in British colonial practice.

Professor Lumb seems to have little, if any, basis to make the wide claims as to Africa being regarded as *terra nullius* and open to *occupatio* by Peaceful Settlement. Much nearer to the time and with obvious authority, Dr Lindley, under the heading 'The Powers in Africa', stated:

That the lands of native tribes were not looked upon as *territorium nullius* also emerges very clearly when we consider the actual procedure by which the various powers extended their sovereignty over Africa. From such an investigation it appears that the territorial rights of the European powers in Africa were in general those which they had obtained by Cession from the native chiefs. In fact, the way in which a Power set about the appropriation of a tract of country was generally by making treaties with the chiefs of all the lands included within it.<sup>537</sup>

Professor Lumb's assertions on the African 'precedents' therefore must be treated with caution.

Other than 'Africa', Professor Lumb furthers claims an 'interesting precedent', being New Guinea. He says that New Guinea is 'treated' as a colony acquired by this method of acquisition. As authority for this, he cites an earlier paper of his own.<sup>538</sup> This, too, is tenuous because, as shown earlier, three justices of the High Court of Australia in *Papua and New Guinea v Daera Guba*, jointly stated 'the traditional result of occupation or settlement' was that 'the indigenous people were secure in their usufructuary title to land' with 'the ultimate title subject to the usufructuary title' vested in the Crown.<sup>539</sup> Only upon the alienation or surrender of that

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<sup>537</sup> Lindley, above n 29, 34. Lindley went on to address the coloniser's practice in each jurisdiction – for example, Great Britain in Bechuanaland, Matabeleland and Mashonaland, Germany in East Africa, and the International Association in the Congo.

<sup>538</sup> RD Lumb, 'The Torres Strait Islands: Some Questions Relating to their Annexation and Status' (1990) 19 *Federal Law Review* 154.

<sup>539</sup> (1973) 139 CLR 353, 397 (Barwick CJ and McTiernan and Menzies JJ).

usufructuary title to the Crown did an absolute fee simple vest.<sup>540</sup> Their Honours may have been speaking generally of 'Occupation' or 'Settlement' but they saw a vastly different 'traditional result' to that perceived by Professor Lumb. Here, again, Lumb's further example concerning the position of New Guinea should be regarded with ambivalence.

It would appear that Lumb's scholarship in the Imperial constitutional law is flawed. New Holland, it would appear, is the only territory purportedly acquired by so-called 'Peaceful Settlement', and which had the consequences ascribed by Lumb.

### **The Dwarfish Thief**

The Australian jurisprudence therefore, to this point in time, relied neither on Occupation, Conquest, Cession or Domination. It called into play a uniquely common law doctrine called Peaceful Settlement, most forcefully expressed, albeit in bald terms, by Gibbs J in in 1979 in *Paul Coe v Commonwealth*,<sup>541</sup> where he stated that it is 'fundamental to our legal system that the Australian colonies became British possessions by settlement'.<sup>542</sup> This 'settlement' mode of acquisition, for his Honour, was available 'in a territory which, by European standards, had no civilized inhabitants or settled law'.<sup>543</sup> Gibbs J was wholly dismissive of any claim that an inherent residual sovereignty inured in the aboriginal inhabitants of 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

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<sup>540</sup> Ibid.

<sup>541</sup> (1979) 24 ALR 118.

<sup>542</sup> Ibid 128.

<sup>543</sup> Ibid 129.

there is in Australia an aboriginal nation exercising sovereignty, even of a limited kind, is quite impossible in law to maintain.

*Coe* was a poorly-framed action conceived on behalf of a pan-'Aboriginal nation'. It was readily dismissed on procedural grounds but it evidenced the ethnocentric juridical prism through which these issues were then viewed in the Anglo-Australian jurisprudence. Sovereignty could only be exercised by 'legislative, executive or judicial organs' and there was, in the judicial notice of Gibbs J, none. Any such claim is 'impossible in law to maintain'.<sup>544</sup>

This 'Peaceful Settlement' mode has the Indigenous peoples re-locating – apparently voluntarily – to enable the European population to utilise and settle their territories. They are sovereign-less and law-less, becoming nominal subjects yet whose personal and property rights can be derogated from without any lawful process or compensation. As noted above, this 'Settlement' doctrine is no 'decorous veil' but a very poor disguise by the Anglo-Australian jurisprudence. This Peaceful Settlement construct is no less than classical Occupation engorged by Vattelien/Chalmers rhetoric. But such a fiction disguises little and hangs like a 'giant's robe upon the dwarfish thief'.<sup>545</sup>

For Gibbs J, notions of Indigenous sovereignty were plainly unarguable, and he permits one only hegemonic Anglo-Australian legal system. Yet this was pre-*Mabo (No 2)*, where the High Court of Australia accepted the Australian common law as recognising the original laws and customs of Indigenous peoples, and the status of this Gibbs J *dicta* and the commentary of Professor Lumb are thus open to question. And, despite the weight of criticism directed at the single-judge *Milirrpum* judgment, unappealed as it

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<sup>544</sup> Ibid.

<sup>545</sup> Shakespeare, *Macbeth*, Act 5, Scene 2.



was, it stood as good law and unchallenged, even if unpersuasive for higher courts, for nigh 20 years.<sup>546</sup>

## Conclusion

We have arrived at the point where the Anglo-Australian jurisprudence holds that the territorial sovereignty of New South Wales was acquired from the Indigenous peoples of New Holland under the enlarged *terra nullius* principle because, although inhabited, it was legally 'practically unoccupied' by its Indigenous peoples. It could thus be acquired under an Occupation of Backward Peoples doctrine, which the Anglo-Australian jurisprudence also styles 'Peaceful Settlement'.

It is notable that reliance on the classical doctrine of Occupation, applied seemingly from the time of the drafting of Phillip's Commissions and first asserted unequivocally by Colonial Office lawyers in the early 1800s, had been abandoned in the Imperial constitutional law by the 1880s. The objective reality, that New Holland was inhabited by Indigenous peoples, had been conceded. The orthodoxy for the first 100 years of British colonisation was necessarily replaced because the fact of habitation by the Indigenous populations – and their continued existence – was inescapable. Changes to the doctrinal basis underpinning the acquisition of sovereignty necessarily required adaption and this occurred, albeit unconvincingly, in 1889 in *Cooper v Stuart*. This re-aligned the original British claim to New Holland by now asserting that sovereignty had been acquired over those inhabited territories, not under the classical Occupation mode, but because it was 'practically' unoccupied by its Indigenous peoples. They were 'unsettled inhabitants' with 'unsettled laws', and so did not 'occupy' their

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<sup>546</sup> If, as Sir Edward Woodward later stated, the case was seen as 'a rare opportunity to test the genius of the British common law and its general principles of justice and morality', it was a flawed and desolate failure: see Woodward, *A Brief Memoir*, above n 397, 104.

*countries* in a manner known to the international or Imperial law. New South Wales was thus acquired by 'Settlement' and 'peacefully' so and was thus annexed to the British Crown. The Occupation of Backward Peoples proposition thus entered the Imperial constitutional law as the Peaceful Settlement doctrine. By 1971, in *Milirrpum*, this theory was upheld in Australian law but re-stated; a territory inhabited by 'uncivilized inhabitants in a primitive state of society' could be dispossessed and, self-evidently in New Holland, by a more civilised society.<sup>547</sup>

Although the respective *Commentaries* of Sir William Blackstone and Chancellor James Kent were cited as authority for the extension of the classical principles of Occupation to lands occupied by Indigenous populations, these citations are of doubtful integrity. This engorged doctrine of Discovery Occupation, the Occupation of Backward Peoples doctrine, has been shown to rest in the Imperial constitutional law as unsupported *dicta* stated in the Privy Council decision of *Cooper v Stuart*.

Belated rationalisations like those of Professor Lumb, alleging that the acquisition of territory by 'Peaceful Settlement' also occurred in parts of Africa and in Papua New Guinea, so as to make the method appear a regular part of the Imperial constitutional law or amount to State practice in international law, are specious.

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<sup>547</sup> (1971) 17 FLR 141, 201.

## CHAPTER IV A JUDICIAL REVOLUTION

It was not until the decision of *Mabo v Queensland (No 2)*<sup>548</sup> in 1992, when a claim of pre-existing Indigenous interests in land was squarely before the superior Australian courts, that the issues surrounding the acquisition of sovereignty over the New Holland territories was visited by the High Court of Australia. Whilst the Judicial Committee of Privy Council remained at the judicial apex of the Australian legal system, the authority of the Board in *Cooper v Stuart* was necessarily accepted as binding and incontrovertible. And the lack of any appeal in *Milirrpum* meant also that Blackburn J's statements represented good law. However, by the time the *Mabo (No 2)* claim was argued in May 1991, the Privy Council had ceased being the final arbiter of the common law of Australia. In 1986, the *Australia Act (UK)* and the *Australia Act (Cmth)* were passed, *inter alia*, ending any appeals to the Judicial Committee of the Privy Council from Australian courts. The High Court of Australia thus was no longer bound by JCPC precedent, and it became the fundamental determiner of the common law of Australia.

This Chapter explores the ramifications of this watershed *Mabo (No 2)* decision, yet only so much as is necessary to guide our discussion surrounding the orthodox sovereignty theory. It is important to understand that the validity of this assertion of British sovereignty by the Colony of Queensland was not at issue at trial or subsequently.

### **Background to litigation**

Prior to 1879, a loose control by the Colony of Queensland was exerted in the eastern Torres Strait, which included the islands of Mer, Dauar and Waier (collectively known as the Murray Islands), the most easterly and

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<sup>548</sup> (1992) 175 CLR 1.

remote of the inhabited islands of the Torres Strait. But Letters Patent in 1878 and the passage by the colonial Queensland Parliament of the *Queensland Coast Islands Act 1879* had the consequence that 'the said islands were annexed to the colony of Queensland from 1 August 1879 and became subject to the laws in force therein'.<sup>549</sup>

### **Action commenced**

In 1981, five Meriam men commenced an action in the High Court of Australia, claiming an inherent title to parcels of land on Mer had not been extinguished by, or upon, the assertion of British sovereignty in 1879.

The claim suffered a chequered path with the Queensland Parliament passing legislation to extinguish any extant so-called native title.<sup>550</sup> This legislation was challenged and ruled invalid in what has become known as the *Mabo (No 1)* decision.<sup>551</sup> In this decision, a bare majority decided the Queensland legislation was invalid. Three of the High Court judges termed the issue of the survival of the claimed Indigenous rights to land 'of the greatest importance',<sup>552</sup> and another member of the Court said it was 'a question which may raise complex issues of fact and law of fundamental importance to all Australians'.<sup>553</sup>

The trial of the substantive issues could thus proceed but findings of fact had first to be determined. Then, in 1986, the Chief Justice of Australia charged the Supreme Court of Queensland to determine all relevant *issues of fact* raised by the pleadings.<sup>554</sup> Issues of law, consequent on the

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<sup>549</sup> Paragraph 7, Statement of Claim.

<sup>550</sup> *Queensland Coast Islands Declaratory Act 1985* (Qld).

<sup>551</sup> *Mabo v Queensland (No 1)* (1988) 166 CLR 186.

<sup>552</sup> *Ibid* 34, Brennan, Toohey and Gaudron JJ.

<sup>553</sup> *Ibid* 8, Wilson J.

<sup>554</sup> Gibbs CJ did so on 27 February 1986, remitting for hearing all issues of fact.

determination of the remitted issues of fact, were reserved to the High Court.<sup>555</sup>

### **Findings of fact**

Accordingly, Moynihan J of the Queensland Supreme Court travelled to the Murray Islands and convened on Mer to hear a wealth of traditional, historical and other evidence. After 67 sitting days, 44 witnesses and near 3500 pages of transcript, he handed down a voluminous set of findings of fact in 1990.<sup>556</sup> His task was made easier by two fortuitous works of anthropological scholarship, the six-volume writings of Professor Alfred Haddon written over a 45-year period, from 1890 to 1935,<sup>557</sup> and a doctoral thesis by Dr Jeremy Beckett, published as a monograph in 1987.<sup>558</sup>

At the outset, and most relevantly, Moynihan J wrote, 'I have no difficulty in accepting, in the light of the evidence that Murray Island was, prior to European contact, and had continued into the present to be the home of a dynamic society.'<sup>559</sup> It was established that in the years immediately preceding their annexation to the British Crown in 1879, the societies of the Torres Strait had been under rapid change, the reason being 'The Coming of the Light'. This 'Coming of the Light' is the euphemistic reference to the establishment of a Christian proselytising mission on nearby Darnley (Erub) Island by the London Missionary Society (LMS) in 1871. A LMS

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<sup>555</sup> The trial Judge, Moynihan J, accepted this with some intellectual chafing: see *Mabo v Queensland* (Determination of Issues of Fact), Unreported, Supreme Court of Queensland, Moynihan J, 16 November 1990, 2 ('*Determination of Facts*').

<sup>556</sup> *Ibid* 2.

<sup>557</sup> AC Haddon, *The Reports of the Cambridge Anthropological Expedition to the Torres Strait* ((6 Volumes) 1890–1935) (hereinafter 'the *Cambridge Expedition*').

<sup>558</sup> Jeremy Beckett, *Torres Strait Islanders: custom and colonialism* (Cambridge University Press, 1987) ('Beckett, *Torres Strait Islanders*'). Beckett was adopted by a Murray Island family society for the purposes of his doctoral studies, 1958–1964: see *Determination of Fact*, above n 552, 44.

<sup>559</sup> *Determination of Fact*, above n 552, 13. Dr Beckett, whose primary scholarly focus was on the manner in which the social systems of the Torres Strait responded to change, described Meriam society, too, as 'resilient and adaptive to change' (*ibid* 44).

report back to London headquarters in August 1873 stated that a teacher had recently visited Mer with an entourage and the entire population of the islands, some 800 persons, were seemingly ready 'to yield themselves implicitly to his guidance'.<sup>560</sup>

No work is done on the Sabbath and the people come together from the three [Murray] islands to attend the services which, except the hymns and reading of the scripture, are conducted in the native tongue.<sup>561</sup>

By 1877 the LMS mission was relocated to Mer. So, by the time of the assertion of British sovereignty in 1879, the 'traditional' society of the Meriam had come within a Christian framework. Dr Beckett wrote of the effect of this Coming of the Light to the Eastern Islanders, which included the Meriam:

They are proud that "The Light" of Christianity came to them in 1871, before the rest of Papua, and frustrate any enquiries about indigenous custom with the reply that these belong to the "Darkness Time" and have been forgotten long ago.<sup>562</sup>

Christianity thus had, and continues to have, a profound influence on Torres Strait Islander societies. There is some doubt, however, that pre-Christian customs had been entirely forsaken by the Meriam, but it was observed by Professor Haddon (and adopted by Moynihan J) that, prior to the LMS arrival, elaborate funeral ceremonies and rituals had been a central feature of Meriam life,<sup>563</sup> so much that 'had not the very old and the very young been exempted from the full rites ... the living would have been perpetually occupied with funeral celebrations'.<sup>564</sup> The collection and mummification of human heads – of both foe and kin – was of particular

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<sup>560</sup> Quoted in Beckett, above n 558, 40.

<sup>561</sup> Ibid.

<sup>562</sup> Jeremy Beckett, 'Papua's Off-Shore Islands' (1965–66) 1 (4) *New Guinea and Australia, The Pacific and South-East Asia* 71, 73.

<sup>563</sup> Ibid 85.

<sup>564</sup> Quoted from Haddon, *Cambridge Expedition*, Volume VI, above n 557, 127.

importance,<sup>565</sup> and this practice was sourced in their spiritual precepts of Bomai-Malo, the dominant imperative of social organisation and community life prior to the Coming of the Light. By 1895, Haddon reported, ceremonies associated with Bomai-Malo had all but ceased.<sup>566</sup> Some 'reconstructions' were recorded, and these were observed by women and children, contrary to customary taboo, and conducted on 'shrine land', which had fallen into desuetude and had to be reclaimed for the purpose. There was no evidence that there had been any Bomai-Malo observances after 1895, and there had been no living initiate into Bomai-Malo since that time.

In terms of governance, Professor Haddon stated that prior to European contact, rules of conduct were defined and enforced 'not by a special judiciary or executive body but by public opinion'.<sup>567</sup> Sorcery, magic and taboo were important cohesive and sanctioning factors.<sup>568</sup> In 1878, the Police Magistrate from Thursday Island visited Mer and advised the island population to select a chief and they did so. The Head, who came to be called the Mamoose, had some Constables under his direction, and a boat, and became 'something of the executive arm of the mission'.<sup>569</sup> In 1882, the Island was reserved for the 'Aboriginal' inhabitants. Then, in 1891, the LMS abandoned Mer and for a time the Island was governed by 'Harry' the Mamoose and 'William' the teacher. In late 1892, a Mr John Stuart Bruce was sent to Mer and he resided there as a civilian administrator for almost 40 years. There developed an Island Council of s/elected representatives,

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<sup>565</sup> *Determination of Facts*, above n 555, 85-6.

<sup>566</sup> *Ibid* 100-102.

<sup>567</sup> *Ibid*, quoted by his Honour as Haddon, Volume VI, *Cambridge Expedition, Determination of Facts*, above n 555, 122.

<sup>568</sup> *Ibid*, his Honour, again citing Haddon, Volume I, *Cambridge Expedition*, 130.

<sup>569</sup> *Ibid* 142.

which also sat as a court. Dr Beckett summarised this strand of history, saying of this period:

The landing did however inaugurate a new moral order, imposed on the *Realpolitik* of the preceding period. At first the mission also took responsibility for law and order, since the island had not yet been annexed. Although in later years Queensland would institute its own rule, driving out not only trespassers but missionary, it would build on the foundation laid by the LMS.<sup>570</sup>

'Malo's Law', by then, was not observed. It was, as the trial judge said, a matter 'of remembrance rather than the predominant controlling feature of daily life'.<sup>571</sup>

Other changes had been wrought too. The language passed from being a non-written one to a written one,<sup>572</sup> and, it has been argued, so too did Meriam tradition.<sup>573</sup> The economy moved from subsistence, based on gardening or fishing (usually on a mutually exclusive basis, that is, gardeners were not fishers, and vice versa) to a cash economy during World War II, which had risen and collapsed soon thereafter, and then moved to a welfare/government-employment economy.<sup>574</sup> Where once gardening or fishing was the means of subsistence, neither was found to fulfil that essential role any longer. So, the relationship between the Meriam and their lands and the waters they harvested, too, may have changed.

Certainly there has been an enormous population redistribution for the Meriam, with many seeking work in the coastal mainland sugarcane industry or in public works such as railway and road construction. Such an exodus was there that more Meriam, including the plaintiff Eddie Koiki

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<sup>570</sup> Beckett, *Torres Strait Islanders*, above n 558, 24.

<sup>571</sup> *Determination of Facts*, above n 552, 158.

<sup>572</sup> *Ibid* 58.

<sup>573</sup> *Ibid* 58-61.

<sup>574</sup> *Ibid* 159.



Mabo and his family, resided in suburban Townsville (a coastal city 800 kilometres to the south) in 1990 rather than on Mer. Family names were introduced in and after World War II and were in widespread use by the 1960s, marriage prohibitions had long disappeared, and burials and 'tombstone openings', although still a feature of Meriam life, were now driven by Christian imperatives and custom. In this respect, Dr Beckett would later describe the Murray Islanders as 'regular churchgoers and strict Sabbatarians'.<sup>575</sup> His Honour, Moynihan J, also noted:

It must be acknowledged that European contact has brought enormous changes. As a result of this contact activities such as headhunting and those associated with the treatment of the dead and the various cults which were central to social life have not been followed for generations. The elaborate social organisation described by Rivers [from Haddon's expedition], the cults, sorcery, magic and taboo although still remembered (on occasions selectively, or incompletely and imperfectly reconstructed) have ceased for one hundred years to be the means by which social order is preserved.<sup>576</sup>

In the result, Justice Moynihan concluded:

So far as the evidence reveals the introduced systems of governance and authority of which I have been speaking owed little to the pre-contact situation on the islands and came to be dominant and pervasive influences in the lives of the people.<sup>577</sup>

It is difficult to cavil with the primary judge's finding of fact in this regard. More importantly, it is difficult, too, to resist the assertion that the Meriam traditional laws and customs had undergone significant amendment.

### **Determination of Facts**

Moynihan J delivered the *Determination of Facts* in November 1990, and in late May 1991 the substantive issues were argued before a full complement of seven Justices of the High Court of Australia.

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<sup>575</sup> J Beckett, 'The Murray Island Land Case' (1995) 6 *Australian Journal of Anthropology* 15; 26 ('Beckett, The Murray Island Land Case').

<sup>576</sup> *Determination of Facts*, above n 555, 158.

<sup>577</sup> *Ibid* 145.

## The decision in 1992

When the reserved decision was handed down on 3 June 1992, a majority of 6:1<sup>578</sup> declared that the Meriam People were entitled to possession, occupation, use and enjoyment of the island of Mer as against the whole world.<sup>579</sup> The Court held that the 'native title' of the Meriam was recognised by the common law of Australia and, despite the general denial of the property rights of these Indigenous populations in Anglo-Australian law and policy for over two centuries, and notwithstanding its susceptibility to extinguishment by legislative or executive action, this native title was recognised by the Australian common law. Straining incredulity, it also found that this native title *always* had been recognised in the Anglo-Australian law. The decision was hailed 'a judicial revolution'.<sup>580</sup>

### The sovereignty issue

Although the Meriam did not challenge the validity of British sovereignty over their traditional islands, some relevant principles of the international and colonial law surrounding the acquisition of territorial sovereignty were necessarily canvassed in the decision's reasoning because the mode of acquisition of the territorial sovereignty is a question anterior to, and determinative of, the issue of what property rights might inure in an Indigenous society after such acquisitions.

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<sup>578</sup> There were three majority judgments: that of Brennan J, which was wholly concurred in by Mason CJ and McHugh J, that of Deane and Gaudron JJ, who wrote a joint judgment, and the sole judgment of Toohey J.

<sup>579</sup> This was subject to some small exceptional parcels of extinguishing tenure.

<sup>580</sup> One of the earliest publications examining the judgment was MA Stephenson and Suri Ratnapula (eds), *Mabo: A Judicial Revolution* (University of Queensland Press, 1993). It may have been a 'revolution' for the Anglo-Australian jurisprudence, but it was prosaic for the balance of the common law world.

### 'Radical 'title' and 'native title'

The High Court disengaged the issue of acquisition of territorial sovereignty from that of ownership of the lands therein. *Imperium* may have passed to the British Crown but the High Court held that this acquired 'radical' title was burdened by the antecedent interests of Indigenous peoples in their traditional lands and waters – a pre-existing 'native title'. Such title survived the assertion of British sovereignty. In terms of the theoretical construct, the High Court of Australia determined that, upon the gaining of the *imperium* in the territory of New South Wales, the British Crown acquired a 'radical' title over the territory, but it did not necessarily acquire the full legal and beneficial interest – the *plenum dominion* – in these lands. This newly-discovered 'native title' was sourced in the manifold indigenous laws which had preceded the arrival of the common law of England into New Holland by many millennia.

All the judgments, bar the dissentient Dawson J,<sup>581</sup> proceeded to declare the common law of Australia as recognising the pre-existing native title to land and waters of indigenous Australian peoples. Importantly, the common law of Australia was declaratory of such native title: it did not constitute such title. These pre-existing rights and interests are sourced in, and given their content by, the traditional laws and customs of the Indigenous people of a territory.

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<sup>581</sup> Justice Dawson upheld Queensland's arguments, succinctly outlined by him as:

The defendant argues that if the traditional land rights claimed by the plaintiffs ever existed, they were extinguished from the moment of annexation [in 1879]. It contends that those rights could not have survived the assertion of sovereignty by the Crown, unless they were recognised in some way. The defendant argues that not only were any traditional land rights over the Murray Islands not recognised, but they were extinguished by the exercise of a clear government policy which existed at the time of annexation and has continued since then. ((1992) 175 CLR 1, 122)

Brennan J, whose opinion was concurred in by Mason CJ and McHugh J, defined this native title as 'the interests and rights of indigenous inhabitants in land, whether communal, group or individual, possessed under the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants'.<sup>582</sup> His opinion stated, after a 'lengthy examination of the problem', a list of nine relevant principles that was the declared common law of Australia:

1. The Crown's acquisition of sovereignty over the several parts of Australia cannot be challenged in an Australian municipal court.
2. On acquisition of sovereignty over a particular part of Australia, the Crown acquired a radical title to the land in that part.
3. Native title to land survived the Crown's acquisition of sovereignty and radical title. The rights and privileges conferred by native title were unaffected by the Crown's acquisition of radical title but the acquisition of sovereignty exposed native title to extinguishment by a valid exercise of sovereign power inconsistent with the continued right to enjoy native title. [...]
6. Native title to particular land (whether classified by the common law as proprietary, usufructuary or otherwise), its incidents and the persons entitled thereto are ascertained according to the laws and customs of the indigenous people who, by those laws and customs, have a connection with the land. It is immaterial that the laws and customs have undergone some change since the Crown acquired sovereignty provided the general nature of the connection between the indigenous people and the land remains.<sup>583</sup>

The Court held that the 'settled' laws and customs of the Indigenous societies of New Holland continued unabated. Justice Brennan implicitly rejected that the contrary view is able to be contemporaneously held:

It is one thing for our contemporary law to accept that the laws of England, so far as applicable, became the laws of New South Wales and of the other Australian colonies. It is another thing for our contemporary law to accept that, when the common law of England became the common law of the several colonies, the theory which was advanced to support the introduction of the common law of

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<sup>582</sup> (1992) 175 CLR 1, 57.

<sup>583</sup> *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 69-70. These nine Principles are set out in full in Appendix VI.

England accords with our present knowledge and appreciation of the facts. When it was sought [in *Milirrpum*] to apply Lord Watson's assumption in *Cooper v Stuart* that the colony of New South Wales was 'without settled inhabitants or settled law' to Aboriginal society in the Northern Territory the assumption proved false.<sup>584</sup>

For Brennan J, the laws and customs of the Indigenous peoples – and implicitly the systems generating the laws and customs – survived the acquisition of sovereignty but these laws and customs might undergo change. Indeed, it is inescapable in a conflict of laws scenario with a new dominant sovereign that the laws of the Indigenous peoples would suffer change in some regard.

His Honour noted that any theory which had the British Crown acquiring an absolute beneficial title in all lands *upon* the assertion of sovereignty was dissonant with Australian history.

The dispossession of the indigenous inhabitants of Australia was not worked by a transfer of beneficial ownership when sovereignty was acquired by the Crown, but by the recurrent exercise of a paramount power to exclude the indigenous inhabitants from their traditional lands as colonial settlement expanded and land was granted to the colonists. Dispossession is attributable not to a failure of native title to survive the acquisition of sovereignty, but to its subsequent extinction by a paramount power.<sup>585</sup>

The actual process of 'extinction' of any extant native title was worked by accretion over the decades, not instantaneously upon the assertion of British sovereignty.

### **Relevant modes of acquiring territorial sovereignty**

In his judgment Brennan J stated that the relevant modes of acquiring territorial sovereignty in the international law of the late 18<sup>th</sup> century were relevantly threefold: Conquest, Cession and Occupation, the latter relating to newly-discovered territory that was *terra nullius*.

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<sup>584</sup> Ibid 38-9, concurred in by Mason CJ and McHugh J.

<sup>585</sup> Ibid 58.

However, according to the judgment, during the Age of Discovery the classical Occupation mode of acquisition was expanded from applying only to uninhabited territories – those that were *terra nullius* – to those New World territories 'discovered' by explorers and adventurers from the Old World yet which were occupied by indigenous peoples. Such inhabited territories came to be regarded, too, as *terra nullius* according to His Honour.<sup>586</sup> He explained:

The great voyages of European discovery opened to European nations the prospect of occupying new and valuable territories that were already inhabited. As among themselves, the European nations parcelled out the territories newly discovered to the sovereigns of the respective discoverers, provided the discovery was confirmed by occupation and provided the indigenous inhabitants were not organized in a society that was united permanently for political action. To these territories the European colonial nations applied the doctrines relating to acquisition of territory that was *terra nullius*. They recognized the sovereignty of the respective European nations over the territory of 'backward peoples' and, by State practice, permitted the acquisition of sovereignty of such territory by occupation rather than by conquest.<sup>587</sup>

This newer expanded position, as stated by Brennan J, may be termed the Occupation of Backward Peoples doctrine, to distinguish it from classical Occupation.

Brennan J implies that it is or was accepted as State practice in the relevant epoch. Yet the period at which this Occupation of Backward Peoples doctrine emerged or was cemented as State practice is nowhere stated. Moreover, when it was accepted into the international law by the European nations is not pinpointed in the judgment. No examples are given of any

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<sup>586</sup> Justice Brennan examined the Imperial constitutional jurisprudence and determined that the denial of the pre-existing property rights of the Indigenous populations of New Holland, and of the customary laws which sustained these rights and interests, rested on the proposition their territories were legally 'unoccupied' when the British asserted sovereignty.

<sup>587</sup> (1992) 175 CLR 1, 32. Emphasis added. This passage will later be contrasted with a similar passage of CJ Marshall in 1823 in the US Supreme Court: see below in Figure IV-1.

earlier or contemporaneous applications of this engorged notion of *terra nullius*.<sup>588</sup> It is undeniable that the judgment relies on this Occupation of Backward Peoples doctrine to have been state practice by at least the late 18<sup>th</sup> century, and certainly by 1788, to be relied upon by the British Crown in claiming parts of New Holland. Brennan J concludes his discussion with the statement that

the British acquisition of sovereignty over the Colony of New South Wales *was regarded as dependent upon the settlement of territory that was terra nullius consequent on discovery*'.<sup>589</sup>

### **The 'various justifications'**

In the course of his discussion, Brennan J highlighted the 'various justifications'<sup>590</sup> which underpinned the application of an engorged *terra nullius* doctrine to territory inhabited by 'backward' peoples. These justifications were, firstly, that the inhabitants were not civilised to a certain standard;<sup>591</sup> secondly, that from Medieval times the benefits of Christianity and European civilisation needed to be extended to those peoples not possessed of them;<sup>592</sup> and finally, if the land was uncultivated by these indigenous populations, the European nations had a right to bring lands into production, and such territory was therefore open to occupation by European nations (again citing Vattel).<sup>593</sup> Shortly stated, the justifications were that these 'backward peoples' were not-civilised, non-Christian or non-cultivators.

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<sup>588</sup> Ibid. It was endorsed in the Imperial constitutional law in *Cooper v Stuart* (1889) 14 AC 286.

<sup>589</sup> (1992) 175 CLR 1, 34. Emphasis added.

<sup>590</sup> Ibid 32.

<sup>591</sup> Ibid. For this latter proposition, Brennan J cites Dr Lindley's 1926 thesis, *The Acquisition and Government of Backward Territory in International Law*, above n 29.

<sup>592</sup> (1992) 175 CLR 1, 32-33.

<sup>593</sup> Ibid 33.

### *Justification for acquisition of Murray Islands*

In concluding his discussion of these 'justifications' to the Meriam, Brennan J states that he doubted whether 'the facts would have sufficed to permit the acquisition of the Murray Islands as though the Islands were *terra nullius*'.<sup>594</sup> This was because the evidence before the trial judge, Moynihan J, had plainly found that as at 1879, when the assertion of British sovereignty was made over the Murray Islands, the Meriam were 'devoted gardeners', they had been earlier proselytised by the London Missionary Society, and the Mamoose and missionaries provided a stable and peaceful society. They were all of the above: cultivators, Christianised and civilised to an accepted standard. However, Brennan J seems then to interrupt his discussion, stating:

However that may be, it is not for this court to canvass the validity of the Crown's acquisition of sovereignty over the Islands which, in any event, was consolidated by uninterrupted control of the Islands by Queensland.<sup>595</sup>

His Honour rests this discussion, unsatisfactorily, on this suggestion that the basis upon which territorial sovereignty now is held over the Torres Strait islands in international law is based on Prescription, hitherto unmentioned in his judgment, rather than relying on any engorged notion of *terra nullius* under the Occupation of Backward Peoples doctrine. The obvious reason is that none of the alleged underlying justifications of engorged *terra nullius* outlined by Brennan J were applicable to the circumstances of the Meriam People at the time of annexation in 1879.

### **What then of New Holland?**

As to the acquisition of the territorial sovereignty of eastern New Holland in 1788, Brennan J stated that basis to be:

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<sup>594</sup> Ibid.

<sup>595</sup> Ibid.



When British colonists went out to other inhabited parts of the world, including New South Wales, and settled there under the protection of the forces of the Crown, so that the Crown acquired sovereignty recognized by the European family of nations under the enlarged notion of *terra nullius*, it was necessary for the common law to prescribe a doctrine relating to the law to be applied in such colonies, for sovereignty imports supreme internal legal authority. The view was taken that, when sovereignty of a territory could be acquired under the enlarged notion of *terra nullius*, for the purposes of the municipal law that territory (though inhabited) could be treated as a 'desert uninhabited' country.<sup>596</sup>

These 'backward' colonies that were treated as 'desert uninhabited' and could thus be acquired under this enlarged notion of *terra nullius* under the Occupation of Backward Peoples doctrine are termed 'settled' colonies by Brennan J, and he continues:

Ex hypothesi, the indigenous inhabitants of a settled colony had no recognized sovereign, else the territory could have been acquired only by conquest or cession. The indigenous people of a settled colony were thus taken to be without laws, without a sovereign and primitive in their social organization.<sup>597</sup>

Brennan J then noted that Lord Kingsdown in *Advocate-General of Bengal v Ranee Surnomoye Dossee*<sup>598</sup> used the term 'barbarous' to describe the native state of such 'settled' colonies. The Privy Council there said:

Where Englishmen establish themselves in an uninhabited or barbarous country, they carry with them not only the laws, but the sovereignty of their own State; and those who live amongst them and become members of their community become also partakers of, and subject to, the same laws.<sup>599</sup>

Brennan J's conclusion as to the basis of acquisition of sovereignty over the incipient colony of New South Wales, and later over the balance of New

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<sup>596</sup> Ibid 36. Brennan J cites and footnotes A James, *Sovereign Statehood* (1986) at 203-9, for the proposition that 'sovereignty imports supreme internal legal authority'. As with the Evatt citation, this is contestable. Indeed, his premise that the relevant rules were to be found at common law is also flawed, as it was the international law principles which governed the situation he was addressing.

<sup>597</sup> Ibid.

<sup>598</sup> *Attorney-General (Bengal) v Ranee Surnomoye Dossee* [1863] EngR 761.

<sup>599</sup> Ibid 800.

Holland, thus rests on the proposition that it was a 'barbarous country', the New Holland peoples deemed to be 'without laws, without a sovereign and primitive in their social organization'.<sup>600</sup> The justifying rationale in the Imperial constitutional law is that the colony of New South Wales, although inhabited by Indigenous peoples, was vacant of law and sovereigns because these peoples were too primitive in their social organisation to have laws or governance.<sup>601</sup> This proposition sits uneasily with the finding, from a property law perspective, that the settled 'laws and customs' of the Indigenous societies of New Holland sourced their native title rights and interests.

In any event, His Honour went on to state that 'the British acquisition of sovereignty over the Colony of New South Wales was regarded as dependent upon the settlement of territory that was *terra nullius* consequent on discovery'.<sup>602</sup> For this proposition he cites *Cooper v Stuart* and an early paper by Dame Elizabeth Evatt.

What begs the question from Brennan J's statement is *who* regarded New South Wales as *terra nullius* circa 1788? The scaffolding for this proposition is weak. *Cooper v Stuart* was decided in 1889, more than a century after any claim by the British to sovereignty in New Holland territories. And the reliance on Evatt's 1968 paper is questionable. His Honour cites Evatt's paper at page 25 yet it is difficult to comprehend where he garners support

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<sup>600</sup> (1992) 175 CLR 1, 36.

<sup>601</sup> *Cooper v Stuart* (1889) 14 AC 286 (JCPC). It is plain that, although the question did not arise for adjudication, the Imperial authorities in London did not depend on any enlarged notion of *terra nullius* at or near to 1788. They relied on the classical mode of Occupation, stating that New Holland was uninhabited: see Bayne, above n 15, 117. David Ritter has argued that the 'rejection' of the doctrine of *terra nullius* in *Mabo (No 2)* is 'highly ambiguous and requires explanation that goes beyond mere doctrine': David Ritter, 'The "Rejection of Terra Nullius" in *Mabo*: A Critical Analysis' (1996) 18 (3) *Sydney Law Review* 5.

<sup>602</sup> (1992) 175 CLR 1, 34.

for his proposition from that paper. Indeed, Evatt concludes her paper with a quote from Paul Fauchille's 1925 treatise *Traité de Droit International*:

*Les puissances civilisées n'ont pas plus de droit de s'emparer des territoires des sauvages, que ceux-ci n'ont le droit d'occuper les continents européens.*<sup>603</sup>

[Civilized powers have no more right to seize the territories of Savages than the latter have the right to occupy the European continents.]

Far from supporting his proposition that the British acquisition of sovereignty in New Holland was based on *terra nullius* consequent on discovery, Evatt's paper is in direct contradiction to it.

### **Which justification?**

Of the potential justifications (non-cultivators, non-Christian or not-civilised) that rendered New Holland *terra nullius*, it would seem that Justice Brennan eschewed the justifications he had earlier outlined in relation to the Murray Islands and instead adopted the view that it was because the Indigenous peoples of New Holland 'were not organized into a society that was united permanently for political action'.<sup>604</sup>

The milestones of the development in the Anglo-Australian jurisprudence from the classical principles of Occupation to the Occupation of Backward Peoples doctrine are tabled in Figure IV-1.

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<sup>603</sup> Ibid 45. *Traité de Droit International* was published almost contemporaneously with Lindley's *The Acquisition and Government of Backward Territory in International Law*. Fauchille's book was called, upon his death the next year, 'the most comprehensive treatise on the law of nations published within this generation'; see James Brown Scott, 'In Memoriam: Paul Fauchille' (1926) 20 (2) *The American Journal of International Law* 335,336. Translation of this passage was assisted by Colin Sheehan and Catharine Burke.

<sup>604</sup> (1992) 175 CLR 1, 34. His Honour cites Chapters III and IV of Dr Lindley's *The Acquisition and Government of Backward Territory in International Law* as the source of this benchmark principle.

**Figure IV-1 The development in Anglo-Australian jurisprudence of the Occupation of Backward Peoples doctrine**

Year	Case	Statement	Mode
1819	Joint advice to Lord Bathurst by the Attorney-General and the Solicitor-General	New South Wales had been acquired not 'by conquest or cession, but taken possession of by him <i>as desert and uninhabited</i> '. <sup>605</sup>	Occupation Assertion of classical <i>terra nullius</i> , that is, that New Holland was physically uninhabited.
1822	Opinion of James FitzJames Stephen, Colonial Office	New South Wales had been acquired 'neither by conquest nor cession, but by <i>the mere occupation of a desert or uninhabited land</i> '. <sup>606</sup>	Occupation Assertion of classical <i>terra nullius</i> , that is, that New Holland was physically uninhabited.
1886	<i>M'Hugh v Robertson</i> (Holroyd J, NSW Supreme Court)	From the first the English have occupied Australia ' <i>as if it were</i> ' an uninhabited and desert country. <sup>607</sup>	Occupation, but in transition from the counter-historical assertion to a metaphorical position.
1889	<i>Cooper v Stuart</i> Lord Watson (JCPC)	The Colony of New South Wales ' <i>consisted of a tract of territory, practically unoccupied, without settled inhabitants or settled law, at the time when it was peacefully annexed to the British dominions</i> '. <sup>608</sup>	Occupation of Backward Peoples This is the first statement in the Anglo-Australian jurisprudence of the Occupation of Backward Peoples doctrine. The classical <i>terra nullius</i> concept of an uninhabited, sovereignless territory is expanded to include those territories held by Indigenous peoples as 'practically unoccupied' because the inhabitants of New Holland were not 'settled' or were without 'settled law'. It was a 'peaceful' annexation, not a Conquest.
1971	<i>Milirrpum</i> Blackburn J	The ' <i>philosophical justification</i> ' for the colonisation of the territory is ' <i>that the whole earth was open to</i>	Occupation of Backward Peoples (or, possibly, Conquest) Judge Blackburn describes his principle as a 'philosophical

<sup>605</sup> Quoted in Reynolds, *Aboriginal Sovereignty*, above n 124, 110.

<sup>606</sup> *Ibid.*

<sup>607</sup> *M'Hugh v Robertson* (1886) 11 VLR 422, 431.

<sup>608</sup> (1889) AC 286, 291 (JCPC).

		<i>the industry and enterprise of the human race, which had the duty and the right to develop the earth's resources; the more advanced peoples were therefore justified in dispossessing, if necessary, the less advanced.</i> <sup>609</sup>	justification' which, if peacefully achieved, may be the first Australian rendition of the Occupation of Backward Peoples doctrine, or if accompanied by violence, may be capable of being regarded as a Conquest.
1992	<i>Mabo (No 2)</i> Brennan J	As among themselves, the European nations parcelled out the territories newly discovered to the sovereigns of the respective discoverers, provided the discovery was confirmed by occupation and <i>provided the indigenous inhabitants were not organized in a society that was united permanently for political action.</i> To these territories the European colonial nations applied the doctrines relating to acquisition of territory that was terra nullius. They recognized the sovereignty of the respective European nations over the territory of 'backward peoples'. <sup>610</sup>  <i>'[T]he British acquisition of sovereignty over the Colony of New South Wales was regarded as dependent upon the settlement of territory that was terra nullius consequent on discovery.'</i> <sup>611</sup>	Occupation of Backward Peoples  This is the acceptance into the Australian jurisprudence of the Occupation of Backward Peoples doctrine. The classical <i>terra nullius</i> is said to have been enlarged – when exactly this occurred is left unstated – to include those territories held by 'backward peoples' because ' <i>the indigenous inhabitants were not organized in a society that was united permanently for political action</i> '.

<sup>609</sup> (1971) 17 FLR 141, 200.

<sup>610</sup> (1992) 175 CLR 1, 32.

<sup>611</sup> Ibid 34. This engorged Occupation of Backward Peoples mode was very thinly-veiled in the Imperial constitutional law, and euphemised in the Anglo-Australian law as 'the Peaceful Settlement' doctrine'.

In stating the benchmark test, that the Indigenous peoples of New Holland were regarded as 'backward peoples'<sup>612</sup> and their territories thus deemed *terra nullius* and sovereign-less, Justice Brennan states that it was because they were 'not organized into a society that was united permanently for political action'.

The judgment does not explore what elements are necessary to enable such a conclusion to be drawn but he does plainly acknowledge the source of the benchmark principle as Dr Lindley's *The Acquisition and Government of Backward Territory in International Law*. However, Justice Brennan does not pinpoint his reference, instead broadly citing both Chapters III and IV of Lindley's work. An exploration of these referenced chapters shows that the source may not support the proposition as stated by Justice Brennan.

### **Lindley's Backward Territory in International Law**

Dr Lindley published *The Acquisition and Government of Backward Territory in International Law (being a treatise on the law and practice relating to colonial expansion)* in 1926. In the oddest of Prefaces, given the title of this thesis, Lindley confesses that the term 'backward territory' is 'not one known to the International Law'.<sup>613</sup> 'Nor is it', he says, 'possible or desirable to give it an exact definition or denotation for our present purpose'.<sup>614</sup>

At the one extreme, it may perhaps be said to be marked by territory which is entirely uninhabited; and it clearly includes territory inhabited by natives as low in the scale of civilization as those of Central Africa. On the other hand, all that can be said as to its upper limits probably is that it is obviously intended to exclude territory

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<sup>612</sup> There was some academic Australian authority, in the form of Professor of International Law at the University of Adelaide, DP O'Connell, stating in his text that: 'Since the Australian aborigines were held incapable of intelligent transactions with respect to land, Australia was treated as terra nullius': DP O'Connell, *International Law in Australia* (Stevens & Sons, 2nd ed, 1970), 409.

<sup>613</sup> Lindley, above n 29, Preface, *v*.

<sup>614</sup> *Ibid*.

which has reached the level of what is sometimes known as European or Western civilization.'<sup>615</sup>

It is apparent that Dr Lindley presents the topic most circumspectly for it is not 'backward territory' he is discussing, but 'backward peoples', which by 1926 and with the Age of Empire in decline, had to be addressed with sensitivity.

**"more or less backward"**

In discussing the 'territory inhabited by natives', Dr Lindley paints in broad strokes: those 'as low in the scale of civilization as those of Central Africa' are 'backward' while those who have attained 'the level of what is sometimes known as European or Western civilization' are not. As to the means of acquiring territorial sovereignty over 'backward' peoples, the rule regarding appropriable territory stated by Lindley is: '[i]f the territory is uninhabited, or is inhabited only by a number of individuals who do not form a political society, then the acquisition may be made by way of Occupation'.<sup>616</sup> It would follow, he states:

that if a tract of country were inhabited only by isolated individuals who were not united for political action, so that there was no sovereignty in exercise there, such a tract would be *territorium nullius*.<sup>617</sup>

And:

In order that an area shall not be *territorium nullius*, it would appear from general considerations, to be necessary and sufficient that it be inhabited by a political society, that is, by a considerable number of persons who are permanently united by habitual obedience to a certain and common superior, or whose conduct in regard to their mutual relations habitually conforms to recognised standards.<sup>618</sup>

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<sup>615</sup> Ibid.

<sup>616</sup> Lindley, above n 29, 45.

<sup>617</sup> Ibid 23.

<sup>618</sup> Ibid.

Conversely:

If the inhabitants exhibit collective political activity which, although of a crude and rudimentary form, possesses the elements of permanence, the acquisition can only be made by way of Cession, or Conquest or Prescription.<sup>619</sup>

Dr Lindley thus poses a number of propositions. An inhabited *territorium nullius* capable of being acquired by Occupation would, to capture his various statements, be one that:

1. is inhabited only by a number of individuals who do not form a political society,
2. a tract of country inhabited only by isolated individuals who were not united for political action;

*but not*

3. where the inhabitants exhibit collective political activity, albeit crude and rudimentary, which has elements of permanence, or
4. where the inhabitants form a political society, being a considerable number of persons who are permanently united by habitual obedience to a certain and common superior, or whose conduct in regard to their mutual relations habitually conforms to recognised standards.

#### **Stating the benchmark test**

It is notable that in his Chapter V, where Dr Lindley discusses 'International Law and Native Sovereignty', he begins by drawing together his discussions of Chapters III and IV, writing: 'Combining the results of our review of the practice of States in the last Chapter with those of our theoretical investigations in Chap. III., the rule regarding appropriable territory can now be stated as follows:'

The members of the International Family will not dispute the validity of the acquisition by one of them of territory in respect of which none of the others has a valid prior claim, and this recognition does not depend upon the method by which the acquisition has been made. *If the territory is uninhabited, or is*

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<sup>619</sup> Ibid 45.



*inhabited only by a number of individuals who do not form a political society, then the acquisition may be made by way of Occupation.*<sup>620</sup>

Lindley requires that the inhabitants form more than a collection of individuals, 'a political society'. If they do not, then the territory may be regarded as a *territorium nullius* and sovereign-less, and thus the mode of acquisition would be Occupation. If, however, the inhabitants of that territory were a political society (or societies), the acquisition can only be made, according to Dr Lindley's work, by a mode other than Occupation.

On Lindley's test, it would be difficult to assert that the Indigenous peoples of New Holland were, either individually or collectively, 'a number of individuals' and so *terra nullius* with no sovereignty in exercise. Indeed, Lindley went on to state:

If the inhabitants exhibit collective political activity which, although of a crude and rudimentary form, possesses the elements of permanence, the acquisition can only be made by way of Cession or Conquest or Prescription.<sup>621</sup>

Again, it would be difficult to assert that the Indigenous peoples of New Holland did not exhibit collective political activity above that of a crude and rudimentary form such that a form of 'sovereignty' was in exercise in their territories. It is difficult to not echo Marshall CJ in stating that what was found in New Holland were inhabitants, divided into separate territories, independent of each other and of the rest of the world, having institutions of their own, and governing themselves by their own laws. In these circumstances, the mode of acquisition, according to Dr Lindley, can only be made by way of Cession, Conquest or Prescription.

It will be appreciated that Justice Brennan, despite citing the work of Dr Lindley as authoritative, did not adopt 'the rule regarding appropriable territory' as distilled and stated by Lindley in his thesis.

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<sup>620</sup> Ibid 45. Emphasis added.

<sup>621</sup> Ibid.

Brennan J in *Mabo (No 2)* shifts the threshold test of 'backward'-ness to the higher end of proof, one which requires the inhabitants to be 'organized into a society that was united permanently for political action'. It seems entirely possible, given the citation, that Justice Brennan took an impression from Chapters III and IV of Dr Lindley's work, the discussions of 'theoretical investigations' and State practice respectively, without appreciating that this was not Dr Lindley's concluded view. There is a great measure of difference between the original authorial discussion and its rendition in this judgment so that Brennan J must be found to be in error on this point.<sup>622</sup>

In stating this 'backward' threshold within this Occupation of Backward Peoples doctrine, Brennan J is also at odds with the early USSC jurisprudence, the International Court of Justice definition and other sources utilised in the judgment.

### **Differences between US Supreme Court and Brennan J**

In expressing the application of the classical Occupation principles to territories inhabited by 'backward peoples' to form this Occupation of Backward Peoples doctrine, there are manifold divergences between the statements in the American jurisprudence of the early 19<sup>th</sup> century and that enunciated by Brennan J. To permit a ready comparison, these statements are contrasted in Figure IV-2.

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<sup>622</sup> Brennan J is also at divergence with Dr Lindley as to what was the relevant State practice; see Lindley, above n 29, 45-7.

**Figure IV-2 Contrasting the statements of Marshall CJ and Brennan J**

<p style="text-align: center;"><b>Marshall CJ</b> <i>Johnson v M'Intosh</i> (1823) USSC</p>	<p style="text-align: center;"><b>Brennan J</b> <i>Mabo (No 2)</i> (1992) HCA</p>
<p>On the discovery of this immense continent, the great nations of Europe were eager to appropriate to themselves so much of it as they could respectively acquire. [...] But, as they were all in pursuit of nearly the same object, it was necessary, in order to avoid conflicting settlements and consequent war with each other, to establish a principle which all should acknowledge as the law by which the right of acquisition, which they all asserted, should be regulated as between themselves. This principle was that discovery gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments, which title might be consummated by possession.</p> <p><i>The exclusion of all other Europeans, necessarily gave to the nation making the discovery the sole right of acquiring the soil from the natives, and establishing settlements upon it. It was a right with which no Europeans could interfere.</i><sup>623</sup></p>	<p>The great voyages of European discovery opened to European nations the prospect of occupying new and valuable territories that were already inhabited. As among themselves, the European nations parcelled out the territories newly discovered to the sovereigns of the respective discoverers, provided the discovery was confirmed by occupation and <i>provided the indigenous inhabitants were not organized in a society that was united permanently for political action. To these territories the European colonial nations applied the doctrines relating to acquisition of territory that was terra nullius. They recognized the sovereignty of the respective European nations over the territory of 'backward peoples' and, by State practice, permitted the acquisition of sovereignty of such territory by occupation rather than by conquest.</i><sup>624</sup></p>

<sup>623</sup> (1823) 8 Wheaton 543, 595.

<sup>624</sup> *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 32. At both its ancient Roman sources, and in its most modern expression in the international law, in the International Court of Justice in the *Advisory Opinion on Western Sahara*, Occupation was found to apply only to uninhabited territory.

### **Relations *inter se***

The first divergence is that Marshall CJ applies the doctrine of Discovery/Occupation to European nations to govern their relations *inter se* with other European nations in the New World. It gave an inchoate title against 'all other European governments' only. It had no application to 'the natives'. It will be recalled that Marshall CJ stated in *Worcester v State of Georgia*<sup>625</sup> any proposition that the discoverer acquired rights in the country discovered 'which annulled the pre-existing rights of its ancient possessors' was 'difficult to comprehend'.<sup>626</sup>

Brennan J, on the other hand, applies the doctrine far more broadly, not only to govern the division between the European nations, but to operate against the 'backward peoples' of the New World. Not only did it change in direction, it changed to the extent that any sovereignty possessed by these 'peoples' could be wholly disregarded if they '*were not organized in a society that was united permanently for political action*'.

### ***'Backward' and non-Backward Peoples***

Marshall CJ, in 1823, draws no distinction in the 'native peoples' of the New World. There are no 'backward' or non-'backward' peoples. The sovereignty acquired by the European nation would be a derived sovereignty and would be acquired by the other modes available, by Conquest, Cession or, over time, by Prescription.

On Brennan J's version, however, there is a necessary distinction between the discovery of 'backward peoples' and those 'organized in a society that was united permanently for political action'. For Brennan J any extant sovereignty of those societies which were united permanently for political action was acknowledged by the European power, and they would be

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<sup>625</sup> (1832) 6 Peters 515 (USSC).

<sup>626</sup> Ibid 542-3.

treated accordingly. In his second lesser class, the 'backward peoples' of the New World – those *not* organized in a society that was united permanently for political action – no earlier sovereignty is acknowledged. Into this class, necessarily for His Honour's reasoning, fall the Indigenous peoples of New Holland. The British sovereignty, thus, is seen to be an 'original' sovereignty, not derived or dependent on another.

However, it is difficult to maintain the consistency that the 'backward peoples' of New Holland possessed no sovereignties when the assertions of British sovereignty were made. Brennan J relevantly stated that the present-day common law of Australia 'accepts that the antecedent rights and interests in land possessed by the indigenous inhabitants of the territory survived the *change* in sovereignty'.<sup>627</sup> By referring to a 'change' of sovereignty, the implication is heavy that there *was* a prior sovereignty or sovereignties. Indeed, in the course of his judgment, his Honour cannot pretend that the historical circumstances are anything other than the acquisition of a derivative sovereignty, and he refers to a 'change' of sovereignty on not less than six occasions.<sup>628</sup> Even the dissentient, Dawson J, premised his opinion on 'a change of sovereignty'.<sup>629</sup>

### *Inconsistency with International practice*

The third observation is that while the opinion of Marshall CJ is still consonant with modern international law from the early 19<sup>th</sup> century to its expression in the 1974 decision in *Advisory Opinion on the Western Sahara*, that of Justice Brennan is not. It is recalled that the International Court of Justice stated:

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<sup>627</sup> *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 57.

<sup>628</sup> Ibid 'a change of sovereignty' at 51; 'a change of sovereignty', at 56; 'a mere change in sovereignty', at 57; 'the change in sovereignty', at 57; 'the change of sovereignty', at 59; and 'a change of sovereignty', at 63.

<sup>629</sup> Ibid 127. Dawson J uses the change reference twice more, 'upon a change in sovereignty' and 'following a change in sovereignty', both at 127.

whatever differences of opinion there may have been among the jurists, the state practice of the relevant period indicates that the territories inhabited by tribes or peoples having a social and political organisation, were not regarded as *terrae nullius*.<sup>630</sup>

It is also notable that Brennan J did not simply accept the benchmark stated by this International Court of Justice decision, that of '*tribes or peoples having a social and political organisation*', but adopted, as we have earlier ascertained, a more abstract test loosely garnered from, but attributed to, Dr Lindley's *The Acquisition and Government of Backward Territory in International Law*.<sup>631</sup>

### *State practice*

Justice Brennan appears then to avoid the guidance of the International Court of Justice on the issue of the State practice. The ICJ found that the State practice of the relevant period – the 1880s – was that territories inhabited by tribes or peoples having a social and political organisation were *not* regarded as *terra nullius* and so incapable of being acquired by Occupation. On this issue, Brennan J, is also at odds with Lindley's studies.

### **Dr Lindley v. Brennan J**

Brennan J also makes a marked departure from Dr Lindley as to the State practice. Brennan J maintains that the European nations, by State practice, permitted the acquisition of the sovereignty of territory of 'backward peoples', under the rubric of Occupation of Backward Peoples doctrine, by

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<sup>630</sup> *Advisory Opinion (Western Sahara)* [1975] ICJ Reports 12, 39.

<sup>631</sup> Lindley, above n 29. However, there are some unsubtle changes. Dr Lindley wrote (at 45):

The members of the International Family will not dispute the validity of the acquisition by one of them of territory in respect of which none of the others has a valid prior claim, and this recognition does not depend upon the method by which the acquisition has been made. If the territory is uninhabited, or is inhabited only by a number of individuals who do not form a political society, then the acquisition may be made by Occupation. If the inhabitants exhibit collective political activity which, although of a crude and rudimentary form, possesses the elements of permanence, the acquisition can only be made by way of Cession or Conquest or Prescription.

discovery and subsequent settlement. In contrast, summarising the evidence of State practice over 400 years, from 1500 to the early 1900s, Dr Lindley wrote:

As an induction from all these instances, extending over four centuries and derived from four continents, it appears that, on the whole, the European States, in establishing their dominion over countries inhabited by peoples in a more or less backward stage of political development, have adopted as the method of such extension, Cession or Conquest, and have not based their rights upon the Occupation of *territorium nullius*.<sup>632</sup>

Dr Lindley expressly denies that the European powers relied on any claim to sovereignty over the territory of 'backward peoples' on the basis that it was a *territorium nullius*, and so appropriable under any doctrine of Occupation of Backward Peoples, except for Australia, where he says, again circumspectly:

Australia has usually been considered to have been properly *territorium nullius* upon its acquisition. [...]

As the facts presented themselves at the time, there appeared to be no political society to be dealt with; and in such conditions, whatever 'rudiments of a regular government' subsequent research may have revealed among the Australian tribes, Occupation was the appropriate method of acquisition.<sup>633</sup>

Instead, contrary to the warning of the Court concerning the views of jurists, Brennan J squarely plumbs for the opinion of a singular 18<sup>th</sup> century jurist, Emmerich de Vattel.<sup>634</sup>

### **A return to Vattel**

In avoiding the International Court of Justice decision of *Western Sahara*, the source relied upon by Justice Brennan in his *Mabo (No 2)* judgment as founding this Occupation of Backward Peoples doctrine is that of

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<sup>632</sup> Lindley, above n 29, 43.

<sup>633</sup> Ibid 40-1.

<sup>634</sup> Brennan J also accepted as part of the international law, as practiced by States, in the period 1788–1829.

Emmerich de Vattel, the Swiss jurist whose opinions we have previously investigated.<sup>635</sup> Unfortunately, Justice Brennan J makes several critical errors in his reliance on – what we have styled – Vattel's Principle of Want.

### **Wrong publication date**

Least perhaps, he places Vattel's *Law of Nations* as being published 'at the end of the eighteenth century', that is after the discovery by Cook and the assertion of British sovereignty in eastern New Holland.<sup>636</sup> However, it was published in 1758, and so its publication *pre*-dated both Blackstone's *Commentaries*, and Cook's claiming of eastern New Holland.

Most notable from this temporal perspective is that Sir William Blackstone, who was well versed in the continental discourse and regularly made mention of Vattel's work, did not expressly or otherwise adopt Vattel's Principle of Want in his *Commentaries*. If, therefore, Blackstone's *Commentaries* are to be given great authority on its publication in 1765 as presenting the written English law, the conclusion must be that Imperial constitutional law did not adhere to any principle that permitted the acquisition of the territories of indigenous peoples in the New World based on any Vattelian argument. To the contrary, it will be recalled, Sir William Blackstone openly and stridently condemned any 'driving out the natives' in his *Commentaries*.<sup>637</sup>

### **Whole or part only?**

The second error by Brennan J is that even if the acquisition of indigenous territories were adopted in the international law under the Vattelian argument, it did not advocate the taking of the whole of their territories.

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<sup>635</sup> See Chapter III.

<sup>636</sup> (1992) 175 CLR 1, 33 at Footnote 70. This error has carried through the subsequent literature: see, for example, statements attributed to Sir Anthony Mason, the former Chief Justice of Australia, in *Hope*, above n 123, and *Bayne*, above n 15, 115.

<sup>637</sup> Blackstone, *Commentaries*, above n 153, Book the First, 107.



Vattel's Principle of Want permitted, out of necessity, the taking of part only of any territory occupied by Indigenous peoples of the New World, being that which the Indigenous peoples had no need. The necessity arose by reason of an overflow of a European population, which perhaps may be at least be historically arguable in the case of New Holland.

### **To Treat or Trick?**

It will also be recalled that Emmerich de Vattel, like Sir William Blackstone after him, did not endorse the forceful taking of Indigenous territories. Vattel urged the *treating* with such populations to acquire territory, that is, by voluntary Cession. Having ignored the International Court of Justice position and explored the alternative position relied upon by Brennan J, it can be appreciated that the Occupation of Backward Peoples doctrine, as stated by His Honour, is of doubtful provenance or legitimacy in the international law, now or inter-temporally.

### ***Ex post facto* rationalisation**

It is clear that the engorged notion of *terra nullius* concerning backward peoples by Brennan J is applied *ex post facto*. As we have seen, Great Britain did not assert this engorged notion in, or near to, 1788. The earliest legal opinions from the Colonial Office, and the early colonial judicial statements, expressed the mode of acquisition as being under the classical Occupation mode – because New Holland was uninhabited. The basis for the acquisition from the Indigenous peoples of New Holland under the Occupation of Backward Peoples doctrine only entered the Anglo-Australian jurisprudence in the 1880s. And although the principle remained the same, that the Indigenous peoples possessed no sovereigns and so could be acquired by Occupation, the justification for its application

changed with the times.<sup>638</sup> For the Privy Councillors in *Cooper v Stuart* in 1889 it was because the Indigenes had no 'settled' law or habitations and so was 'practically unoccupied'. For Judge Blackburn in 1971, it was that the Indigenous peoples were 'uncivilised inhabitants living in primitive societies' and 'the whole earth was open to the industry and enterprise of the human race' and that 'the more advanced peoples were therefore justified in dispossessing, if necessary, the less advanced'.<sup>639</sup> In his 1992 analysis, Justice Brennan posited New Holland as occupied by 'backward peoples' which were 'not organized in a society that was united permanently for political action'.

### **The irreconcilable tension**

The *Mabo (No 2)* decision thus contains a deeply-embedded contradiction. All three majority judgments in *Mabo (No 2)*, that of Brennan J,<sup>640</sup> Deane and Gaudron JJ and Toohey J, expressly rejected the application of the *terra nullius* notion to New Holland.<sup>641</sup> New Holland was inhabited and therefore could not be *terra nullius*. As Brennan J stated:

The common law of this country would perpetuate injustice if it were to continue to embrace the enlarged notion of *terra nullius* and to persist in characterising the indigenous inhabitants of the Australian colonies as people too low in the scale of social

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<sup>638</sup> See also, for example, Fitzmaurice, above n 93. Historians, including Fitzmaurice, seem to be in furious agreement to label 'terra nullius' as 'a legal fiction'. It appears that because the expression 'terra nullius' was not employed in the legal discourse until at, or in the wake of discourse following, the *Afrikakonferenz* in 1884–85, and was not used at or near 1788 in relation to the British annexation of New Holland territories, the concept of an unoccupied territory belonging to no-one – and so *terra nullius* – has an ancient and honourable lineage in the international legal discourse: see discussion above n 93.

<sup>639</sup> (1971) 17 FLR 141, 200.

<sup>640</sup> This was concurred in by Mason CJ and McHugh J.

<sup>641</sup> Ibid 58, 109 and 182 respectively. Some commentators, for example, Ritter, above n 601, have argued that 'any so-called doctrine of *terra nullius*' did not constitute a legal hurdle to recognition of native title in the Australian common law and that the High Court unnecessarily addressed the issue. This view is not accepted in this thesis as it fails to account for how the common law of England was received in New Holland. See also RH Bartlett, *The Mabo Decision* (Butterworths, 1994).

organisation to be acknowledged as possessing rights and interests in land.<sup>642</sup>

In 1992, the Australian common law could not continue to embrace such an aberrant and abhorrent notion to deny the antecedent allodial interests in land of Indigenous societies. Yet, the very same notion is what is embraced as the underpinning of British sovereignty over New Holland. Brennan J stated:

the British acquisition of sovereignty over the Colony of New South Wales was regarded as dependent upon the settlement of territory that was *terra nullius* consequent on discovery.<sup>643</sup>

The British claim to sovereignty of New Holland thus rests on, and continues to 'embrace', the notion that the Indigenous peoples of New Holland were 'too low in the scale of social organisation' to be acknowledged as possessing any prior or existing sovereignties in their respective lands.

### **'There are problems'**

For the Australian jurisprudence, however, the problems go much deeper than mere appearances. As Deane and Gaudron JJ understatedly noted in their joint judgment, 'there are problems'.<sup>644</sup> Their Honours pointedly wrote:

It is scarcely arguable that the establishment by Phillip in 1788 of the penal camp at Sydney Cove constituted occupation of the vast areas of the hinterland of eastern Australia designated by his Commissions.<sup>645</sup>

Sir Kenneth Roberts-Wray had made this point, perhaps more emphatically, a generation earlier. In 1966 he wrote it was 'incredible' to entertain such a scenario and openly questioned:

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<sup>642</sup> Ibid 58.

<sup>643</sup> Ibid 34.

<sup>644</sup> Ibid 78.

<sup>645</sup> Ibid.

could a foothold in a small area on the east side of a sub-continent 2000 miles wide be sufficient in English law (as it certainly would not be in international law) to confer not only sovereignty but also title to the soil throughout the hinterland of nearly three million square miles?<sup>646</sup>

Indeed, Emmerich de Vattel, the very jurist said to be at the root of this orthodox theory surrounding the acquisition of New Holland under an engorged notion of *terra nullius*, had condemned, two centuries earlier, the engrossing of 'a much greater extent of territory' than able to people or cultivate as 'an absolute infringement of the natural rights of men, and repugnant to the views of nature'.<sup>647</sup>

There is an air of the fantastical in the orthodox Anglo-Australian sovereignty scenario. Consequent upon the 'discovery' by Lt Cook in 1770 and upon the reading of Governor Phillip's Commissions on 7 February 1788, it is said that an absolute, plenipotentiary sovereignty courses across the vast territory claimed as New South Wales. Seemingly, it is an original sovereignty for none is acknowledged as preceding it. The sovereignty was originally claimed as lawful in the international law because it was not inhabited by Indigenous peoples, but then, once it became impossible to deny their habitation and acknowledge their societies, it claimed it was because they were 'backward peoples'. A grab bag of justifications is offered for why one cannot acknowledge 'backward peoples'. Visions of a British sovereignty instantaneously sweeping across the New Holland expanse in 1788, the Indigenous peoples oblivious, is a nonsense that is impossible to maintain in any coherent legal system.

It is also unsustainable from any historiographical perspective. What is plain from our foregoing discussion is that the British authorities did not apply any engorged notion of a *territorium nullius* to the situation of New

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<sup>646</sup> Roberts-Wray, above n 43, 631.

<sup>647</sup> Vattel, Book 1, s.208.

Holland in, or near to, 1788. They relied instead on the classical principles of Occupation, claiming, falsely, that New Holland was uninhabited. This is clearly established by the legal opinions of the Colonial Office provided to Lord Bathurst in 1819 and repeated in 1822.<sup>648</sup> It is only in the late 19<sup>th</sup> century that a subtlety crept into the Imperial constitutional law, that New Holland was *deemed* to be uninhabited – *as if it were* uninhabited – with the Privy Councillors in 1889 stating that New South Wales was 'practically unoccupied'. Yet this is the very same epoch in which Spain claimed the Western Sahara under a similarly-engorged notion of *terra nullius*, and that claim has been condemned as not being the international State practice of that epoch – and so acceptable in the international law.<sup>649</sup>

The parlous state of the theory means that ringing questions concerning the acquisition of British sovereignty over New Holland are left unanswered. Claims of an original British sovereignty coursing across half the continent of New Holland at a moment in time from a kerchief of land on the eastern seaboard are fanciful, 'scarcely arguable' by two members of the *Mabo No 2* Court,<sup>650</sup> and, as noted by an English authority on the Imperial constitutional law, 'indeed startling'.<sup>651</sup> Then, even if such a claim could be

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<sup>648</sup> See the discussion in Chapter II.

<sup>649</sup> Moreover, modern international law has expressly rejected the purported application of the enlarged notion of *terra nullius* in 1884 to Indigenous peoples in North Africa, in the very decade the Imperial constitutional law was making similar assertions in the Australian colonies.

<sup>650</sup> (1992) 175 CLR 1, 78 (Deane and Gaudron JJ).

<sup>651</sup> Roberts-Wray, above n 43, 631. It is not irrelevant to observe that upon appointment to the High Court of Australia, it was a convention that the appointees were made Knights of the British Empire. All ten of the chief justices prior to Murray Gleeson's appointment as Chief Justice in 1998 were knighted. Of the 29 puisne justices appointed prior to the cessation of the Imperial awards system, only five (O'Connor, Higgins, Piddington, Evatt and Murphy JJ) went unknighthed. In addition, every Chief Justice of Australia was appointed to the Judicial Committee of the Privy Council until 1974. The *Mabo (No 2)* Court had four knights, Sir Anthony Mason, Sir Gerard Brennan, Sir William Deane and Sir Daryl Dawson. Justice Mary Gaudron, the first female Justice of the High Court of Australia, and who wrote a joint judgment with Justice Deane, was not a Dame of the British Empire.

justified, the British are taken, doctrinally and historically, to be the first 'discoverers' and 'occupiers' of New Holland. Where does this leave the Indigenes of New Holland who, on archaeological evidence, would appear to have discovered and occupied their distinct *countries* under the ancient mode of Occupation many thousands of years ago? Could it perhaps be argued that the international law denied Indigenous peoples any such entitlements to discover and occupy in pre-historic times?<sup>652</sup> The very antiquity of the classical doctrine of Occupation would make this a difficult argument, remembering that Sir William Blackstone cited the Biblical division of territory between the tribes of Israel on escaping Egypt as evidence as the antiquity of this principle. Such an argument has been made, but it was condemned by Dr Lindley when he wrote:

We have now to consider how far it is true, as is sometimes stated, that International law has no place for rules protecting the rights of backward peoples and that, therefore, such international rights as backward peoples have been recognised to possess were moral and not legal.

Although this view is now widely expressed in England, it is not, as we have already seen in Chapter III., so generally adopted by continental jurists, and it derives little support from the classical writers on International Law. Moreover, there have not been wanting in this country authorities who have maintained that International Law does, or should, extend its protection to independent peoples who are not of its community.<sup>653</sup>

Also, regarding the British as first occupiers (in the international law sense) carries the implication that the British acquired an original title obtained by occupation of these 'sovereign-less' territories, wholly dismissive of the then-existing Indigenous societies. Dr Lindley wrote in 1926:

We have cited abundant evidence to show that advanced Governments do recognise sovereign rights in less advanced

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<sup>652</sup> Dr Lindley's thesis allowed little room for this argument: see Lindley, above n 29, 46.

<sup>653</sup> Ibid 45. Lindley proceeds to quote Sir Robert Phillimore's view that any assertion that the International Law 'is confined in its application to European territories' is a detestable one.

peoples with whom they come into contact, and do, in general, deal with such peoples on a treaty basis when acquiring their territory. In face of that evidence, and of such a pronouncement as that of the Judicial Committee of the Privy Council in the matter of the Southern Rhodesian lands, to which we have referred, any rule of International Law which regarded the territory of independent backward peoples as being under no sovereignty and belonging to nobody would not only not be based upon 'evidence of usage to be obtained from the action of nations' but be in direct conflict therewith.<sup>654</sup>

If, however, these small societies were taken to be possessed of some form of 'sovereignty' cognisable to the international law, what happened to these 'sovereignties' upon the assertions of European sovereignty? Were their 'sovereignties' extinguished, or subsumed in some manner? If such 'sovereignties' were extinguished, was it wholly so or only partially? And even if these societies were regarded by the international law of the time as 'sovereign-free', they were nonetheless stable, autonomous, organised societies of great antiquity and with a definable territory, measured not in leagues but in utter and timeless familiarity. What, then, was the effect of British sovereignty on their inherent autonomy?

Are these questions presently important? If this issue remains an aspect of the Imperial constitutional law only, is it not enough to re-badge the doctrine of the Occupation of Backward Peoples as the 'Peaceful Settlement' doctrine, as some judicial and academic commentators have attempted, and let these antiquarian issues remain uninterred. All of the judges in *Mabo (No 2)* asserted that the Acts of State whereby the New Holland colonies were annexed to the British Crown, by whatever means, are beyond challenge in the municipal courts. What reason, therefore, compels us to disinter these foundations of the Australian colonial constitutional

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<sup>654</sup> Ibid 46.

framework, half sunken in the sands like 'two trunks in the desert',<sup>655</sup> and mostly forgotten.

The difficulty with having this indecorous notion at the heart of the Australian state is that it is neither a stable nor honourable state of affairs. It is not stable because of its obvious lack of acceptance in the international law, both inter-temporally and now, and in its deviation from the established jurisprudence of other countries with a similar common law heritage such as the United States and Canada. The Anglo-Australian jurisprudential veil is far from decorous: it is soiled and tawdry. And whatever legal ingenuity has been employed is most unpersuasive. The Australian jurisprudence is in such a straight-jacketed form that it seems it cannot escape its own maze of fictions. If law *is* the justifying discourse for the dispossession of Indigenous peoples of Australia, as has been claimed,<sup>656</sup> it is an extremely fragile discourse.

That the original terms upon which the British Crown acquired sovereignty over New Holland and over its Indigenous societies is more a matter of theatrical assertion and bare contention rather than of knowledge is clearly an unsatisfactory state. And the contemporary doctrinal dissonance remains: if the enlarged notion of *terra nullius* was so roundly condemned and (purportedly) rejected from the common law of Australia as being aberrant and abhorrent, and has likewise been scarified from the international law, how does it – and why should it – command any legitimacy in the Imperial constitutional law and should such fictions remain as the juridical cornerstone of the modern Australian nation state? Perhaps most importantly, if the mode of acquisition has consequences in the present for the Australian jurisprudence, then it is of a continuing

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<sup>655</sup> Shelley's *Ozymandius*.

<sup>656</sup> Russell, above n 51, 31.



relevance. It is to be recalled that whilst the Act of State doctrine disallows any challenge to the validity of the assertion of sovereignty,<sup>657</sup> the consequences of the acquisition of sovereignty in the municipal law are open to interrogation before, and consideration by, these same municipal courts.<sup>658</sup> Thus, even if the validity of the acquisition of territorial sovereignty remains unchallengeable, the *mode* of acquisition is clearly open to contestation.

### **Other relevant modes of acquisition?**

Realising the doctrinal paradox exposed in *Mabo (No 2)*, some commentators argued that, rather than positing New Holland as an occupied territory under the egregious enlarged notion of *terra nullius*, it would be better regarded as territories which had been acquired under another mode of acquisition, the most plausible being Conquest.<sup>659</sup>

### **Conquest**

Under the extant international law of the late 18<sup>th</sup> and early 19<sup>th</sup> century, Conquest was a legitimate mode of acquiring territory and would provide not only an unassailable title, extinguishing any prior 'sovereignties', it would provide greater certainty as to the consequences of this acquisition.<sup>660</sup> Thus, on this argument, although no war was formally declared on the Indigenous peoples of New Holland by Great Britain, this was, in effect, how the Indigenous peoples were dispossessed of their lands and radical title/sovereignty acquired.

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<sup>657</sup> This thesis abides that doctrine and no challenge is made to the validity of sovereignty; rather, that it should rest on a sounder basis.

<sup>658</sup> *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 32.

<sup>659</sup> See, for example, Simpson, above n 15; and Bayne above n 15, 115.

<sup>660</sup> See Sharon Korman, *The Right of Conquest: the Acquisition Of Territory By Force In International Law And Practice* (Clarendon Press, 1996) and Lindley, above n 29, 47.

In colonial times, the prospect of Conquest was raised and became the subject of debate, perhaps the most celebrated exponent being immigrant barrister, Edward Wilson Landor. In his 1847 book, *The Bushman*, he wrote:

We claim the sovereignty, yet we disclaim having obtained it by conquest; we acknowledge that it was not by treaty; we should be very sorry to allow that it was by fraud; and how, in the name of wonder, then, can we defend our claim? Secretaries of State have discovered the means, and tell us that Her Majesty's claim to possession and sovereignty is "based on a right of occupancy."  
[...]

The most convenient and the most sensible proceeding, on the part of our rulers at home, would be to consider this country in the light of a recent conquest.<sup>661</sup>

Landor had earlier thundered against 'successive Secretaries of State'

who write to their governors in a tone like that of which men of sour tempers address their maladroit domestics, have repeatedly commanded that it must never be forgotten "that our possession of this territory *is based on a right of occupancy*".

A "right of occupancy!" Amiable sophistry! Why not say boldly at once, the right of power? We have seized the country, and shot down the inhabitants, until the survivors have found it expedient to submit to our rule.<sup>662</sup>

But it was already too late to correct the historical record. Had Landor's counsel been accepted, a set of difficult issues would have been presented to the British yet they were not insurmountable. What transpired, however, was that the sophistry continued and, indeed, in contemporary Australia, the debate concerning Conquest has been played out, not in the jurisprudence, but in the field of history. The so-called 'History Wars', at its core, is a contest between the 'peacefully settled' scenario favoured by the 'successive Secretaries of State' *versus* the 'right of power' scenario favoured by Landor.<sup>663</sup>

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<sup>661</sup> EW Landor, *The Bushman, or Life in a New Country* (Richard Bentley, first published 1847, Johnson Reprint Corp [1970] ed), 192-93.

<sup>662</sup> Ibid 187.

<sup>663</sup> It has also widely referred to the 'Black Armband/White Blindfold' debate.

It seems plain that Australian historiography now accepts that the 'settlement' of New Holland was a state of war.<sup>664</sup> Notwithstanding its historical attractions, this Conquest proposition has found little acceptance in the colonial or Australian law, pre- or post-*Mabo (No 2)*.

The formal judicial repudiation of this conquest scenario came in 1979.<sup>665</sup> A Wuradjuri plaintiff argued that British sovereignty over New South Wales was based on Conquest, seeking to gain the benefit of the ancient rule of Conquest accepted in *Campbell v Hall*,<sup>666</sup> that the laws and property rights in the conquered territory survived the change of sovereign until altered.

The statement of claim, rather than accepting the orthodox theory of British sovereignty, alleged that 'Australia was acquired by the British Crown by conquest'.<sup>667</sup> Sir Harry Gibbs, then a puisne Justice of the High Court, repudiated this claim in short-shrift, stating:

It is fundamental 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.<sup>668</sup>

Accepting Conquest as the mode of acquisition would see the British, not as the peaceful settlers portrayed in *Cooper v Stuart*, but rather as conquerors 'who seized the country'. The judicial 'story' of the British acquisition of the New Holland territories, prior to the *Mabo (No 2)* decision, was not one that

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<sup>664</sup> Publications continue to detail the war-like conditions of settlement: see Timothy Bottoms, *Conspiracy of Silence* (2013) and Henry Reynolds, *Forgotten War* (NewSouth 2013). One reviewer of Reynolds's most recent work wrote: "It was, surely and simply, war. It was Australia's Great War, the War at Home, an event that has profound consequences for the entire continent, exponentially more so than any of the overseas conflicts that we generally look at to define our national identity": Rohan Wilson, 'The War We Waged on Our Own Soil', *Weekend Australian (Review)* 3–4 August 2013, 22.

<sup>665</sup> *Paul Coe v Commonwealth* (1979) 24 ALR 118.

<sup>666</sup> [1558–1774] All ER Rep. 252.

<sup>667</sup> (1979) 24 ALR 118, 128 (Gibbs J).

<sup>668</sup> *Ibid* 129. This 'Settlement' mode of acquisition, for his Honour, was available 'in a territory which, by European standards, had no civilized inhabitants or settled law'.

entertained or permitted any visions of bloodshed or forced dispossession.<sup>669</sup>

Despite Gibbs J's summary dismissal of Conquest, the issue was not addressed substantively – the claim was dismissed on procedural grounds. Whether there was or was not a Conquest, as defined in the international law, of the New Holland territories by the British is arguable and the historical facts permit some ambiguities at the frontier.<sup>670</sup> Ultimately, however, the fictions supporting the Conquest theory were best laid to rest by Dr John Hookey, when he stated:

The conquest theory requires us to assume that there was a war between Great Britain and the Aborigines even though war was neither declared, intended nor believed to be taking place as far as the British authorities were concerned, and when their use of organised military force against the Aborigines was, at most, sporadic. It requires us to conclude that the unofficial and probably disapproved acts of dispossession by White settlers were somehow acts of war rather than crimes and civil wrongs.<sup>671</sup>

Despite it likewise being rejected in *Coe* and *Mabo (No 2)*, and lacking the historical credence noted by Hookey,<sup>672</sup> regarding New Holland as a conquered territory still has its proponents because of the utter clarity it

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<sup>669</sup> In what remains the least-accepted aspect of the *Mabo (No 2)* decision, the joint judgment of Deane and Gaudron JJ spoke of 'the conflagration of oppression and conflict which was, over the following century, to spread across the continent to dispossess, degrade and devastate the Aboriginal peoples and leave a national legacy of unutterable shame' (175 CLR 1, 104): see Jason L Pierce, *Inside the Mason Court Revolution: The High Court of Australia Transformed* (Carolina Academic Press, 2006), 68-9.

<sup>670</sup> See, for example, Gordon Reid, *A Nest of Hornets* (Oxford University Press, 1982) where the author, a historian, states: "The evidence shows that the Native Mounted Police Force, rather than being a means of maintaining law and order on an unruly frontier, was in effect an instrument of official and unofficial land settlement policy. Collectively, the policy was simple: occupy the land and if the Aborigines resist, force them off the land; if they refuse to leave shoot them" (at xii). See also Raymond Evans, *A History of Queensland* (Cambridge University Press, 2007)

<sup>671</sup> Hookey, 'Settlement and Sovereignty', above n 321, 16-17.

<sup>672</sup> It is noted that martial law was declared against the Wiradjuri People for the latter months of 1824, and that Queensland's Native Mounted Police had formal *Rules* which permitted the use of 'appropriate force': see Jonathan Richards, *The Secret War: A True History of Queensland's Native Police* (University of Queensland Press, 2008).

would provide the question of the ultimate title and to many of the unresolved consequential issues.

### **Anyone for Cession?**

In the absence of historical evidence, very few commentators propose that the Indigenous territories of New Holland were acquired by Cession, that is, by way of treaty with the Indigenous societies, despite it being the favoured method of British colonisers for establishing relations between indigenous peoples in British North America and New Zealand.<sup>673</sup>

Historically, the cession option was formally and expressly curtailed in Australia. John Batman's purported private 'treaties' in the Port Phillip district were overruled by gubernatorial proclamation.<sup>674</sup> An argument has been made that the Tasmanian situation, whereby indigenous peoples were voluntarily relocated to islands in the north on an understanding of protection was a 'treaty-like arrangement'.<sup>675</sup> Likewise, other such arrangements in the British Australian colonies might be argued to be unwritten accords, yet unconvincingly so. Cession has no judicial or other endorsement in the Australian jurisprudence.

The concept of a treaty is often presented as the contemporary means whereby the unresolved foundational issues might be addressed.<sup>676</sup> It briefly entered the spotlight when the Hawke Government agreed in 1988 that 'it is committed to work for a negotiated Treaty with Aboriginal people' and that these negotiations 'will lead to an agreed Treaty in the life

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<sup>673</sup> Russell notes that from the time of the Treaty of Paris in 1763 until the commencement of the Revolution in 1774, 30 treaties were signed with Amer-Indian peoples: see Russell, above n 51, 43-4.

<sup>674</sup> Bayne, above n 15, 118.

<sup>675</sup> Russell, above n 51, 80-1.

<sup>676</sup> See, for example, Marcia Langton *et al*, *Honour Among Nations? Treaties Agreements with Indigenous People* (Melbourne University Press, 2004); and Anthony, above n 129, 150.

of this Parliament'.<sup>677</sup> However, the government resiled from this undertaking, but advocates of this position can still be heard.<sup>678</sup>

### Perhaps Prescription

Likewise, there is little credence for asserting a prescriptive title to New Holland. This is the adverse possession of the international law, where a sovereign controls territory without challenge, so that a legitimate title is catalysed over time to the point where it is perfected. However, it does appear to be used as a backstop argument on occasion,<sup>679</sup> notably by the Senate Standing Committee on Constitutional and Legal Affairs which canvassed the issue of the basis of Australian sovereignty in 1983.<sup>680</sup> It stated:

The conclusion to be drawn from the application of this rule to the Commonwealth's position, is that *if there were any defect in Australia's title*, the rule of prescription would apply to overturn the defect and to vest sovereign title in the Commonwealth Government.<sup>681</sup>

However, this conclusion is dubious by the Standing Committee's own rendition. 'A prescriptive title to sovereignty', the Committee stated:

arises in circumstances where no clear title to sovereignty can be shown by way of occupation, conquest or cession, but the territory in question has remained under the continuous and *undisputed* sovereignty of the claimant for so long that the

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<sup>677</sup> *Barunga Statement*, 12 June 1988.

<sup>678</sup> The most vocal advocate of this position presently is *Australians for Native Title and Recognition* (ANTaR): see 'Submission to the Expert Panel on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples' (*Australians for Native Title and Reconciliation*, September 2011), 25.

<sup>679</sup> In Brennan J's discussion in *Mabo (No 2)* of the British sovereignty over the Murray Islands, His Honour notes that not any of the three 'justifications', even if accepted, 'would have sufficed to permit the acquisition of the Murray Islands as though the Islands were terra nullius'. He then likewise posits that 'it is not for this Court to canvass the validity of the Crown's acquisition of sovereignty over the Islands which, in any event, was consolidated by uninterrupted control of the Islands by Queensland authorities': (1992) 175 CLR 1, 33.

<sup>680</sup> Australian Parliament, 'Two Hundred Years Later ...', above n 53.

<sup>681</sup> *Ibid* 46. Emphasis added.

position has become part of the established international order of nations.<sup>682</sup>

Yet the Standing Committee had earlier stated, under the heading, 'The disputed question of sovereignty in Australia':

Some would say that sovereignty inhered in the Aboriginal people inhabiting Australia at the time of settlement by Europeans and that this sovereignty still subsists even though not recognised by the occupying power or its legal system. Certainly the question of sovereignty was one frequently raised by Aboriginal witnesses who appeared before us.<sup>683</sup>

Aboriginal attitudes to, and assertions of, sovereignty are still evolving. [...] ... the general claim to sovereignty by right of history is asserted by representatives of the Aboriginal people.<sup>684</sup>

Indeed, the Report footnotes and quotes from the transcript of direct evidence before the Standing Committee of the continued disputation of sovereignty.<sup>685</sup> While it is true that no other nation state legally challenged the territorial sovereignty of the British to New Holland, it is clear it is not 'undisputed' as that sovereignty is challenged by its Indigenous peoples and was challenged before the Standing Committee itself. The 1988 Barunga Statement called for recognition of 'prior ownership, continued occupation and sovereignty'<sup>686</sup> and the calls for 'sovereignty' from the Torres Strait Islanders are persistent.<sup>687</sup> While Australia's *external* sovereignty may be secure on a prescriptive title and unchallengeable from

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<sup>682</sup> Ibid 45-6, emphasis added.

<sup>683</sup> Ibid 37.

<sup>684</sup> Ibid 37-8.

<sup>685</sup> Ibid 38. The quote, at 61, is:

Since 1788 our nation has been invaded by ever-increasing numbers of Europeans who, with superior weapons, have attempted to deport our people and destroy our law and culture and seize without compensation, our land. We have never conceded defeat ... The Aboriginal people have never surrendered to the European invasion and assert that sovereignty over all of Australia lies with them. The Settler state has never recognised the prior ownership of this land belonging to that of the Aboriginal nation. We demand that the colonial settlers who have seized the land recognise this sovereignty and on that basis negotiate their right to be there.

<sup>686</sup> *Barunga Statement*, 12 June 1988. The full text is set out at Appendix V.

<sup>687</sup> See Sharp, above n 56, for a chronicle of these calls.

other nation states, the issue of its *internal* sovereignty is still very much contested and under critical interrogation.

In this chapter we have seen the Australian jurisprudence grappling uneasily and less than convincingly with ancient unresolved issues. In Chapter V, we shall see that in 2002 the High Court of Australia had occasion to further illuminate the questions surrounding the British acquisitions of territorial sovereignty in New Holland and the legal effects on the then-existing Indigenous societies, providing, perhaps, an alternate vision of how the assertions of British sovereignty in New Holland might be constructed.



## CHAPTER V THE INTERSECTION OF NORMATIVE SYSTEMS

As we have seen, the *Mabo (No 2)* decision exposed a jurisprudence which was belatedly called upon to confront a long-ignored foundational issue. In retrospect, few should have been surprised by the result because allodial Indigenous property rights had been generally endorsed in the Imperial constitutional law from the earliest exposure to the New World and accepted in every other major common law jurisdiction. Australia was the exception to this general acceptance, and it would have been surprising indeed if the High Court had not upheld these allodial rights. The reasoning, as has been noted, was 'strikingly conservative'<sup>688</sup> and 'not a revolutionary doctrine'.<sup>689</sup>

### **Post-Mabo (No 2)**

However, the *Mabo (No 2)* decision generated an enormous volume of commentary,<sup>690</sup> much of it critical, and some vociferously so.<sup>691</sup> It was the

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<sup>688</sup> RG Atkinson, 'Commentary on 'Sir Gerald Brennan – the Principled Judge' in Michael White and Aladin Rahemtula (eds), *Queensland Judges on the High Court* (Supreme Court of Queensland Library, 2003) 123, 131.

<sup>689</sup> Robert French, 'The Role of the High Court in the Recognition of Native Title' (2002) 30 (2) *University of Western Australia Law Review* 129, 130.

<sup>690</sup> Justice Callinan has noted the 'forests of paper' consumed in commentary on the decision: above n 13, 211.

<sup>691</sup> For a tendentious analysis of the *Mabo (No 2)* decision, see Peter Connolly, 'The Theory of Universal and Absolute Crown Ownership' (Paper presented at the *Mabo – A Critical Review*, TC Bierne School of Law Annual Symposium, Brisbane, 1992), 53-66, copy held by author. This paper was omitted from the published proceedings in Stephenson and Ratnapala (eds), *Mabo: a Judicial Revolution*, but subsequently it appeared as PD Connolly, 'The Theory of Universal and Absolute Crown Ownership' (1994) 18 (1) *University of Queensland Law Journal* 9. Connolly wrote (at 11) of the 'set of vague, undefined and indefinable "usufructs", a notion he maintained 'belongs to the world on the other side of the looking glass.' The controversy is maintained still, with Christopher Pearson, a columnist for *The Australian*, writing in January 2006 that *terra nullius* – or land belonging to no one – was 'a piece of stage machinery' introduced by the historian, Henry Reynolds, 'to help sway ignorant judges' minds about 200 years of settled land law'. By way of response to Pearson, in an article the next month, retired Chief Justice Sir Anthony Mason, who concurred in the judgment of Brennan J, replied: 'I'd be astonished if the members of the court were influenced by Henry Reynolds. I must say, as far as Henry Reynolds is concerned, I've never read his books. I think we were referred to some passages in his

belated recognition of this native title that won the plaudits from proponents and occasioned the brickbats from opponents. What became quickly apparent in the wake of this watershed decision is that it was not going to be simple to incorporate this 'native title' into the dominant Anglo-Australian legal framework after a 200-year hiatus. Despite the methodological declaration in the *Mabo (No 2)* decision that the Imperial constitutional law transported to colonial New Holland in the late 18<sup>th</sup> century *always* had recognised these Indigenous rights and interests, two centuries of implied denial at general law, and neglect in policy and practice, rendered the enforcement of the judgment a difficult national assignment. The Australian Government, with a determination equal to the enormous resistance to the judgment,<sup>692</sup> negotiated the legislative response through both Houses of Parliament in late 1993. On the day the *Native Title Act 1993* passed into law,<sup>693</sup> then Prime Minister Keating told a packed news conference, 'a 200-year-old problem had been put behind us'.

The Prime Minister was plainly wrong. The recognition of native title remains an insoluble part of the national landscape with one commentator stating, a full decade after the decision, that native title was 'breathhtakingly complex' and 'a deeply troubled work in progress'.<sup>694</sup> Two decades on, over 150 determinations of native title have been made in the Federal courts, but another 500 native title claims remain to be resolved. In reality, an ancient

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books in the course of argument in the materials, and I remember reading two or three pages, but I wasn't very impressed by Henry Reynolds.' See Hope, above n 123. Even more recently, a historian has claimed that *terra nullius* was 'invented' by Reynolds: see Michael Connor, *The Invention of Terra Nullius* (Macleay Press, 2008). This is answered by Fitzmaurice, above n 93.

<sup>692</sup> One judicial officer stated that 'there were many powerful interests including those in government who were discomfited and challenged by the decision': see Atkinson, above n 684, 131.

<sup>693</sup> *Native Title Act 1993* (Cth). It came into effect on 1 January 1994.

<sup>694</sup> Stuart Rintoul, 'Dreaming No More', *The Weekend Australian*, 1–2 June 2002, 24.

issue has only begun to be addressed and other long-dormant issues now lay exposed to re-examination.

### **The Broader Implications**

Indeed, the clamour concerning this belated recognition of an allodial 'native title' and its impact on the real property systems obscured the constitutional aspects of *Mabo (No 2)* to all but a few commentators.<sup>695</sup> And among those few, it was Professor Garth Nettheim who gave voice to the true 'revolution' that was the *Mabo (No 2)* decision, being not the property law aspects which were spectacular in their result but unsurprising when the Imperial constitutional jurisprudence was unpacked, but rather the broader implications of the decision.<sup>696</sup> For what the *Mabo (No 2)* High Court did, Professor Nettheim noted, 'presented the Common Law of Australia as leaving space for the co-existence of laws of indigenous peoples'.<sup>697</sup> The Australian jurisprudence had formally and irrevocably acknowledged other 'law' in the jural landscape, both pre-existing the British assertions of sovereignty and, indeed, surviving those assertions. *This* was the true revolution of the *Mabo (No 2)* decision.

### **The Native Title Act 1993**

Importantly, when the decision was translated into legislative form, the statutory definition of 'native title' embedded in s 223(1) of the *Native Title*

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<sup>695</sup> Russell noted that the *Mabo (No 2)* decision, being on common law native title, did not seem to have, on its face, any constitutional significance: Russell above n 51, 5.

<sup>696</sup> Garth Nettheim, 'Mabo and Legal Pluralism: the Australian Aboriginal justice experience' in KM Hazlehurst (ed), *Legal Pluralism and the Colonial Legacy: Indigenous Experiences of Justice in Canada, Australia and New Zealand* (Avebury, 1995) 103. Mention was also made by Noel Pearson, 'Aboriginal Law and Colonial Law Since Mabo' in Christine (ed) Fletcher (ed), *Aboriginal Self-Determination in Australia* (Aboriginal Studies Press, 1994) 155.

<sup>697</sup> *Ibid* 107. It was Bruce Kercher who raised the sovereignty issues, writing that the 'sovereignty implications of the judgment are still to be worked out; how far do the co-existing sovereignties of the Crown and the indigenous people of Australia go?': see Kercher, above n 274, 200.

*Act 1993* (Cth) captured the concept that the rights and interests which were to be recognised and protected under the legislation were sourced in and generated by the laws and customs of the respective Indigenous peoples. It is defined as:

**Key concepts: Native title and acts of various kinds etc. Native title**

*Common law rights and interests*

223 (1) The expression *native title* or *native title rights and interests* means the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where:

- (a) the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and
- (b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and
- (c) the rights and interests are recognised by the common law of Australia.

**The *Yorta Yorta* Decision**

In the 20 years since the watershed decision, there has been a welter of judicial decisions interpreting the complexities of the provisions of the *Native Title Act* but no claims have been litigated at common law. Any sustained discussion of the principles underpinning the acquisition of territorial sovereignty of the British New Holland territories had therefore not progressed, and the discourse was falling mute. Then, in a series of seemingly unconnected decisions concerning the common law underpinnings of the *Native Title Act* and the concept of native title, culminating in *Members of the Yorta Yorta Aboriginal Community v Victoria and Others*,<sup>698</sup> the High Court of Australia had occasion to illuminate the questions surrounding the British acquisitions of territorial sovereignty in

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<sup>698</sup> (2003) 214 CLR 422.

New Holland and its legal impact on the then-existing Indigenous societies.<sup>699</sup>

In this *Yorta Yorta* decision, Chief Justice Gleeson and Justices Gummow and Hayne gave a joint majority judgment.<sup>700</sup> This joint majority opinion stated that to understand what the *Native Title Act* seeks to achieve, and what is defined therein as 'native title', it is important to first comprehend what their Honours describe as 'some fundamental principles'.<sup>701</sup> The fundamental principles concern what is described as 'the intersection of normative systems' and provide a significant illumination of obscure and shadowy foundational territory. It is to the *Yorta Yorta* decision that we turn in this Chapter. The doctrine of the intersection of normative systems is set out and analysed, and the implications of this unheralded doctrine are examined. To understand the utility of the doctrine, the works of Hans Kelsen, Austin, Hart and other jurists, where relevant, will be considered, and most particularly the implications of the concept of native title recognised in *Mabo (No 2)* and the discussion in the *Yorta Yorta* decision to the integrity of the theoretical Kelsenite *grundnorm*.

We examine the ramifications of this alternative vision of the intersection of norms in early New Holland, and present, in the following Chapter, a coherent and defensible theoretical construct of sovereignty. This construct is based on our present knowledge and appreciation of the fundamental facts and which fuses together the historical and legal underpinnings.

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<sup>699</sup> Part of Chapter V has previously been published in the Murdoch University Electronic Journal of Law, as 'A Greater Sense of Tradition: The Implications of the Normative System Principles in *Yorta Yorta* for Native Title Determination Applications' (2003) 10 (4) *E Law – Murdoch University Electronic Journal of Law* (also at <http://www.murdoch.edu.au/elaw/issues/v10n4/lavery104.html>).

<sup>700</sup> McHugh J and Callinan J wrote separate concurring judgments.

<sup>701</sup> (2003) 214 CLR 422, 441.

## Background to *Yorta Yorta* decision

The facts in *Yorta Yorta* can be briefly stated. The application for a native title determination was lodged in 1994 by the Yorta Yorta People, one of the very first determination applications under the *Native Title Act*. The claim was for portions of land and forest, and all the waters, along a broad section of the closely-settled Murray and Goulbourn River valleys in north-central Victoria and southern New South Wales. Mediation was attempted by the National Native Title Tribunal involving some 500 parties, but it proved unmanageable. It was thus the first native title matter to go to trial in the Federal Court of Australia before experienced judge, Howard Olney. After a marathon trial, Olney J found against the Yorta Yorta People, holding that the 'the tide of history' had washed away any real acknowledgment or observance of their traditional laws and customs. Olney J concluded:

It is clear that by 1881 those through whom the claimant group now seeks to establish native title were no longer in possession of their tribal lands and had, by force of the circumstances in which they found themselves, ceased to observe those laws and customs based on tradition which might otherwise have provided a basis for the present native title claim.<sup>702</sup>

The tide of history has indeed washed away any real acknowledgment of their traditional laws and any real observance of their traditional customs. The foundation of the claim to native title in relation to the land previously occupied by those ancestors having disappeared, the native title rights and interests previously enjoyed are not capable of revival. This conclusion effectively resolves the application for a determination of native title.<sup>703</sup>

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<sup>702</sup> Ibid [121].

<sup>703</sup> Ibid [129].

This finding, that time and change had eroded the traditional laws and customs to the point that the foundation of native title has disappeared,<sup>704</sup> was appealed by the Yorta Yorta People.

Before the Full Court of the Federal Court, deep divisions surfaced as to what Olney J intended by applying the 'tide of history' metaphor, which he had adopted from the judgment of Brennan J in *Mabo (No 2)*, to the erosion of the Yorta Yorta laws and customs. Previously, little focus had been given to the Indigenous laws and customs that generated the native title sought to be recognised. The Full Court divided 2:1 in dismissing the appeal, Chief Justice Black in dissent.<sup>705</sup> Leave to appeal was sought from, and granted by, the High Court of Australia.

### **Joint majority opinion of High Court**

By a majority of 5:2, the High Court dismissed the appeal by the Yorta Yorta claimants.<sup>706</sup> The trial finding, that their native title rights and interests could not presently be recognised because their ancestors had ceased to acknowledge their laws and observe their customs in the period since the assertion of sovereignty in 1788 by the British Crown, was upheld. Essentially, the High Court determined that the jural foundations of the native title rights and interests which are capable of recognition under the *Native Title Act* had been irrevocably eroded.

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<sup>704</sup> *Yorta Yorta Aboriginal Community v Victoria* [1998] FCA 1606 (FCA, Olney J, 18 December 1998). For a critique of the trial decision, see Roderic Pitty, 'A Poverty of Evidence: Abusing Law and History in *Yorta Yorta v Victoria* (1998)' (2000) 6 *Australian Journal of Legal History* 4141.

<sup>705</sup> (2001) 110 FCR 244. For a discussion of the decision at this appellate level, see S Young, 'The Trouble with Tradition: Native Title and the *Yorta Yorta* Decision' (2001) 30 *University of Western Australia Law Review* 28.

<sup>706</sup> For the majority, Gleeson CJ, Gummow and Hayne JJ gave a joint opinion, and McHugh J and Callinan J wrote separate judgments dismissing the appeal. McHugh J, in a short opinion, concurred in the joint majority judgment. Gaudron and Kirby JJ dissented.

The decision examined Olney J's trial findings, concluding that his express rejection of the assertion that the Yorta Yorta had continuously acknowledged and observed 'traditional' laws and customs since a time prior to 1788 was, more fundamentally, a finding that:

the society which had once observed traditional laws and customs had ceased to do so, and by so ceasing to do, no longer constituted the society out of which the traditional laws and customs sprang.<sup>707</sup>

For the Yorta Yorta, the Court decided, this meant that the jural foundation of any native title that might possibly be recognised by Australian law had been fundamentally and irrevocably eroded. Accordingly, no native title, as it is defined in 223(1) of the *Native Title Act*, could presently exist in the Yorta Yorta society for such rights to be recognised.<sup>708</sup>

The joint majority opinion in the High Court, that of Chief Justice Gleeson and Justices Gummow and Hayne, concurred in by McHugh and Callinan JJ, is undoubtedly the leading expression of the relevant law. It begins by re-emphasising that because this was an application for determination of native title made pursuant to the *Native Title Act 1993*, it is necessary to begin and conclude with a consideration of the provisions of the legislation itself.<sup>709</sup> However, their Honours said, to understand what the Native Title Act seeks to achieve and what is defined in s 223(1) as 'native title', it is important to comprehend 'some fundamental principles'.<sup>710</sup>

### **The 'fundamental principles'**

The leading judgment then, of especial interest, enunciates a body of principle that surrounds the acquisition of sovereignty by the British and

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<sup>707</sup> Ibid 458.

<sup>708</sup> Ibid 458-9.

<sup>709</sup> (2003) 214 CLR 422, 440. This had been emphasised by the High Court in other recent cases that the judgment itself footnotes.

<sup>710</sup> Ibid 441.



colonial Crowns across the now Australian territories. Assuming always that an acquisition of sovereignty is unquestionable in the municipal courts, these fundamental principles commence theoretically with the (now) well-established proposition that certain Indigenous interests survived that British Crown's assertions of sovereignty in 1788 and beyond. What survived for the Indigenous societies, according to *Mabo (No 2)*, were allodial interests in relation to land or waters. These rights and interests owed their origin to the traditional laws acknowledged and the traditional customs observed by the relevant Indigenous peoples concerned, that is, the joint majority opinion stated, to 'a normative system' other than that of the new sovereign power.<sup>711</sup>

### **Autochthonous normative systems**

With the introduction of the normative system concept, it is then developed.

When it is recognised that the subject matter of the inquiry is rights and interests (in fact rights and interests in relation to land or waters) it is clear that the laws or customs in which those rights or interests find their origins must be laws or customs having a normative content and deriving, therefore, from a body of norms or normative system – the body of norms or normative system that existed before sovereignty. Thus, to continue the metaphor of intersection, the relevant intersection, concerning as it does rights and interests in land, is an intersection of two sets of norms.<sup>712</sup>

The joint opinion then explains how the fundamental premise from which the *Mabo (No 2)* decision and the *Native Title Act* severally proceed are married:

[T]he fundamental premise from which the decision in *Mabo [No 2]* proceeded is that the laws and customs of the indigenous peoples of this country constituted bodies of normative rules which could give rise to, and had in fact given rise to, rights and

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<sup>711</sup> Ibid.

<sup>712</sup> Ibid.

interests in relation to land or waters. And of more immediate significance, the fundamental premise from which the *Native Title Act* proceeds is that the rights and interests with which it deals (and to which it refers as 'native title') can be possessed under traditional laws and customs.<sup>713</sup>

### **The jurisprudential backdrop**

Their Honours then state that what is important is 'to recognise that the rights and interests concerned originate in a normative system, and to recognise some consequences that follow from the [British] Crown's assertion of sovereignty',<sup>714</sup> not any jurisprudential backdrop. However, then followed an elaborate enunciation of principle which was not necessary for the decision but, their Honours said, must be taken into consideration in the understanding of the statutory definition of native title.<sup>715</sup> These principles will be detailed in the following discussion.

### **At this 'Intersection'**

The core concept is that of the intersection of normative systems, the common law intersecting with manifold autochthonous normative systems.<sup>716</sup> Some allodial interests in relation to land or waters sourced in Indigenous laws and customs survived the intersection and are recognised by the Australian common law.<sup>717</sup> These allodial rights are collectively

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<sup>713</sup> Ibid 442.

<sup>714</sup> Ibid 443.

<sup>715</sup> Ibid. Curiously the Court denied the existence of any post-*Native Title Act* 'common law' native title ((2003) 214 CLR 422, 453); see the joint judgment of Gleeson CJ and Gummow and Hayne JJ. Mc Hugh J pointedly disagreed with this interpretation, at 467-8, albeit in concurring with Gleeson CJ and Gummow and Hayne JJ. This denial has been lambasted by commentators, notably Noel Pearson, 'The High Court's Abandonment of the Time-Honoured Methodology of the Common Law' in its Interpretation of Native Title in *Miriuwung Gajerrong and Yorta Yorta*' (Paper presented at the Sir Ninian Stephen Annual Lecture, University of Newcastle Law School, 17 March 2003).

<sup>716</sup> Their Honours speak of 'two sets of norms', meaning, it is submitted, the English set of norms arriving in New Holland and intersecting with each set of allodial Indigenous laws and customs.

<sup>717</sup> Their Honours were careful to state that only 'certain' rights survived the assertion of sovereignty. However, other laws and customs necessarily survived the intersection, too,

styled 'native title'. In explaining this, their Honours stated: 'As six members of this Court said in *Fejo v Northern Territory*,

native title has its origin in the traditional laws acknowledged and the customs observed by the indigenous people who possess the native title. Native title is neither an institution of the common law nor a form of common law tenure but it is recognised by the common law. *There is, therefore, an intersection of traditional laws and customs with the common law.*<sup>718</sup>

These traditional laws and customs owe their existence to an Indigenous normative system. What the Court did in *Mabo (No 2)*, their Honours explained, was to acknowledge and protect this recognition in the Australian common law. In the subsequent legislative response, however, this 'native title' was defined in the *Native Title Act 1993* and protected thereunder. Thus, their Honours stressed, the definition in s 223(1) *Native Title Act* was centrally important. Their Honours asked what meaning was to be attributed to 'traditional' in sub-paragraph (a), that is, 'the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples'?

As the claimants submitted, "traditional" is a word apt to refer to a means of transmission of law or custom. A traditional law or custom is one which has been passed from generation to generation of a society, usually by word of mouth and common practice. But in the context of the *Native Title Act* "traditional" carries with it two other elements in its meaning. First, it conveys an understanding of the age of the traditions: the origins of the content of the law or custom concerned are to be found in the normative rules of the Aboriginal and Torres Strait Islander societies that existed before the assertion of sovereignty by the British Crown. It is only those normative rules that are 'traditional' laws and customs.

Secondly, and no less importantly, the reference to rights or interests in land or waters being *possessed* under traditional laws

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and to assert that they are not presently 'recognised' is an obvious pretence and counterfactual. This is argued in Chapter V.

<sup>718</sup> (2003) 214 CLR 422, 439 citing (1998) 195 CLR 96, 128, Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ. Italics are in the original. Internal footnotes for the preceding two sentences respectively cite Brennan J in *Mabo (No 2)*.

acknowledged and traditional customs observed by the peoples concerned, requires that the normative system under which the rights and interests are possessed (the traditional laws and customs) is a system that has had a continuous existence and vitality since sovereignty.<sup>719</sup>

The origins of the Indigenous laws and customs in which these rights and interests are sourced, and which are then capable of recognition and protection by the *Native Title Act*, must thus pre-date the assertion of British sovereignty over the relevant Indigenous territory. Otherwise, their Honours said, the term 'traditional' would have no present meaning in the statutory definition. Thus, their Honours grafted onto the adjective 'traditional', as used in s 223(1)(a), a greater meaning than is suggested by the ordinary meaning of that term, one restrictive and more forensically onerous for Indigenous claimants.<sup>720</sup>

Their Honours therefore held that acknowledgment and observance of these traditional laws and customs by the Indigenous society claiming this native title must have continued, substantially uninterrupted, since the time of assertion of British sovereignty for their native title rights and interests to achieve, and to maintain, recognition and protection.<sup>721</sup> For the Yorta Yorta People, that relevant date was 7 February 1788. In explaining this qualification, the leading opinion stated:

In the proposition that acknowledgment and observance must have continued substantially uninterrupted, the qualification "substantially" is not unimportant. It is a qualification that must be made in order to recognise that proof of continuous acknowledgment and observance, over the many years that have elapsed since sovereignty, of traditions that are oral traditions is very difficult. It is a qualification that must be made to recognise

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<sup>719</sup> Ibid 444. Italics are in the original.

<sup>720</sup> Much of the subsequent commentary was critical of this increased onus of proof on Indigenous claimants: see, for example, Richard Bartlett, 'An Obsession with Traditional Laws and Customs Creates Difficulty Establishing Native Title Claims in the South: *Yorta Yorta*' (2003) 31 *Western Australia Law Review* 35.

<sup>721</sup> (2003) 214 CLR 422, 455.

that European settlement has had the most profound effects on Aboriginal societies and that it is, therefore, inevitable that the structures and practices of those societies, and their members, will have undergone great change since European settlement.<sup>722</sup>

Therefore, the only Indigenous native title rights or interests that will be recognised after the assertion of the British sovereignty are those that find their origin in pre-sovereignty Indigenous laws and customs.<sup>723</sup> 'To that end', the joint judgment stated

it must be shown that the society, under whose laws and customs the native title rights and interests are said to be possessed, has continued to exist throughout that period as a body united by its acknowledgment and observance of the laws and customs.<sup>724</sup>

This corpus of principle might collectively and conveniently be called the doctrine of intersection of normative systems.

### **The 'fundamental premise' in *Mabo (No 2)***

The leading *Yorta Yorta* judgment itself states that 'the fundamental premise' from which *Mabo (No 2)* proceeded was

that the laws and customs of the indigenous peoples of this country constituted bodies of normative rules which could give rise to, and had in fact given rise to, rights and interests in relation to land or waters.<sup>725</sup>

This premise was fundamental, yet seemingly implicit as no reference to the relevant portion of *Mabo (No 2)* is provided in the judgment. However, it is hardly a controversial proposition that the Indigenous peoples of New Holland had laws and customs that might be styled 'bodies of normative

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<sup>722</sup> Ibid 456.

<sup>723</sup> Ibid.

<sup>724</sup> Ibid 457.

<sup>725</sup> Ibid 442. Despite acknowledging that the law and customs gave rise to rights and interests in land and waters, these normative systems were denied any capacity to give rise to *other* rights and interests; at 433-4. This axiomatic reasoning is addressed below.

rules' on a jurisprudential analysis.<sup>726</sup> After all, even in the 1970s, 'stable' orders of Indigenous societies were discernible to the Anglo-Australian legal system and such societies had been retained and maintained in the epoch subsequent to European assertions of sovereignty.<sup>727</sup>

An important consequence of this is that although the doctrine of the intersection of normative system principles underpins the definition of native title in the *Native Title Act*, these principles are sourced in the Anglo-Australian constitutional common law. As such they would appear to govern not only claims for determinations of native title under the *Native Title Act*, but also assertions for recognition of native title at common law.<sup>728</sup> This assertion finds support in the fact that the authors of the leading judgment themselves speak of 'some fundamental principles' informing the concept of native title<sup>729</sup> and also source their reasoning in 'the fundamental premise'<sup>730</sup> underpinning the leading common law authority of *Mabo (No 2)*.

### **The critical response**

Not unlike the *Mabo (No 2)* decision, the foundational significance of the *Yorta Yorta* doctrine of the intersection of normative systems largely escaped critical attention. There was a flurry of condemnation<sup>731</sup> from native title advocates because the High Court's interpretation of 'traditional' placed a far greater forensic burden on Indigenous claimants of native title

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<sup>726</sup> Toohey J, the first Aboriginal Land Commissioner in the Northern Territory under the *Aboriginal Land Rights (Northern Territory) Act 1976*, in *Mabo (No 2)* took it to be inconceivable that 'indigenous inhabitants in occupation of land did *not* have a system by which land was utilized in a way determined by that society': see (1992) 175 CLR 1, 187-8, emphasis in the original.

<sup>727</sup> *Milirrpum* (1971) 17 FLR 141.

<sup>728</sup> Note that, most curiously, the High Court in *Yorta Yorta* denied any such remaining jurisdiction.

<sup>729</sup> (2003) 214 CLR 422, 441.

<sup>730</sup> *Ibid* 442.

<sup>731</sup> See, for example, Bartlett and others, above n 720.

than previously understood.<sup>732</sup> For a successful prosecution of an application for a determination of native title under the *Native Title Act*, the Court stated claimants must establish on the evidence that their Indigenous society, under which traditional laws and customs the native title rights and interests are claimed, has continued through the post-British sovereignty epoch as a vital society, united in the acknowledgment and observance of their pre-sovereignty laws and customs.<sup>733</sup> The narrow definitional portal to the *Native Title Act* construed in *Yorta Yorta* was thus likely to prove fatal to many applications for determinations of native title.<sup>734</sup> In eastern and southern Australia, it is generally acknowledged, Indigenous societies suffered devastating interruption, and whilst these Indigenous societies are presently vital and increasingly dynamic, to prove that their current laws and customs are 'traditional', in the required sense, is extremely difficult to adduce from a forensic perspective.<sup>735</sup>

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<sup>732</sup> For a tidy overview, see Vance Hughston, 'A Practitioner's Perspective of Native Title' (2009) (Issue 93 ('Native Title')) *ALRC Reform*

<<http://www.austlii.edu.au/au/other/alrc/publications/reform/reform93/9.html>>; *ibid.*

<sup>733</sup> (2003) 214 CLR 422, 457. This issue, the Court stressed, is a question of fact.

<sup>734</sup> See, for example, Richard H Bartlett, *Native Title in Australia* (LexisNexis Butterworths, 2nd ed, 2004), 81-2. For a contrary view, see J Waters, 'Members of the Yorta Yorta Aboriginal Community v Victoria' (2003) 6 (1) *Native Title News* 6. It has been suggested by another commentator that the *Native Title Act* be amended to re-define the term 'traditional' and so override the restrictive *Yorta Yorta* interpretation: see Pearson, above n 715.

<sup>735</sup> Even judges have difficulty asking the right questions: see *Bodney v Bennell* [2008] FCAFC 63 (23 April 2008) where the Full Federal Court held that the trial judge failed to consider, as required by s 223(1) *Native Title Act*, whether there had been continuous acknowledgment and observance of the traditional laws and customs by the single Noongar society from the assertion of British sovereignty in 1829 until recent times. The Court stated that an 'enquiry into continuity of society, divorced from an inquiry into continuity of the pre-sovereignty normative system, may mask unacceptable change with the consequence that the current rights and interests are no longer those that existed at sovereignty, and thus not traditional': at [74], Finn, Sundberg and Mansfield JJ. See also Daniel Lavery, 'A Greater Sense of Tradition: The Implications of the Normative System Principles in *Yorta Yorta* for Native Title Determination Applications' (2003) 10 (4) *E Law – Murdoch University Electronic Journal of Law*.

## **The Significance of the Doctrine**

At the doctrinal level, however, the intersection of normative system principles present a significant illumination of the original terms upon which the British Crown assumed sovereignty over the many distinct Indigenous peoples of New Holland and their territories. It is plain that the High Court has constructed a major annex to the theory surrounding the assertion of British sovereignty over colonial New Holland, adding flesh to the skeletal doctrine of aboriginal rights in the Anglo-Australian constitutional common law. While *Mabo (No 2)* had acknowledged that the Indigenous peoples of New Holland possessed laws and customs, giving rise to rights and interests in land and waters which were cognisable to the Anglo-Australian common law, and thus a continuing legal plurality in modern Australia, this *Yorta Yorta* doctrine acknowledges that the Indigenous peoples of New Holland were normative societies, in 1788, at other relevant times, and, most importantly, if their native title can be proved up, these entities remain normative societies into the present.

And in consciously stating the phenomena as an intersection of normative systems, the High Court placed an almost unbearable strain on the orthodox theory of sovereignty in Australia – where no such intersection had previously been acknowledged as occurring. As such, it is important to trace and understand the provenance of these principles.

## **The provenance of the doctrine**

As the doctrine of intersection of normative systems was previously unknown to Australian law the question first begging is: from where did the doctrine which views the meeting of Indigenous societies of New Holland with the colonising British as an intersection of normative systems emerge?



### **Statutory sources?**

The *Native Title Act* itself offers no answer. There is nothing in the current or historical provisions or preamble that affords its introduction or adoption. And the very extensive debates that preceded the original passage of the 'old' *Native Title Act* in 1993, and the so-called 'Ten Point Plan' amendments in 1998, which constitute the 'new' *Native Title Act*, do not speak of, or to, an analysis based on any intersection of any normative systems.

### **Arguendo**

An analysis of the transcript shows that no party to the *Yorta Yorta* litigation urged upon the High Court that any such doctrine be adopted in the developed form in which it emerges. And, by Australian standards of oral argument, the emerging principles were very lightly treated in oral submissions before a Court which prides itself on the cut-and-thrust between Bench and Counsel. It commenced in argument with a question from Justice Hayne directed to Mr Young QC appearing for the *Yorta Yorta* claimants:

MR YOUNG: [W]e say there is a further flaw and if you extrapolated this approach to an investigation moving back from the present into what is truly traditional. The flaw is this, that you do not need to investigate by tracing particular laws and customs so as to connect a particular law and custom with a particular law and custom, say scarring or tooth [a]vulsion or something like that, that you can identify back at 1840.

HAYNE J: But do you accept that we are concerned with an intersection between two normative systems?

MR YOUNG: I do, your Honour.

HAYNE J: That is that the traditional law and custom with which we are concerned is not simply a question of habit; it is a question of normative rules for the society under consideration.

- MR YOUNG: No, your Honour. Normative rules, in our submission, would fall into the same sort of Anglo-Saxon process of characterisation.
- HAYNE J: No, Anglo-Saxon law is not the only normative system in this world.
- MR YOUNG: No, my adjective was wrong, your Honour.
- HAYNE J: There are many other normative systems.<sup>736</sup>

### **Precedent?**

In terms of precedent from within the Australian jurisprudence, there appears to be no direct ancestry for the *Yorta Yorta* doctrine. The High Court's own earlier decisions of *Fejo*<sup>737</sup> (1998), *Yanner v Eaton*<sup>738</sup> (1999), *Yarmirr*<sup>739</sup> (2001) and *Ward*<sup>740</sup> (2002) are cited but the authority that is invoked is an amalgam of an implicit premise in the *Mabo (No 2)* decision and the metaphor – quoted earlier – used in *Fejo*. No further case law is referenced. No earlier precedent is quoted or mentioned as sourcing the principles to be then extrapolated.

It is the coupling of the 'intersection' metaphor from *Fejo* with what was termed 'the fundamental premise' from *Mabo (No 2)* that provides the true parentage of the *Yorta Yorta* intersection of norms principles.

In the judgment, the intersection metaphor and the normative system concept are joined,<sup>741</sup> and their Honours describe their discussion as a 'jurisprudential analysis'. In the whole body of this leading judgment's discussion,<sup>742</sup> citation is made primarily to the writings of HLA Hart, John Austin's *The Province of Jurisprudence Determined*, and the classic, mid-20<sup>th</sup>

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<sup>736</sup> Transcript of Proceedings, *Yorta Yorta Aboriginal Community v Victoria* (High Court of Australia, 23 May 2002).

<sup>737</sup> *Fejo v Northern Territory* (1998) 195 CLR 96 ('*Fejo*').

<sup>738</sup> *Yanner v Eaton* (1999) 201 CLR 351.

<sup>739</sup> *Commonwealth v Yarmirr* (2001) 208 CLR 1.

<sup>740</sup> *Western Australia v Ward* (2002–3) 213 CLR 1 (HCA).

<sup>741</sup> *Ibid* 442, quoted above.

<sup>742</sup> *Ibid*. What is referred to by the judges as a 'lengthy introduction' occurs at paragraphs [31]-[57], 439-447.

century texts of Paton and Julius Stone. Their Honours, it seems, are being informed by positivist jurisprudential theory rather than precedent.

### **Bentham and Austin**

John Austin's *The Province of Jurisprudence Determined* was published in 1832 (to acclaimed failure) but owed much to his contemporary Jeremy Bentham's earlier works, particularly *The Introduction to the Principles of Morals and of Legislation*, published in the year after the first assertion of British sovereignty over New Holland. There Bentham wrote:

Written law then is the law of those who can both speak and write: traditionary law, of those who can speak but can not write: customary law, of those who neither know how to write, nor how to speak. Written law is for civilized nations: traditionary law, for barbarians: customary law, for brutes.<sup>743</sup>

In Bentham's nomenclature, the Indigenous peoples of New Holland were barbarians at best, brutes at worst. Informed by the Scottish Enlightenment, Bentham saw human society as evolutionary. Societies evolved from a state of Nature, through the stages of hunter/gatherer, to pastoralist, then on to the agriculturalist and, finally, into enlightened commerce. Each stage was characterised by particular concepts and institutions concerning law, property and government.<sup>744</sup> Yet, for Bentham, at least the Indigenous peoples of New Holland were possessed of 'law'. For Austin, however, different considerations apply. Indigenous rules of conduct which are prescribed in the Dreaming would certainly qualify as commands, but whether these commands constitute 'law' might run aground on Austin's narrow definition of a sovereign. In Austinian theory, therefore, it is doubtful that these Indigenous societies of New Holland

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<sup>743</sup> Bhikhu Parekh (ed), *Bentham's Political Thought* (Croom Helm, 1973), 126-7.

<sup>744</sup> Bain Attwood, 'The past as future: Aborigines, Australia and the (dis)course of History' in Bain Attwood (ed), *In the Age of Mabo: History, Aborigines and Australia* (Allen & Unwin, 1996), ix.

were possessed of 'law'.<sup>745</sup> Hart reworked the positivist tradition in *The Concept of Law*,<sup>746</sup> and according to his renovated theory there are two minimum conditions necessary for a legal system to exist.

On the one hand those rules of behaviour which are valid according to the system's ultimate criteria of validity must be generally obeyed, and, on the other hand, its rules of recognition specifying the criteria of legal validity and its rules of change and adjudication must be effectively accepted as common public standards of official behaviour by its officials.<sup>747</sup>

Essentially, Professor Hart contends that a defining characteristic of a legal system is that it is a body of substantive rules plus a fundamental rule for the identification of these other rules of the system, his so-called 'rule of recognition'.<sup>748</sup> Does, then, the *Law* of the Indigenous societies of Australia meet the two conditions and so in Hart's opinion qualify as a legal system? To this quixotic issue, the *Yorta Yorta* leading judgment answered:

To speak of such rights and interests being possessed under, or rooted in, traditional law and traditional custom might provoke much jurisprudential debate about the difference between what HLA Hart referred to as 'merely convergent habitual behaviour in a social group' and legal rules. The reference to traditional customs might invite debate about the difference between 'moral obligation' and legal rules. A search for parallels between traditional law and traditional customs on the one hand and Austin's conception of a system of laws, as a body of commands or general orders backed by threats which are issued by a sovereign or subordinate in obedience to the sovereign, may or may not be fruitful. Likewise, to search in traditional law and traditional customs for an identified, even an identifiable, rule of recognition which would distinguish between law on the one

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<sup>745</sup> In the Foreword to Gluckman's work, Professor AL Goodhart wrote that, rather than altering the definition, Austinians and neo-Austinians 'preferred to adopt the remarkable view that early law was not law at all': see Max Gluckman, *The Judicial Process of the Barotse of Northern Rhodesia* (The University of Manchester (for the Institute of African Studies at the University of Zambia), 1955), *xiii*.

<sup>746</sup> HLA Hart, *The Concept of Law* (Oxford University Press, 1961).

<sup>747</sup> *Ibid* 113.

<sup>748</sup> (2003) 214 CLR 422, 442.

hand, and moral obligation or mere habitual behaviour on the other, may or may not be productive.<sup>749</sup>

But all this is surely by-the-by, and, as informed and learned as this exposition is, it is of tangential relevance. Their Honours acknowledge this by abruptly concluding the discussion by stating:

What is important for present purposes, however, is not the jurisprudential questions that we have identified. It is important to recognise that the rights and interests concerned originate in a *normative* system, and to recognise some consequences that follow from the Crown's assertion of sovereignty.<sup>750</sup>

Yet, it will be noted, that in backtracking to the concept of a normative system, their Honours return to a jurisprudential theory informed by their own conceptual underpinnings and tradition.

### ***Law is law***

In their discussion, the High Court justices in *Yorta Yorta* made one issue beyond debate. They will brook no argument that the other 'law' in the Australian jural landscape, the allodial *Law* of the Indigenous peoples first recognised in *Mabo (No 2)*, is law, both historically and presently.<sup>751</sup>

Jurisprudential meanderings of what Benthamite stage of enlightened civilisation one may have discovered Indigenous 'law', or whether, under Austinian theory, a cognisable 'sovereign' could be found in these Indigenous societies, will not be entertained. The High Court built a permanent bridge to the pre- and post-sovereignty Indigenous laws and customs, labelling them normative, and removing any positivist argument that their laws and customs are so low on a scale of civilisation as not to be

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<sup>749</sup> Ibid 442-3.

<sup>750</sup> Ibid 443. Emphasis is in the original.

<sup>751</sup> As recently as July 2013, former Prime Minister Kevin Rudd said that the 1963 Yirrkala Bark Petition 'was the beginning of an understanding that another older Law was in place in this Land': see Yirrkala Speech, 9 July 2013, at <http://www.abc.net.au/news/2013-07-10/yirrkala-celebrates-bark-petitions-land-rights/4811660>, accessed 10 July 2013.

cognisable as 'law'. This is certainly consonant with the legal, historical and anthropological record and with *Mabo (No 2)*.

### **Continuing plurality?**

However, while this doctrine of intersection of normative systems is well stated by their Honours, two discordant notes are struck in the analysis.

The first such chord is the assertion by their Honours that

what the assertion of sovereignty by the British Crown necessarily entailed was that there could thereafter be no parallel law-making system in the territory over which was asserted sovereignty. To hold otherwise would be to deny the acquisition of sovereignty and as has been pointed out earlier, that is not permissible.<sup>752</sup>

This denial of any parallel law-making *systems* is seemingly an attempted amendment to the Nine Principles set out by Brennan J in *Mabo (No 2)*, particularly Principle 6, which permits change to the laws and customs.<sup>753</sup>

Their Honours' statement in this regard appears challengeable on both the factual and doctrinal fronts.

### **The Factual Frontline**

From the factual perspective, it is most difficult to suggest that no parallel law-making occurred in the Indigenous societies of New Holland after the British assertions of sovereignty. A quick re-visit to the historical setting of *Milirrpum* evidences this conclusively.

### **Re-visiting *Milirrpum***

The first recorded observations by an Englishman of the Yolngu People of north-eastern Arnhem Land was in 1803 when Matthew Flinders described them as bold and aggressive.

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<sup>752</sup> *Yorta Yorta* (2003) 214 CLR 422, 443-4.

<sup>753</sup> These Nine Principles are set out at Appendix VI.

It does not accord with the usually timid character of the natives of Terra Australis, to suppose the Indians came over from the Isle [of] Woodah for the purpose of making an attack; yet the circumstance of their being without women of children – their following so briskly after Mr. Westall, – and advancing armed to the wooders, all imply that they rather sought than avoided a quarrel.<sup>754</sup>

Quite unbeknown to the Yolngu, the claim was that they had become Crown subjects and were amenable to New South Wales colonial authority 15 years earlier,<sup>755</sup> things that may not have become apparent to them until sometime in the mid-20<sup>th</sup> century. For the intervening 150 years, the Yolngu of north-east Arnhem Land lived a life untouched by Anglo-Australian colonial authority. Their foreign intercourse, which was uncircumscribed by British or other colonial authority, was largely with the trepanning Maccassans.<sup>756</sup> Settlements at Fort Dundas, Fort Wellington and Port Essington in the 1820s to the 1840s failed and had been abandoned.<sup>757</sup> It was not until the arrival of European missionaries in the late 1920s<sup>758</sup> and conflicts with Japanese interests over marine resources began to manifest,<sup>759</sup>

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<sup>754</sup> Quoted in Williams, above n 396, citing Flinders, 1814, Volume II, 198.

<sup>755</sup> McMinn, above n 245, 1-3.

<sup>756</sup> This trade was outlawed in the early-20<sup>th</sup> century: see *Blue Mud Bay* case (2005) 141 FCR 457.

<sup>757</sup> Fort Dundas (1824–29) was on Melville Island, with Fort Wellington (1827–29) and Port Essington (1838–49) on the Cobourg Peninsula.

<sup>758</sup> See *Blue Mud Bay* case (2005) 141 FCR 457, [10].

<sup>759</sup> In 1932, some Japanese trepang fishermen had been killed and police constable Albert McColl and other police were dispatched from Darwin, belatedly, to investigate the killings. In a celebrated collision of worlds, Dhukiarr, a Yolngu man from eastern Arnhem Land, was tricked into returning to Darwin, arrested and put on trial and found guilty of murdering McColl. He was sentenced to hang within 28 days after a most unusual trial in the Supreme Court of the Northern Territory. Appealed to the High Court of Australia, Dhukiarr was described as 'a completely uncivilised aboriginal native belonging to a tribe frequenting Woodah Island'. The Court recited the versions of events:

They landed at Woodah Island with four trackers, and, after travelling on foot about twenty miles, they came to a deserted native camp on the edge of a thick jungle. They found the fires warm. They camped in the vicinity for lunch, posting the trackers round about. One of the trackers came in with information which enabled the party to surround a number of lubras, whom they handcuffed together and brought back to camp. There the police questioned them. Later another report was brought that natives were

that the Australian Government sent officials to north-east Arnhem Land just before World War II.<sup>760</sup> By the 1960s, however, the Yolngu had engaged with the Anglo-Australian legal system to attempt to enforce interests known to their *Rom*, their *Law*. *Rom* has, inferentially, been the source of normative rules from prior to 1788, and subsequently.

And, in the *Milirrpum* litigation,<sup>761</sup> the trial and the judgment of which comprised the first searching look by a court at the juridical foundations of an Indigenous society in Anglo-Australian jurisprudence, the Yolngu failed on every factual and legal ground, bar one. Indicating that he had no lack of evidence, the Court made a finding that has a continuing relevance.

Judge Blackburn stated:

I am very clearly of [the] opinion, upon the evidence, that the social rules and customs of the plaintiffs cannot possibly be dismissed as lying on the other side of an unbridgeable gulf. The evidence shows a subtle and elaborate system highly adapted to the country in which the people led their lives, which provided a stable order of society and was remarkably free from the vagaries of personal whim or influence. If ever a system could be called 'a government of laws, and not of men', it is that shown in the evidence before me.<sup>762</sup>

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landing in a canoe on a point nearby and three of the constables and two trackers set off to intercept them. McColl and two trackers were left at the camp with the lubras, who were first unfettered. On the return of the constables, the two trackers were found at the camp, but neither McColl nor the lubras were there. Next morning McColl's dead body was found about four hundred yards away from the camp with a spear wound in his chest and a blood-stained spear lying a few paces from it.

This appeal was the first case of an Indigenous Australian to be heard in the High Court of Australia; it is reported as *Tuckiar v R* (1934) 52 CLR 335. It was successful, on a number of grounds, with four judges labelling the disclosure by the defence counsel of privileged communications from his client, Dhakiyarr, as 'wholly indefensible'. The High Court ordered his release and that he be returned to his country. However, soon after his release from Fannie Bay Goal, Dhakiyarr completely vanished.

<sup>760</sup> These included the celebrated anthropologist, Donald Thomson: see *Blue Mud Bay* case (2005) 141 FCR 457, [14].

<sup>761</sup> *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141.

<sup>762</sup> *Ibid* 267. Justice Toohey, after retiring from the High Court, called this statement one of 'the most powerful affirmations' of Indigenous law by someone not Aboriginal: see John Toohey, 'Aboriginal Customary Laws Reference – An Overview' (Western Australian Law



The social rules and customs, providing 'a stable order of society', evinced 'a subtle and elaborate system'.

**'And that was that.'**

The defendant Commonwealth of Australia had argued to the Northern Territory Supreme Court that the 'system' demonstrated on the Yolngu evidence did not have the characteristics of a system of law necessary for an Anglo-Australian court to recognise it as such. In essence, the Commonwealth argued that the Yolngu were so low in the scale of social organisation that their conceptions of rights, duties and of law could not be recognised.<sup>763</sup> 'And that', according to the Counsel for the Commonwealth, 'was that.'<sup>764</sup>

Judge Blackburn would have none of it.

In my opinion, the arguments put to me do not justify the refusal to recognise the system proved by the plaintiffs in evidence as a system of law. Great as they are, the differences between that system and our system are, for the purposes in hand, differences

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Reform Commission, 1999), 191. Despite this ringing endorsement of their 'legal system' by Judge Blackburn, perhaps the first peering by an outlier into *Rom*, the Yolngu were bitterly disappointed that the judge, having seen with his own eyes secret and sacred objects (the viewing of these secret *rangga* is referred to at page 167 of the judgment), did not plainly comprehend that the land was theirs. Moreover, the judge found (at 183) to the contrary, stating: 'that the sacred *rangga* are, among other things, charters to land, is a matter of aboriginal faith; they are not evidence, in our sense, of title'.

<sup>763</sup> The reference to 'the other side of an unbridgeable gulf' is to the report of the Board relating to Rhodesia: see *Re Southern Rhodesia* [1919] AC 211 (JCPC), 234 (JCPC) where Lord Sumner (at 233-34) wrote:

The estimation of the rights of aboriginal tribes is always inherently difficult. Some tribes are so low in the scale of social organization that their usages and conceptions of rights and duties are not to be reconciled with the institutions or the legal ideas of civilized society. Such a gulf cannot be bridged. It would be idle to impute to such people some shadow of the rights known to our law and then to transmute it into the substance of transferable rights of property as we know them.

<sup>764</sup> This 'memorable phrase' was utilised by Ellicott QC, lead Counsel for the Commonwealth of Australia, in his final oral submissions to Blackburn J in *Milirrpum*; quoted in Stanner, *White Man Got No Dreaming*, above n 258, 290.

of degree. I hold that I must recognise the system revealed by the evidence as a system of law.<sup>765</sup>

Blackburn J was scrutinising this Indigenous society in the late 1960s and early 1970s and would not accept that the Yolngu did not then possess, on the evidence presented to the court, a body of laws and customs then cognisable to the Northern Territory Supreme Court as 'a system of law'. Blackburn J in *Milirrpum* had a body of evidence to rely upon, and made a finding of fact in 1971 based on that evidence.

If Blackburn J found a vibrant, wholly functioning system of law in the Yolngu in the early 1970s, it is a historical and anthropological pretence to suggest that, upon the assertions of sovereignty by the British Crown in 1788, Yolngu society in Arnhem Land was thereafter incapable of law-making – that it was instantly stunned into impotency. In large measure, Yolngu society remained wholly unaffected by the assertion of British sovereignty in 1788, their *Rom* untouched. It is entirely fanciful to claim that no parallel law-making occurred in Yolngu society from some moment on 7 February 1788. Far from ridding fictions from the legal theory, the judges are asserting yet another.

As for the hundreds of such Indigenous societies that existed in New Holland in 1788, Blackburn J was openly questioning of the notion that these societies had no ordered manner of community life upon the assertion of British sovereignty, saying:

[H]aving heard the evidence in this case, I am, to say the least, suspicious about the truth of the assertions of the early settlers of New South Wales that the aboriginals had no ordered manner of community life.<sup>766</sup>

It is true that because of their remoteness, and the fact that Arnhem Land had been declared an Aboriginal reserve in 1931, the Yolngu had escaped

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<sup>765</sup> *Milirrpum* (1971) 17 FLR 141, 268.

<sup>766</sup> *Milirrpum* (1971) 17 FLR 141, 266.

the brunt of European colonisation of eastern and southern Australia. Yet so, too, had other such Indigenous societies survived the intersection. The historical and anthropological evidence being ignored by the assertion that a change in sovereignty 'suspends' the law-making capacity is thus ever-present and substantial. Indeed, Emeritus Professor Bruce Kercher, Australia's foremost legal-historian, wrote that, despite the attempts of some judges to avoid the point, 'the recognition of native title is automatically a recognition of other legal systems, those of the Aborigines and Torres Strait Islanders'.<sup>767</sup>

### **Other evidence of continuing legal plurality**

And it is not only from *Milirrpum* that the source of cogent evidence that Indigenous legal systems continue to operate in the Australian jural landscape. The Australian Law Reform Commission, referenced in 1977 to inquire into the recognition of Customary Law, tabled a two volume report in 1986,<sup>768</sup> which found widespread adherence to Indigenous laws and customs. In November 2003, the Northern Territory Law Reform Commission released a report confirming again that for much of the Northern Territory, one-sixth of the continental land mass of Australia, customary law is presently an integral and important part of the community life of indigenous Territorians;<sup>769</sup> one half of that land is held or controlled by Indigenous peoples.<sup>770</sup> The most recent report to confirm the

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<sup>767</sup> Kercher, above n 276, 200.

<sup>768</sup> ALRC, *The Recognition of Aboriginal Customary Laws*, above n 70.

<sup>769</sup> NTLRC, *Report on Aboriginal Customary Law*, above n 70, which included a recommendation that customary law be recognised as a source of law.

<sup>770</sup> Another important anthropological study is MJ Meggitt, *Desert People* (Angus & Robertson, 1976), looking at the customary law of the Walbiri. See also Nancy M Williams, *Two Laws: Managing Disputes in a Contemporary Aboriginal Community* (Australian Institute of Aboriginal Studies, 1987), in particular Chapter 7, 'Conflict of Jurisdiction, the Distinction between "Big Trouble" and "Little Trouble"', 127-129, and showing how the Yolngu, evincing a remarkable adaptability, continue to function under a duality of legal systems.

plurality of Indigenous legal systems was in Western Australia in 2006. Over the period 2000–06 the Law Reform Commission undertook a detailed inquiry into the recognition of Aboriginal law and culture in Western Australia. Its terms of reference required it to 'inquire into and report upon Aboriginal customary laws in Western Australia' and to consider whether and, if so, how customary laws might be recognised within the Western Australian legal system. A comprehensive Final Report set out 131 recommendations for reform of the laws, policies and practices of WA government and courts based upon formal recognition of traditional law.

### **The doctrinal perspective**

From the doctrinal perspective, it is submitted that the High Court judgment – in denying any prospect of continuing legal plurality – fell into error in a manner similar to that judicially condemned in *Mabo (No 2)*. Brennan J stated that the change of beneficial ownership in traditional lands was not occasioned when British sovereignty was asserted, but was subsequently extinguished by a paramount power.<sup>771</sup> By adopting the false assumption that the law-making capacity of the Indigenous societies was necessarily vitiated upon the acquisition of sovereignty by the British Crown, the judges are being guided perhaps by the notion of a plenipotent, indivisible sovereignty. They state, as the only reason for their assumption, that 'to hold otherwise would be to deny the acquisition of sovereignty and ... that is not permissible'.<sup>772</sup> If this point was not developed in argument between Bench and Counsel, which we are aware it was not, then maybe a more rigorous position may have been adopted.

Their jurisprudential analyses state that the Indigenous peoples of New Holland were possessed of normative systems which generated laws and

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<sup>771</sup> *Mabo (No 2)* (1992) 175 CLR 1, 58.

<sup>772</sup> *Yorta Yorta* (2003) 214 CLR 422, 443-4. This axiomatic reasoning is addressed below.

customs at the time of the acquisition of sovereignty. This analysis maintains that these autochthonous normative systems must continue to be 'vital' to generate the traditional laws and customs to create and maintain the native title yet it asks that these normative systems can only exist, after the assertion of sovereignty by the British Crown, in some rudimentary, heavily-circumscribed fashion. A normative system, one would logically contend, in order to be a normative system, must necessarily generate 'norms'. If it no longer *generates* norms, it would cease to be normative.<sup>773</sup>

The restriction on continued law-making is curious, and apart from the circular explanation that it would be a denial of sovereignty, no cogent reason or binding authority is thereafter given by their Honours why this law-making capacity in the Indigenous societies is necessarily rendered impotent. Perhaps, it is submitted, they were merely re-asserting that, under the Act of State doctrine, challenge to the various assertions of sovereignty was impermissible. It is axiomatic under the Act of State doctrine (Brennan J's First Principle) that the acquisition of sovereignty cannot be challenged in the domestic courts.<sup>774</sup> Yet there is no cogent reason or any authority why a claim as to the consequences of the acquisition could not be pleaded and entertained by the High Court of

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<sup>773</sup> In *Northern Territory of Australia v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* [2005] FCAFC 135, a Full Federal Court stated: '[t]he form of the determination [...] involves an acceptance that the community of native title holders is a living society. It is not consistent with the purposes of the NT Act, nor productive of any practical benefit to require that the laws and customs of indigenous society and the rights and interests arising under them be presented as some kind of organism in amber whose microanatomy is available for convenient inspection by non-indigenous authorities.' (Wilcox, French and Weinberg JJ, [116])

<sup>774</sup> Professor Lumb, too, broadens this restriction by stating that acts of state 'could not be queried in a court of law': see Lumb, above n 45, 89. Professor Lumb had earlier, confidently but wrongly, predicted that it was 'a distortion of history to assert that such rights [to have an allodial title recognised or compensation granted for loss of such title] exist or may be claimed because of a defect in title of the British Crown': see RD Lumb, 'Is Australia an "Occupied" or "Conquered" Country?' (1984) 11 (December) *Queensland Bar News* 16, 20.

Australia. Was not that the position that the *Mabo (No 2)* High Court itself had taken? The acquisition of sovereignty was not under challenge; rather, it was the consequences at general law which were at issue. As Brennan J stated, citing the leading authority on the Act of State doctrine, the *Sea and Submerged Lands* case,<sup>775</sup> although the question of whether a territory has been acquired by the Crown is not justiciable in municipal courts, '*those courts have jurisdiction to determine the consequences of an acquisition under municipal law*'.

Certainly the prospect of arguing an *external* sovereignty in the Indigenous societies in Australia would be automatically denied to petitioners, but the assertion of an *internal* law-making capacity is plainly open to them and, indeed, under Brennan J's Nine Principles, seemingly a necessary concomitant. However, if their Honours are contending that no parallel internal law-making systems in the territory over which was asserted British sovereignty is to deny the acquisition of sovereignty, then the statement exceeds the objective reality. These quantities, British sovereignty and Indigenous law-making, are not mutually exclusive, and the inevitability of that consequence is by no means foregone, as the North American jurisprudence clearly shows.

### **Parallel law-making systems in North America**

In *Johnson v M'Intosh*,<sup>776</sup> Chief Justice Marshall described a course of events in the British North American colonies not dissimilar to that experienced in the British colonies in New Holland,<sup>777</sup> where European policy, numbers and skill prevailed. The European population advanced, the Indigenous

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<sup>775</sup> *New South Wales v Commonwealth* (1975) 135 CLR 337.

<sup>776</sup> (1823) 8 Wheaton 543.

<sup>777</sup> Compare, for example, the diary entry of the Port Phillip Protector, William Thomas, in 1841: 'The blacks this morning very dissatisfied, and talk much about "no good white men take away country, no good bush, all white men sit down, go go kangaroo", quoted in Reynolds, *Aboriginal Land Rights in Colonial Australia*, above n 192.

necessarily receded. Land, no longer occupied by its ancient inhabitants, was parcelled out at the will of the new sovereign.<sup>778</sup> Of the respective rights of the European settlers and the Indians, Marshall CJ stated:

On the discovery of this immense continent, the great nations of Europe were eager to appropriate to themselves so much of it as they could respectively acquire. [...] But, as they were all in pursuit of nearly the same object, it was necessary, in order to avoid conflicting settlements and consequent war with each other, to establish a principle which all should acknowledge as the law by which the right of acquisition, which they all asserted, should be regulated as between themselves. This principle was that discovery gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments, which title might be consummated by possession.

The exclusion of all other Europeans, necessarily gave to the nation making the discovery the sole right of acquiring the soil from the natives, and establishing settlements upon it. It was a right with which no Europeans could interfere.<sup>779</sup>

The ancient principles of Occupation were substantially applied in respect of newly-discovered *inhabited* territories, yet with necessary adaptation. The allodial title to the soil remained with the indigenous occupiers with the concomitant restriction that the exclusive right of acquiring this latter title lay to that Crown;<sup>780</sup> that is, the European sovereign acquired a right of pre-emption to the allodial title. As to the effect of the European sovereignty on the aboriginal laws and customs and the status of this aboriginal title, the Chief Justice stated:

In the establishment of these relations, the rights of the original inhabitants were, in no instance, entirely disregarded; but were necessarily, to a considerable extent, impaired. They were

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<sup>778</sup> *Johnson and Graham's Lessee v M'Intosh* (1823) 8 Wheaton 543, 590-91.

<sup>779</sup> *Ibid* 595. This will later be contrasted with what Brennan J stated in *Mabo (No 2)* and, perhaps more pithily, in 1995 when he said, 'The land in these colonies was treated as ownerless and thus available for acquisition by the European power which settled the territory': see Sir Gerard Brennan, 'Aboriginal Land Claims – An Australian Perspective' (Paper presented at the International Appellate Judges Conference (Seventh International, 1995), Ottawa, Canada, 27 September 1995), 1.

<sup>780</sup> (1823) 8 Wheaton 543, 592.

admitted to be the rightful occupants of the soil, with the legal as well as just claim to retain possession of it, and to use it according to their own discretion; but their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will to whomsoever they pleased, was denied by the original fundamental principle that discovery gave exclusive title to those who made it.<sup>781</sup>

The title the discovering and settling Crown obtained was the right *inter se* other European powers to territorial sovereignty, that is, the *external* sovereignty. Although fractured from the English common law in 1789, the American legal system still drew upon the common law and other sources. Until the publication of Kent's *Commentaries on the American Law* between 1826 and 1830, the *Commentaries* of Blackstone held much credence. The Marshall-led US Supreme Court was intellectually and historically honest in their approach. The theory extant at the time as stated in Blackstone, and latterly by the learned Chancellor Kent, was inadequate to the task.<sup>782</sup> The nomenclature of the *Commentaries* was inadequate to meet the circumstances; the British settlement of North America, like that of New Holland, was neither a pure Occupation nor a pure Conquest. It was an assertion of sovereignty by a European nation of far superior military and technological strength over a series of territories occupied by Indigenous peoples. In New Holland, there was no declaration of war but there was a well-established history of bloodshed and dispossession of its Indigenous peoples. Doctrine must, in this circumstance, give way to historical fact.<sup>783</sup>

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<sup>781</sup> Ibid 593.

<sup>782</sup> This is acknowledged by Brennan J in *Mabo (No 2)* (1992) 175 CLR 1, 32.

<sup>783</sup> *Contra* B Selway, 'The Use of History and Other Facts in the Reasoning of the High Court of Australia' (2001) 20 (2) *University of Tasmania Law Review* 129, 149-151. Selway argues, unconvincingly, that the pre-Revolutionary 'history' as stated by Chief Justice Marshall was 'simplistic, and probably misleading'. John Marshall, the 'Great Chief Justice', was Virginian-born, a negotiator for the United States for the Treaty of Paris (1783) (which settled the terms of cession with Great Britain after the American Revolutionary War), Secretary of State in the administration of President John Adams, and then US Supreme Court Chief Justice for over 30 years (1803–1833).



And thus a residual but necessarily qualified internal autonomy was upheld as being possessed by the Indians. However, for our purposes, what is most obvious is that if a residuum of indigenous sovereignty survived the assertion of British sovereignty, so too did the laws and customs which manifested that sovereignty, together with an inherent capacity to change those laws and customs. What is axiomatic for the High Court in *Yorta Yorta* in 2002 was not a necessary consequence for the US Supreme Court in 1823. For the latter court, the clearest enunciation of its doctrinal accommodation lay ahead in the cases of *Worcester v Georgia*<sup>784</sup> and *Cherokee Nation v State of Georgia*.<sup>785</sup> Indeed, in obiter in *Worcester*, Marshall CJ stated:

[T]he settled doctrine of the law of nations is, that a weaker power does not surrender its independence – its right to self government, by association with a stronger power, and taking its protection. A weak state, in order to provide for its safety, may place itself under the protection of one more powerful, without stripping itself of the right of government, and ceasing to be a state.<sup>786</sup>

What is curious in the doctrinal extreme is that the conquest of a territory resulted in the legal systems of the inhabitants of that territory being upheld, whereas in the so-called peaceful Occupation of Backward Peoples doctrine, the extant law-making capacities were purportedly 'extinguished' absolutely or in large measure. The *Yorta Yorta* position requires one to accept that the legal and governance *systems* of Indigenous inhabitants of the territory whereupon the English are permitted to 'settle', with the connotation that such settlement was peaceful, are necessarily vitiated.<sup>787</sup>

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<sup>784</sup> (1832) 6 Peters 515 (USSC).

<sup>785</sup> (1831) 5 Peters 1 (USSC).

<sup>786</sup> (1832) 6 Peters 515, 560 (USSC). See also the treatment of *Worcester* in Cohen, *Handbook of Federal Indian Law*, above n 208, 235.

<sup>787</sup> There are numerous examples that the superior colonial courts accepted that Indigenous persons were still governed by their own laws and customs: see, for example,

An analogous point is eloquently made by Chief Justice Marshall in a later-still decision concerning the cession of East and West Florida to Great Britain under the Treaty of Paris in 1763.<sup>788</sup>

It may not be unworthy of remark, that it is very unusual, even in cases of conquest, for the conqueror to do more than to displace the sovereign and assume dominion over the country. The modern usage of nations, which has become law, would be violated; that sense of justice and of right which is acknowledged and felt by the whole civilized world would be outraged, if private property should be generally confiscated, and private rights annulled. The people change their allegiance; their relation to their ancient sovereign is dissolved: but their relations to each other, and their rights of property, remain undisturbed. If this be the modern rule even in cases of conquest, who can doubt its application to the case of an amicable cession of territory.<sup>789</sup>

The 'modern usage of nations' referred to by the Great Chief Justice was *circa* the turn of the 18<sup>th</sup> century, the very epoch at which Great Britain was colonising New Holland. Likewise, the acquisition of territorial sovereignty over New Holland was neither a case of conquest of the Indigenous territories nor a series of amicable cessions of territory by these peoples. *A fortiori*, the same reasoning would apply to the 'peaceful' annexation of New South Wales to the British dominions in 1788, and to the further British assertions in relation to New Holland.

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Anonymous, 'R v Paddy and Wills', *The Northern Miner* (Charters Towers, Queensland), 14 October 1886, 3 <<http://nla.gov.au/nla.news-article77206787>>.

<sup>788</sup> Treaty of Paris (1763).

<sup>789</sup> *US v Percheman* (1833) 7 Peters 51, 86 (USSC). It also stated: 'A cession of territory is never understood to be a cession of the property belonging to its inhabitants. The king cedes that only which belonged to him. Lands he had previously granted were not his to cede. Neither party could so understand the cession. Neither party could consider itself as attempting a wrong to individuals condemned by the practice of the whole civilized world.'

## The Métis

The position of the Métis in the modern Canadian constitutional framework is *sui generis*, yet of a similar nature. In *R v Powley*,<sup>790</sup> the Supreme Court of Canada unanimously rejected the proposition that present-day aboriginal rights must necessarily find their origin in pre-sovereign traditions, customs and laws, thus rejecting the theoretical position at the heart of the intersection of norms doctrine in *Yorta Yorta*. In this case, a father and son were charged with hunting a bull moose and knowingly possessing game contrary to Ontario's *Fish and Game Act 1990*. The Powleys admitted shooting and possessing the bull but, as members of the Métis community of Sault Ste. Marie, argued that they had a constitutional right which was protected by s 35 of the *Constitution Act 1982* (Canada) which provides:

- (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
- (2) In this Act, 'aboriginal peoples of Canada' includes the Indian, Inuit and Métis peoples of Canada.<sup>791</sup>

At trial in the Ontario Court of Justice, their defence was accepted. The Powleys succeeded on appeal through the Ontario superior courts until the Ontario Crown was granted leave to appeal by the Supreme Court of Canada (the SCC or Supreme Court). This was distinct from earlier cases on aboriginal rights in s 35 because, unlike the Indian and Inuit, the Métis did not pre-date the arrival of the European powers (in this instance France and then Great Britain) in North America; rather, they were a product of it. These were the 'half-breeds' referred to in the historical records.<sup>792</sup> Quoting

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<sup>790</sup> *R v Powley* [2003] SCC 43 (SCC) (McLachlin CJ and Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel and Deschamps JJ), 19 September 2003.

<sup>791</sup> *Constitution Act 1982* (Canada), s 35.

<sup>792</sup> J Teillet, 'Métis Harvesting Rights in Canada: *R v Powley*' (2001) 5 *Indigenous Law Bulletin* 16.

from the Royal Commission into Aboriginal Peoples, the Supreme Court stated:

Intermarriage between First Nations and Inuit women and European fur traders and fishermen produced children, but the birth of new Aboriginal cultures took longer. At first, the children of mixed unions were brought up in the traditions of their mothers or (less often) their fathers. Gradually, however, distinct Métis cultures emerged, combining European and First Nations or Inuit heritages in unique ways.<sup>793</sup>

By definition, the Métis were a post-contact phenomena, their societies emerging via a process of post-contact ethno-genesis. It was against this 'historical and cultural backdrop'<sup>794</sup> that the Supreme Court of Canada considered the defence claimed by the Powleys. In terms of precedent, the Supreme Court was confronted with the powerful authority of *R. v Van der Peet*,<sup>795</sup> where the Supreme Court had held, in the words of Chief Justice Lamer for the majority:

what s.35(1) does is provide *the constitutional framework through which the fact that aboriginals lived on the land in distinctive societies, with their own practices, traditions and cultures, is acknowledged and reconciled with the sovereignty of the Crown*. The substantive rights which fall within the provision must be defined in light of this purpose; the aboriginal rights recognized and affirmed by s.35(1) must be directed towards the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown.<sup>796</sup>

It is notable that at this intersection, the distinctive indigenous societies were not necessarily vitiated or 'suspended'.

Yet what of the Métis? Seemingly the rights of the Indian and Inuit protected by s 35 must rest in societies existing *before* the assertions of European sovereignty in Canada. The Ontario Crown argued that to be consistent with the *Van der Peet* decision, the Court must locate the Métis

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<sup>793</sup> [2003] SCC 43, [10], quoting from the *Report of the Royal Commission on Aboriginal Peoples*, Volume 4, 199-200.

<sup>794</sup> *Ibid* [13].

<sup>795</sup> [1996] 2 SCR 507 (SCC).

<sup>796</sup> *Ibid* [31]. Emphasis added.

rights in the pre-contact practices or traditions of the aboriginal ancestors of these particular Métis, in this instance the Ojibway of southern Ontario.

However, the unanimous nine-member Supreme Court stated:

We reject the appellant's argument that Métis rights must find their origin in the pre-contact practices of the Métis' aboriginal ancestors. This theory in effect would deny to Métis their full status as distinctive rights-bearing peoples whose own integral practices are entitled to constitutional protection under s.35(1). The right claimed here was a practice of both the Ojibway and the Métis. However, as long as the practice grounding the right is distinctive and integral to the pre-control Métis community, it will satisfy this prong of the test. This result flows from the constitutional imperative that we recognize and affirm the aboriginal rights of the Métis, who appeared after the time of first contact.<sup>797</sup>

The Métis are thus distinctive rights-bearing peoples but those rights are not required to be sourced in the pre-sovereignty laws, customs or practices. Their rights developed since that time, generated, on a *Yorta Yorta* jurisprudential analysis, by the normative system of the post-sovereignty Métis. In other words, the Supreme Court of Canada accepted that the Métis developed and possessed a rights-generating system *after* the assertion of non-indigenous sovereignty by both France and Great Britain. The assertion of sovereignty, firstly by the French and then by Great Britain, did not necessarily vitiate any existing parallel law-making systems of the Ojibway and, indeed, permitted that of the Métis to emerge in the post-European sovereignty epoch. The intersection was not a destructive zone but, rather, a creative one.

### **Another vision?**

While the *Yorta Yorta* decision has been subject to strident criticism for its forensic requirements, the extrapolation of the fundamental premise of *Mabo (No 2)* and the intersection of normative systems principles in *Yorta*

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<sup>797</sup> Ibid [38].

*Yorta* permits another vision of how the acquisition of British sovereignty over New Holland might be reconciled with the Indigenous societies that existed there and continue to exist in the modern Australian context. This vision permits that each determination of native title under the *Native Title Act* in the post-*Mabo (No 2)* era acknowledges not only an extant native title, but a vital Indigenous normative system wherein traditional laws and customs are presently extant and alive.

The intersection doctrine thus presents a coign of vantage from which a future theory of sovereignty, one in which history and law are reconciled, may be viewed. This alternate theory will be presented in Chapter VI.

## CHAPTER VI AN ALTERNATE THEORY OF SOVEREIGNTY

The juridical questions that need to be resolved with respect to the conflict of immigrant British and the Indigenous peoples in the New Holland context are, of course, not novel in the Imperial constitutional law.

Jurisdictions facing these same issues – Canada, the USA and New Zealand – necessarily have had to find their own path through the difficult and thorny matters. In the Australian jurisprudence, however, we have exhibited little stomach for debate. Recently, New Zealand's former Chief Justice, Dame Sian Elias, in speaking of sovereignty issues in Australasia into the 21<sup>st</sup> century, asked whether it is fanciful to entertain the notion that 'sovereignty' issues posed a particular anxiety for Australia and New Zealand. She said:

The constitutional order in the United Kingdom has been transformed in our lifetimes with very little fuss. By comparison, we seem unaccountably anxious. Is our agitation because our independence has been only recently perfected and sovereignty seems all the more precious for that? Is it because the constitutional arrangements of our jurisdictions have been incompletely explored? Or is it because both of us have indigenous people to accommodate within the constitutional framework?<sup>798</sup>

Her final question is very perceptive. It touches upon the inherent weakness in the Anglo-Australian jurisprudence which the *Mabo (No 2)* decision exposed. There has been *no* accommodation of these Indigenous peoples in the formal Anglo-Australian constitutional framework. There is no Treaty of Waitangi as in New Zealand, no 'domestic dependent' nationhood construct such as in the United States or, as with Canada, no acknowledgment and affirmation of their aboriginal status in a modern constitution. If not for the *Mabo (No 2)* and *Yorta Yorta* decisions referencing the Imperial constitutional jurisprudence, the Indigenous

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<sup>798</sup> Dame Sian Elias, 'Sovereignty in the 21<sup>st</sup> century: Another spin on the merry-go-round,' (2003) 14 *Public Law Review* 148, 149.

peoples of New Holland/Australia would be virtually absent from the Australian constitutional framework. Australia, alone among these common law-based jurisdictions has made no formal accommodation that when the British arrived, Indigenous peoples were present. The question of whether the Indigenous peoples of New Holland possessed any inherent 'sovereignty' and the 'change' of sovereignty never has been fully explored or addressed.

The enormous challenge for each of these so-called 'settler' societies has been, or remains, to fashion its own approach. The corresponding jurisprudence may offer some guidance, yet, because of the differing colonial situations, each is bespoke. For the Australian jurisprudence, it is made more difficult because of the absence of any discourse. Prior to 1992, the answer given to the fundamental sovereignty issues by the extant Anglo-Australian jurisprudence is that there was no 'sovereignty' extant in these Indigenous societies of New Holland. Therefore there was no need for any further exposition. Elizabeth Evatt summarised this Anglo-Australasian position to the late 1960s:<sup>799</sup>

The most important difference between Australia and New Zealand is that in the case of the former beyond the general Instruction to Captain Phillip to "conciliate their affections," agreement by the natives, either formally or informally expressed, was never thought necessary; Australia has always been regarded as a case of occupation.<sup>800</sup> In New Zealand on the other hand the procedure of acquisition was governed by the prior recognition of native sovereignty.<sup>801</sup>

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<sup>799</sup> See Evatt, above n 231, 44.

<sup>800</sup> Here Evatt footnotes *Cooper v Stuart* as authority.

<sup>801</sup> Evatt supports Lindley's supposed division between 'politically organised or unorganised societies' (at 44) but this shorthand is inappropriate. As noted earlier, Lindley wrote:

If the territory is uninhabited, or is inhabited only by a number of individuals who do not form a political society, then the acquisition may be made by way of Occupation. If the inhabitants exhibit collective political activity which, although crude and rudimentary form, possess the elements of permanence, the



Then, in 1992, that changed. The Australian jurisprudence accepted that the Indigenous territories in New Holland/Australia were possessed of systems of laws and customs. The 'Great Australian Silence'<sup>802</sup> was broken and there was an irreversible acknowledgment by the Australian legal system that these manifold Indigenous societies generated their own laws and customs, sourcing rights and interests, which were not *extinguished* upon the assertions of non-Indigenous sovereignty. These traditional laws and customs ran prior to the assertions of British sovereignty, and many continue to run in those Indigenous societies today. The *Mabo (No 2)* decision meant that the Australian jurisprudence could never 'disremember'.<sup>803</sup>

Yet, the jurisprudence remains most reluctant – perhaps understandably so – to confront these unresolved constitutional issues. There remains no 'accommodation' in the constitutional framework. Indeed, if not for the *Mabo (No 2)* and *Yorta Yorta* decisions referencing the Imperial constitutional jurisprudence, the Indigenous peoples of New Holland/Australia would be virtually absent from the Australian constitutional framework. Australia, alone among these common law-based jurisdictions, has made no formal accommodation that when the British arrived, Indigenous peoples were present. While the old theory of sovereignty is smashed, it remains most reluctant to address its oldest unresolved issues.

The declaration in *Mabo (No 2)* that New Holland was acquired under the Occupation of Backward Peoples doctrine does carry an implication that

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acquisition can only be made by way of Cession or Conquest or Prescription.  
(Lindley, above n 29, 45)

It would be a difficult task to presently argue that the Indigenous peoples of New Holland did *not* 'exhibit collective political activity'.

<sup>802</sup> French, above n 689, 130.

<sup>803</sup> WEH Stanner, *After the Dreaming* (The 1969 Boyer Lectures) (Australian Broadcasting Commission, 1972), 18. The term is taken from his phrase, the 'Cult of Disremembering'.

the 'backward' Indigenous societies were not possessed of any pre-existing 'sovereignty' in 1788.<sup>804</sup> *Ex hypothesi*, under the engorged notion of *terra nullius*, the Indigenous inhabitants were so low on the scale of civilised society, there could not be any sovereign(s). If the Australian jurisprudence is to continue to assert that these normative Indigenous societies did *not* have any form of recognisable 'sovereignty', it must defend the proposition that these Indigenous societies were too low on the scale of civilisation in 1788 and other relevant times to be accorded any such quality. Such a defence would be an unenviable task, being indefensible in the international law of that epoch and drenched in eugenisist notions most jurists would find repugnant. As poor as its appetite for introspection is, the High Court in the leading judgment in *Yorta Yorta* made the fundamental step of walking away from old theory and beginning to posit a more viable contribution of an intersection of systems – the ancient laws and customs of the Indigenous societies of New Holland intersecting with the imported English law.

The Australian jurisprudence has little alternative other than to confront and address these ancient issues in a modern framework. As Reynolds has recently written:

The acceptance by the [High] Court [in *Mabo (No 2)*] that there was a system of land tenure [by the Indigenous peoples of New Holland] is an implicit acknowledgment of the prior existence of some form of sovereignty. Like the land that was appropriated

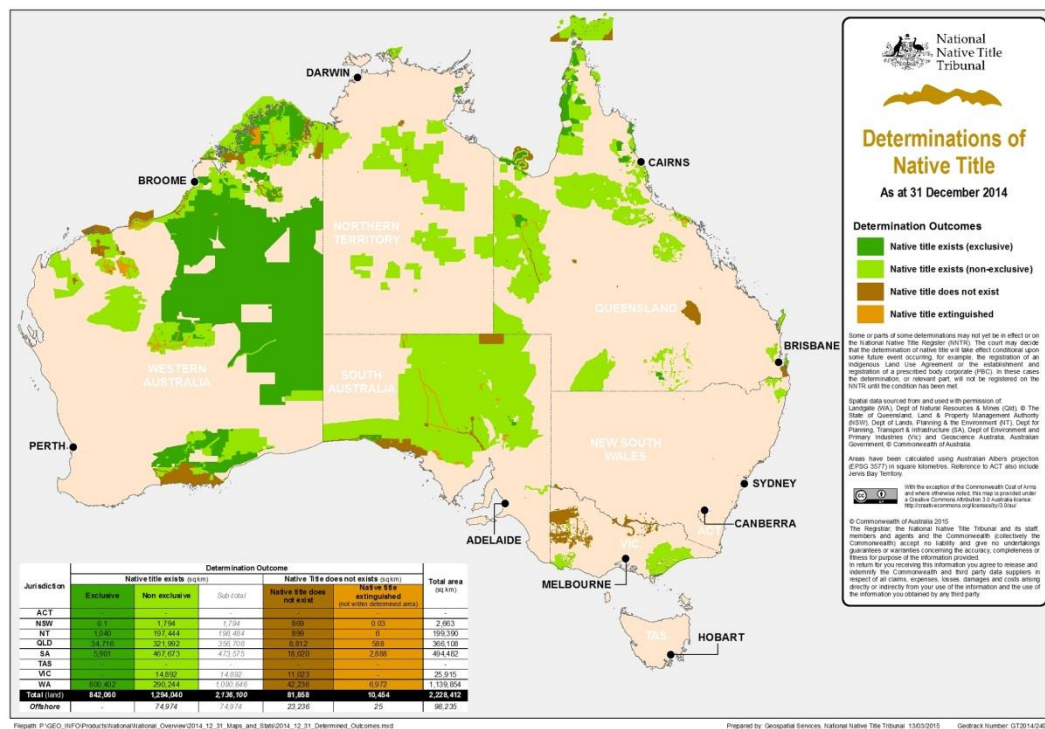
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<sup>804</sup> *Contra* the discussion in Bartlett, above n 641, where he asserts that in *Mabo (No 2)* there is a suggestion that if the Australian indigenous societies were possessed of sovereignty, it was wholly negated upon the acquisition of sovereignty: at x. Selway, too, asserts this, in Bradley Selway, 'The Role of Policy in the Development of Native Title' (2000) 28 *Federal Law Review* 403, 419. If one adopts this position, then it must be shown how such 'sovereignities' were extinguished by the assertions of British sovereignty. Selway asserts that 'the doctrine of tenures formed the basis for the recognition of native title by the Australian Common law' but this view must be treated with some caution.

in a gradual, piecemeal, fashion, the internal sovereignty must have been assumed, slowly and violently, district by district.<sup>805</sup>

To the present, there have been in the order of 220 determinations of native title under the *Native Title Act 1993*. These are illustrated in Figure VI-1.<sup>806</sup>

**Figure VI-1 Determinations of Native Title (31 December 2014)**



Each of these determinations acknowledges the presence and continuing vitality of a 'native title'. These determinations, as seen through the lens afforded by the *Yorta Yorta* judgment, present a number of challenges to the orthodox account of the British Crown's assertions of territorial sovereignty over their Indigenous territories in the 18<sup>th</sup> and 19<sup>th</sup> centuries. The intersection-of-normative-systems doctrine views the Indigenous peoples whose title has been recognised in their respective *countries* as vital normative societies. Indeed, the *Yorta Yorta* doctrine signals the abandonment of the orthodox theory of sovereignty and begins the construction of a more viable theory.

<sup>805</sup> Henry Reynolds, *Forgotten War* (NewSouth, 2013), 193.

<sup>806</sup> This is as at June 2014.

On the doctrinal level, the consequences are manifold.

The first consequence is that the Indigenous normative systems *survived* the assertions of British sovereignty over continental New Holland. These Indigenous normative systems were not necessarily extinguished at discrete moments in time in 1788, 1824 or 1829. The jural landscape of New Holland was not vacant: there was an 'intersection'. This is a change from the fiction that the Indigenous societies of New Holland were not there at all or were, whilst physically there as an objective reality, were 'invisible' to the new British sovereign. These societies continued to be acknowledged under the British sovereign and must continue to exist and to demonstrate their continued vitality, as the High Court stressed in the *Yorta Yorta* formulation,<sup>807</sup> to successfully obtain a determination of native title under the *Native Title Act*.

The picture that emerges of the 'intersection' to which their Honours in *Yorta Yorta* referred is that it did not occur – indeed could not have occurred – at discrete moments in time in 1788, 1824 and 1829, but was incremental. The sovereignty asserted by the British in the late 18<sup>th</sup> and early 19<sup>th</sup> centuries did not instantaneously sweep across the jural landscape. The intersection *began* with the assertion of British sovereignty in 1788 and continues into the present. Every determination of native title under the *Native Title Act* is a formal acknowledgment by one normative system, the Anglo-Australian, of another, an autochthonous and traditional Indigenous normative system.

The second consequence of continuing relevance is that every determination of native title under Australian law is a formal recognition

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<sup>807</sup> (2003) 214 CLR 422, 444: the normative system must have a demonstrable 'continuous existence and vitality since sovereignty', and 'it must be shown that the society [...] has continued to exist throughout that period as a body united by its acknowledgment and observance of the laws and customs'.

that the relevant Indigenous society has 'traditional' laws and customs which can be traced to the pre-British sovereignty epoch, and which are presently extant and demonstrable. Indigenous *Law* is thus recognised by the Australian law as both present in New Holland at the time of the assertions of British sovereignty, and importantly, that same *Law* is present and normative in contemporary Australia.

The third important consequence is the recognition of not merely the legal plurality but of a continuing societal plurality. The intersection doctrine recognises that Indigenous societies existed pre-1788 and continue to exist in the present. The society, under which laws and customs the native title is said to be possessed, must have continued to exist throughout that post-British sovereignty period as a society united by its acknowledgment and observance of the laws and customs.<sup>808</sup> Moreover, all the Indigenous societies which have been recognised as having native title under s 87 of the *Native Title Act* by the Federal courts must continue to be vital societal normative systems in order to ensure the maintenance of recognition of their native title.<sup>809</sup>

And there is no magic in the term *society*. As the Full Federal Court explained in the 2005 *Alyawarr* decision:

The elements of a determination of native title are set out in s 225. It requires a determination of 'who the persons, or each group of persons, holding the common or group rights comprising the native title are'. That requires consideration of whether the persons said to be native title holders are members of a society or community which has existed from sovereignty to the present time as a group, united by its acknowledgement of the laws and customs under which the native title rights and interests claimed are said to be possessed. That involves two inquiries. The first is whether such a society exists today. The

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<sup>808</sup> (2003) 214 CLR 422, 444.

<sup>809</sup> See observations in *Ward v Western Australia* (2002–3) 213 CLR 1 (HCA), 71-2 in the joint judgment of Gleeson CJ, Gaudron, Gummow and Hayne JJ.

second is whether it has existed since sovereignty. The concept of a 'society' in existence since sovereignty as the repository of traditional laws and customs in existence since that time derives from the reasoning in *Yorta Yorta*. The relevant ordinary meaning of society is 'a body of people forming a community or living under the same government' – Shorter Oxford English Dictionary. It does not require arcane construction. It is not a word which appears in the NT Act. It is a conceptual tool for use in its application. It does not introduce, into the judgments required by the NT Act, technical, jurisprudential or social scientific criteria for the classification of groups or aggregations of people as 'societies'. The introduction of such elements would potentially involve the application of criteria for the determination of native title rights and interests foreign to the language of the NT Act and confining its application in a way not warranted by its language or stated purposes.<sup>810</sup>

Every present (and future) determination of native title in the post-*Mabo* (*No 2*) era acknowledges not merely an extant native title but an extant Indigenous normative system wherein traditional laws and customs are presently operative and functioning. As such, these determinations of native title can be viewed as the re-emergence in the jural landscape of quiescent Indigenous normative entities which survived the British assertions of territorial sovereignty, and survive still. These Indigenous societies were autonomous normative systems – that is, *sovereign* entities – whose vitality is continuous and, upon a determination of native title, are recognised as presently extant.<sup>811</sup>

Yet the most profound consequence is untouched in the *Yorta Yorta* judgment. These autochthonous normative entities to which their Honours spoke survived the British assertions of sovereignty, and survive still.

These normative entities, presently numbered over 200, are sourced *outside*

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<sup>810</sup> *Northern Territory of Australia v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* [2005] FCAFC 135, [78] (Wilcox, French and Weinberg JJ).

<sup>811</sup> Mantziaris and Martin assert that it is 'clear that native title law does not afford any form of sovereignty or limited sovereignty to indigenous systems of law and custom': see Christos Mantziaris and David Martin, *Native Title Corporations Legal And Anthropological Analysis* (The Federation Press, 2000) at 29. This opinion was rendered prior to the *Yorta Yorta* decision.

of the present formal Australian constitutional framework and therefore represent a source of law running parallel with the Crown in right of Australia and the States and Territories. In Kelsenite terms, each set of traditional laws and customs emanate from a *grundnorm* other than that of the Australian legal *grundnorm*. The sovereignty asserted by the British was not plenipotent because it did not absorb the autonomous Indigenous entities which are being now recognised in the Australian jurisprudence as continuous and, upon each determination of native title, extant and functioning. Within each of these Indigenous normative entities lies a residuum of allodial sovereignties which were quiescent to the Anglo-Australian jurisprudence yet are now acknowledged in that jural landscape.

With every native title determination, the orthodox theory of sovereignty, which holds that that the Indigenous societies of New Holland were so low on the scale of civilisation so as not to possess any 'sovereignty', suffers another telling blow. The sovereignty asserted by the British in New Holland in 1788, 1824 and 1829 was not instantaneous. It was neither original, nor plenipotent, nor indivisible. This orthodox theory of sovereignty is broken and must be abandoned for a more coherent, historically congruent theory.

### **Is there a coherent and defensible alternative theory?**

It is clear that at the time of the assertions of sovereignty by Great Britain over parts of New Holland, beginning in 1788, it was occupied by hundreds of small autonomous Indigenous societies. It is equally clear that once Great Britain began colonisation of the east coast of the historical New Holland, the loss of these Indigenous territories commenced.

Advancement of White Settlement



Figure VI-2 Gumbert's Mapping



Dr Marc Gumbert's mapping,<sup>812</sup> reproduced in Figure VI-2 above, gives a ready temporal appreciation of this process. Such a plotting exercise shows an *accretion* of British territorial sovereignty across the continent of New Holland.<sup>813</sup> It is also patent that after the assertions of British sovereignty many Indigenous societies, post-1788 and well into the future, remained independent self-governing societies, each with a system of law and custom which successfully rendered it a stable, functioning society. Until 1820, for example, the colonised area was very discrete, amounting to no more than a few hundred square kilometres of the nearly 3,000,000 square kilometres purportedly claimed as New South Wales in 1788. The British may have performed the symbolic act, indicating both the *factum* (the act) and the *animus occupandi* (the intention to occupy) but lacked, almost entirely, the ability to effectively control the territory it claimed. As such, the most it obtained in 1788, and would be recognised in international law, was an inchoate right against other European nations to actually occupy the balance of the territory within a reasonable time. An assertion of sovereignty may have been made in 1788, but it was legally unsound and is, in the light of known facts and understandings, indefensible.

### **An alternative theory of sovereignty?**

What, then, is the state of our present knowledge and appreciation of the facts advanced to rest, hopefully with some legitimacy, the adoption of alternate theory of Anglo-Australian sovereignty? In *Yorta Yorta*, the High Court failed to state whether the pre-existing normative systems were sovereign prior to the assertions of Great Britain or to explain what happened – with precision – to these normative systems at sovereignty. It

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<sup>812</sup> Marc Gumbert, *Neither Justice Nor Reason: A Legal and Anthropological Analysis of Aboriginal Land Rights* (University of Queensland Press, 1984), 13. Used with permission of the author.

<sup>813</sup> Conversely, the exercise dramatically evinces the utter pretence of fixing on 1788 as the year of sovereignty for eastern Australia.

does acknowledge, however, that these normative systems survived the assertions. It seems a small leap of reason to infer that if the Indigenous societies can be juridically recognised as a vital normative system, then these indigenous societies possessed a form of sovereignty which the Anglo-Australian normative system might likewise recognise.

An alternate theory might proceed thus. It is clear that at the time of the assertions of sovereignty by Great Britain, beginning in 1788, New Holland was occupied by any number of small autonomous Indigenous societies. It is equally true that once Great Britain began the colonisation of the east coast of New Holland in early 1800s, the loss of these Indigenous territorial sovereignties commenced. Yet for over 35 years, until 1824, the small area around Port Jackson was the *only* mainland settlement in the whole of the claimed area of New South Wales. In the period 1820 to 1890, there was rapid expansion, and the effective control of the continental land mass was, in large measure, achieved.<sup>814</sup> If a plotting exercise were conducted, it would show an accretion of British territorial sovereignty – via a process of Domination – across the continent of New Holland until, with certainty, one could proclaim that at the federation of the former British colonies into the Commonwealth of Australia on 1 January 1901, no *external* Indigenous territorial sovereignties remained. All had entered under the aegis of the federated Australian nation state. By that time, these small societies had lost their capacity as 'States' and, accordingly, could not exercise independent relations with other nation states. Such accretions of external sovereignty, as Acts of State, achieved by Domination, are unchallengeable in the domestic courts. However, it is patent that until the British sovereignty crept across the continent, the Indigenous societies remained – in 1788 and well into the 20<sup>th</sup> century – independent self-governing

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<sup>814</sup> See, for example, Noel Loos, *Invasion and Resistance: Aboriginal–European Relations on the North Queensland Frontier, 1861–1897* (ANU Press, 1982).

societies, each with a system of law and custom that successfully rendered many as stable functioning societies. If a law-changing capacity exists outside the imported Anglo-Australian legal system, it means that for any number of Indigenous societies an internal form of limited yet inherent autonomy exists within that society.

It must likewise be acknowledged that the Indigenous societies of New Holland continued to exercise qualified autonomies after 1788, as between their own members and between other Indigenous societies. This was recognised for the Yolngu in *Milirrpum*.<sup>815</sup> And it was expressed more broadly in the leading judgment in *Yorta Yorta* that the indigenous New Holland societies amounted to 'normative systems' and some, clearly, presently retain this normative capacity.

Abandoning the fallacious proposition that the Indigenous peoples of New Holland were 'sovereign'-less, these congruent legal-historical principles are proposed.

- British sovereignty did not instantly sweep across New South Wales and the balance of New Holland in 1788, 1824 or 1829, but incrementally as Great Britain took effective control of the continent and Van Diemen's Land.
- By a process of Domination, during the period 1788–1900, an external sovereignty was secured and perfected (such that this sovereignty is now inviolable and unchallengeable under the Act of State doctrine).

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<sup>815</sup> *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141.

- The Indigenous population of New Holland did not become British subjects in 1788, 1824 or 1829, but incrementally so as Great Britain took effective control of the continent of New Holland.
- Likewise, as the British acquired territorial sovereignty, the common law of England was extended to these Indigenous societies and their territories.
- The dominant British sovereignty did not overwhelm the normative systems of the Indigenous societies of New Holland, their self-governance or their societal structures. These societies retained an inherent 'internal' sovereignty. Indigenous laws and customs survived the assertions of sovereignty by the British and residuums of inherent Indigenous normative systems, as sources of another 'law', are now re-emerging in the jural landscape in the native title era.
- The Indigenous laws and customs and their residuums of internal sovereignty are not within the formal Australian constitutional framework and these Indigenous 'sovereignties' must be accounted for within that framework.

### **The listing constitutional framework**

While there is much to confront, as Dame Sian Elias counselled, there is little need to catastrophise. The constitutional discourse in Australia is presently in a state of a particular vulnerability - or of opportunity - according to one's want. With the passage of the Australia Acts in 1986, the source of the formal Australian Constitution is no longer the Imperial Parliament. In withdrawing the Imperial underpinning however, the question of the source of the modern Australian 'sovereignty' (that term here used more broadly) is seemingly now a matter of judicial guesswork.

In *Australian Capital Television Pty Ltd v Commonwealth*,<sup>816</sup> Mason CJ posited that as the Australia Acts ended the sovereignty of the Imperial Parliament, it was hence recognised that the 'the ultimate sovereignty resided in the Australian people'.<sup>817</sup> Justice McHugh also adopted this view, with qualification, in the *McGinty* decision:<sup>818</sup>

Since the passing of the Australia Act UK in 1986, notwithstanding some considerable theoretical difficulties, the political and legal sovereignty of Australia now resides in the people of Australia. But the only authority that the people have given to the parliaments of the nation is to enact laws in accordance with the terms of the Constitution.<sup>819</sup>

This postulate that the Australian people have given the various parliaments the power to make law under the Australian Constitution is an enormous leap of fact and theory, and viewed with open scepticism by some learned commentators such as Professor Zines.<sup>820</sup> Unlike the American Constitution, the Australian Constitution was never empowered by 'the people'. It was a compact between the constituting colonies (absent Western Australia), which was encased in Imperial legislation passed at Westminster in 1900. The amendment of the Constitution, although requiring a popular vote, requires a double majority – a majority of persons in a majority of states – thus reinforcing the centrality of the constituent States. The 'theoretical difficulties' spoken of by McHugh J appear more than considerable, and enough to make the proposition of doubtful utility.

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<sup>816</sup> (1990) 177 CLR 106.

<sup>817</sup> Ibid 138.

<sup>818</sup> *McGinty v Western Australia* (1995) 186 CLR 140.

<sup>819</sup> Ibid 230.

<sup>820</sup> See Leslie Zines, *The High Court and the Constitution* (Federation Press, 5<sup>th</sup> ed, 2008), 'Sovereignty of the People', discussion at 553-59; also Andrew Fraser, 'False Hopes: Implied Rights and Popular Sovereignty in the Australian Constitution' (1994) 16 *Sydney Law Review* 213.

Yet another possibility is seemingly adopted by Justices Brennan, Deane and Toohey in *Capital Duplicators Pty Ltd v Australian Capital Territory*.<sup>821</sup> There they referred to the instrument designed to fill the objectives of the 'federal compact' that had been reached by the constituent colonies. This concept of a federal compact is closer to the historical reality, but it still does not account for the present circumstances. One constitutional commentator has written of this tension:

It is probably unnecessary to identify any explanation as to why the Constitution is binding. As a matter of fact, it must be binding simply because it establishes the court itself and the other institutions of Australian government. That is a political fact accepted by the Court, the other arms of Government and the people. The accepted political and legal reality is that the Constitution is binding – this is enough to justify the assumption that it is binding.<sup>822</sup>

This is most unpersuasive. It is, because it is, because it needs to be, has an Alice-in-Wonderland rationality requiring not reason, but blind faith. It is necessary to explain because it would seem completely rational and reasonable in any constitutional democracy to be able to express clearly why and how a constitution is binding.

The one discordant note struck in the *Yorta Yorta* exposition to this alternate theory is that the High Court stated that these Indigenous normative entities cannot be law-making systems. Incongruously, it demanded that they remain presently vital societies with traditional (but necessarily adaptive) laws and customs. No cogent explanation is given as to why the 'recognition' is so restricted and, again, it appears to rest on a denial that

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<sup>821</sup> *Capital Duplicators Pty Ltd v Australian Capital Territory* (1990) 177 CLR 248.

<sup>822</sup> See Bradley Selway, 'Constitutional Interpretation in the High Court of Australia' in Michael White and Aladin Rahemtula (eds), *Queensland Judges on the High Court* (Supreme Court of Queensland Library, 2003), 1, 6.

the Indigenous peoples of New Holland were – and indeed are presently – full rights-bearing human beings.<sup>823</sup>

It is also incongruent with the historical acceptance of a residual law-making capacity of Indigenous societies accepted in the factual matrix of *Milirrpum*, and, more abstractly, in *Mabo (No 2)*. Apart from these significant holdings, the many inquiries of the Aboriginal Land Commissioner under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) provides three decades of acknowledgment and affirmation of underlying and extant Indigenous law and legal systems.<sup>824</sup>

Additionally, what has largely escaped comment in the vast legal literature which surrounds *Mabo (No 2)* is that the underpinning traditional laws and customs of the Indigenous peoples – the source of this native title – are organic. Such laws and customs are not dead, static things but a living, responsive aspect of their societies. Unwritten customary law is inherently flexible and adaptive.<sup>825</sup> The laws are held and the customs observed by a body of persons, and these laws and customs change with time and circumstance and, unwritten in the main, they are 'open to regular

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<sup>823</sup> The unspoken inference which permeates the Australian jurisprudence is that these Indigenous societies were so low on the juridical scale of humanity so as not to be rights-bearing peoples other than to possess rights in relation to land and waters – and even these are extremely 'fragile'<sup>823</sup> and could be compulsorily acquired by the state without any process or compensation – fills the void.

<sup>824</sup> Defences based on indigenous law – such as an assault mandated by indigenous custom – are less readily accepted at common law but now appear in statutory form in the *Native Title Act* and have been accepted in the courts. See *R v Yunupingu* (Unreported, Magistrates Court, Darwin, Gillies SM, 20 February 1998) where Y was charged with assault after taking a camera from the possession of a journalist, and exposing the film after it had been used to photograph on Yolngu land without permission. His 'honest claim of right' defence was upheld.

<sup>825</sup> For an early non-European perspective on customary law in Africa, see T Olawale Elias, *The Nature of African Customary Law* (Manchester University Press, 1956).

interrogation'.<sup>826</sup> Dr Beckett, when speaking of the Meriam People, noted the potential disappointment of anyone believing that their laws and customs were 'a matter of calm consensus'.<sup>827</sup> It is a nonsense to assert that the holders of these laws and customs do not command the capacity to change these laws and customs. And if these laws can change, there exists a law-making capacity. So much was fully accepted in *Mabo (No 2)*.

In this Chapter, an alternate theory of British sovereignty has been proposed. The orthodox theory did not survive the *Mabo (No 2)* decision in 1992, and an alternative theory, based in historical fact and sustainable in the international law, is available to explain the assertion of British sovereignty over the New Holland territories. The challenge for Australian jurisprudence is to condemn the implausible orthodox legal theory, to which it has clung for over two centuries, and to incorporate the residuum of these Indigenous sovereignties it has discovered into an inclusive 21<sup>st</sup> century framework.

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<sup>826</sup> This phrase is borrowed from A Reilly, 'The Ghost of Truganini: Use of Historical Evidence as Proof of Native Title' (2000) 28 *Federal Law Review* 453, 468 where the statement was that the past, in an oral history, 'is open to regular interrogation'.

<sup>827</sup> Beckett, 'The Murray Island Land Case', above n 575, 21.



## CONCLUSION

This thesis explored the fundamental principles underpinning the British acquisitions of territorial sovereignty in New Holland in the late 18<sup>th</sup> and early 19<sup>th</sup> centuries. In answering the most basal issue of whether the Indigenous societies of New Holland possessed sovereignty at the time of the British assertions in 1788, 1824 and 1829, we have ranged through the Imperial constitutional law and practice over five centuries, to find that the answer in the Anglo-Australian jurisprudence is that the Indigenous societies of New Holland are not acknowledged as possessing any form of 'sovereignty'. The many hundreds of mainland Indigenous societies inhabiting the vast New Holland territory are acknowledged as human societies, yes, but so 'backward' so as not to be capable of possessing any form of social or political autonomy that may be acknowledged in Anglo-Australian law. They were *Homo sacer* in the language of Agamden. As expressed in the 1837 House of Commons report, the 'Aborigines' of New Holland were regarded as so low on the scale of civil society that any rights or sovereignty they might possess could be 'wholly disregarded'.<sup>828</sup> Under an engorged *terra nullius* doctrine they were deemed so low on the scale of civilisation to be sovereign-less, and the British Crown became the absolute – and the original – sovereign of their New Holland territories at moments in time in 1788, 1824 and 1829.

This, then, is the orthodox legal narrative of British sovereignty over the New Holland territories – a tale of unilateral dispossession endorsed by the Anglo-Australian jurisprudence and rooted in scales-of-civilisation notions of the 19<sup>th</sup> century. The orthodox theory is of an original, plenipotent and indivisible British sovereignty sweeping in three stages across nearly 3,000,000 square kilometres of mainland New Holland and Van Diemen's

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<sup>828</sup> *Report on Aboriginal Tribes (1837)*, above n 20.

Land, meeting no other 'sovereigns', or even other forms of some lesser autonomy, in its path. In what must be one of the most curious pieces of jurisprudence, the Indigenes of New Holland purportedly become British subjects at these moments in time yet their property, real, personal and communal, could then be stripped from them by the Crown without any lawful process or compensation. They may have become British subjects in theory but not rights-bearing British subjects. With a further twist of irony, the jurist Emmerich de Vattel, who is accredited as authoring this engorged notion of *terra nullius* and thus legitimising their utter dispossession, described the principle that a sovereign might take such lands as his own in such a manner as 'monstrous'.<sup>829</sup>

In examining the basal principles underpinning the British acquisitions of territorial sovereignty in New Holland, Chapter I outlined the relevant modes of acquisition of sovereignty in the international law in the late 18<sup>th</sup> century, notably the ancient principles concerning the acquisition of territory by Occupation. Necessarily we backgrounded the inter-temporal international law and state practice surrounding the acquisition of territory – *circa* 1800 – at the times sovereignty was asserted in New Holland by the British Crown. The relevant writings of the Swiss jurist, Emmerich de Vattel, and the creative post-Revolutionary jurisprudence of the incipient US Supreme Court were addressed.

Chapters II and III foregrounded the position in New Holland and the proposition upon which the British justified the acquisition of the eastern portion of New Holland in 1788 which was, counter-factually, that the territory was uninhabited by human beings under the classical Occupation principles. This was, of course, a patent falsehood. When the anticipated doom of these 'Aborigines' proved increasingly indefensible in the late

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<sup>829</sup> Vattel, above n 99, 309.

1800s, the fiction of an uninhabited New Holland was abandoned in favour of the metaphorical proposition that New Holland was acquired 'as if it were uninhabited'. In the mutation of the Judicial Committee of the Privy Council in 1889, New South Wales was 'practically' unoccupied and so 'peacefully settled'<sup>830</sup> This Peaceful Settlement notion held sway for near on a century and the ironic principle – that 'more advanced peoples' might dispossess the 'less advanced' of their territories as necessity demanded – was accepted into Anglo-Australian law in the *Milirrpum* decision.<sup>831</sup> For Gibbs J in *Coe*, it was 'fundamental' that the New Holland colonies 'became British possessions by settlement', over 'a territory which, by European standards, had no civilized inhabitants or settled law'.<sup>832</sup> This 'settlement' was more in the nature of a peaceful 'handing over' by the 'less advanced' peoples of their territories to the 'more advanced peoples' rather than of any involuntary or forced dispossession. That the 'history of the relationships between the European settlers and the aboriginal peoples has not been the same in Australia and in the United States' was reason enough to dismiss any contrary North American precedents in this respect, and the Act of State doctrine was employed to dismiss any discussion of the issues. The orthodox legal narrative of British sovereignty in New Holland was 'fundamental', yet it was not open to interrogation.

It must be said, and avoiding any presentist sentiment, it would have been exceptional if the Anglo-Australian courts, to this point in time still courts in the British Imperial hierarchy, would have done anything other than wholly accept without cavil the Peaceful Settlement/Occupation of Backward Peoples principles. The very legitimacy of their positions, offices and titles – for most, if not all, were knights of the realm – rested on this

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<sup>830</sup> *Cooper v Stuart* (1889) AC 286 (JCPC).

<sup>831</sup> (1971) 17 FLR 141, 200.

<sup>832</sup> *Paul Coe v Commonwealth* (1979) 24 ALR 118, 129.

race-based theoretical position, which posited the Australian Indigenous peoples as lesser forms of humanity and unequal under and before the law, however implausible and contrary to established international norms it may have been.

Thus for over two centuries the Anglo-Australian jurisprudence accepted this simplistic Imperial narrative - a fairy-tale of sorts. Then, as we explored in Chapter IV, in *Mabo (No 2)*<sup>833</sup> in 1992, the High Court of Australia determined that the British Crown, upon its assertions of territorial sovereignty in New Holland, acquired merely a radical title to the territory, not an absolute title as previously asserted in Anglo-Australian law. Allodial 'native' rights and interests in land, sourced in the laws and customs of the Indigenous societies of New Holland, had both survived the assertions of the British sovereignty and were – and always had been – capable of being recognised by the Anglo-Australian common law. The High Court of Australia uncovered this latent 'native title', and, far from New Holland being a jural vacuum, it discovered a multiplicity of laws, customs and legal systems in that jural landscape. Completely repudiating the Judicial Committee of the Privy Council in *Cooper v Stuart*,<sup>834</sup> the High Court of Australia held that the Indigenous peoples of New Holland had 'settled law' in a defined territory, that the whole continent was occupied by these Indigenous peoples. Far from being 'peacefully settled', as alleged by the Privy Council, it had been taken by the British in what two High Court judges described as a 'conflagration of oppression and conflict which was [...] to spread across the continent to dispossess, degrade and devastate the Aboriginal peoples and leave a national legacy of unutterable shame'.<sup>835</sup> The *Mabo (No 2)* decision thus

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<sup>833</sup> *Mabo (No 2)* (1992) 175 CLR 1.

<sup>834</sup> *Cooper v Stuart* (1889) AC 286 (JCPC).

<sup>835</sup> *Mabo (No 2)* (1992) 175 CLR 1, 104 (Deane and Gaudron JJ).

exposed the Peaceful Settlement doctrine in the Imperial constitutional law as a fantasy. However, it necessarily laid bare the engorged notion of *terra nullius*, purportedly sourced in the international law of that epoch, not merely the concept upon which the Australian real property theory was neglectfully premised but also as the foundation stone of the modern Australian nation state. *Mabo (No 2)* initiated 'a process of mutual adjustment that will continue long into the future' wrote Professor Webber.<sup>836</sup>

In the words of Brennan J, the international law 'recognized the sovereignty of the respective European nations over the territory of backward peoples' and, by State practice, permitted the acquisition of sovereignty of such territory by Occupation.<sup>837</sup> The British acquisition of sovereignty over the Colony of New South Wales was regarded as 'the settlement of territory that was *terra nullius* consequent on discovery'.<sup>838</sup> The classical Occupation principles were transformed into the Occupation of Backward Peoples doctrine, the *terra nullius* concept being enlarged from lands owned by 'no one' and thus sovereign-less to include the territories of these Indigenous peoples. They, too, were sovereign-less. These Occupation of Backward Peoples principles were uniquely applied to the Indigenous peoples of New Holland, they being the only peoples determined to be 'backward' in the Imperial constitutional law.

The majority of the High Court in *Mabo (No 2)* refused to accept that the islands of the Torres Strait or mainland Australia were *terra nullius* at the times of assertions of British sovereignty and so as to deny the claim of a 'native title'. Yet Brennan J, incongruously, had earlier set the same

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<sup>836</sup> Jeremy Webber, 'Beyond Regret: *Mabo's* Implications for Australian Constitutionalism' in Duncan Ivison, Paul Patton and Will Sanders (eds), *Political Theory and the Rights of Indigenous Peoples* (Cambridge University Press, 2000) 60, 61.

<sup>837</sup> Ibid 32.

<sup>838</sup> Ibid 34.

engorged *terra nullius* notion as the foundation of the British assertions of sovereignty over New Holland. How then could such a position be presently defensible, both internal to the decision and externally? Such a claim – that the territory of 'backward' peoples could be lawfully occupied as *terra nullius* – had been rejected by the International Court of Justice in 1974 as not being available or legitimate at the very time the Judicial Committee of the Privy Council in *Cooper v Stuart* articulated such an exaggerated claim relating to the New Holland territories.<sup>839</sup> The history and conclusion of principle stated by Justice Brennan on this point, as argued in this thesis, are both of doubtful credence. The Occupation of Backward Peoples doctrine – if it was ever accepted in law or state practice in the late 18<sup>th</sup> century, the 19<sup>th</sup> century or at all – was rejected as being unsound in international law, yet it moonlights still in the Anglo-Australian constitutional law.

In accepting the doctrine of native title, the High Court had reached into the body of principle in the Imperial constitutional law. It has been argued in this thesis that the embryonic doctrine of aboriginal rights, housed in the Imperial constitutional law, was received as part of the English law imported to New Holland. Despite being a 'foetal' body of largely unwritten law, it nonetheless contained fundamental constitutional principles relating to indigenous customary law, aboriginal powers of self-government and indigenous rights to their ancestral lands. That the New Holland circumstances did not throw up many of the issues which the doctrine addressed, and that the Australian jurisprudence has not yet recognised the general doctrine of aboriginal rights, is no argument that it had or has no application to the Australian circumstances. The fact that the new Holland territories were inhabited by Indigenous populations makes

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<sup>839</sup> *Advisory Opinion on the Western Sahara* [1975] ICJ Reports 12.

the application of the doctrine unavoidable. One of the most severe obstacles to the *recognition* of the doctrine of aboriginal rights in Australia is its novelty.<sup>840</sup> But, like the 'revolution' of *Mabo (No 2)*, it is a small tempest in a vast historical panorama.

So, having excavated long-neglected prescripts in the Imperial constitutional law in 1992, the orthodox legal narrative surrounding acquisition of the territorial sovereignty of New Holland by Great Britain was examined and opened to contestation. The foundation principles, long neglected, were turned over and examined. It was contemporarily odious, the most superior Australian judges had stated, that Australia's Indigenous peoples might be treated as a lesser form of humanity. Justice Brennan wrote that the 'fiction' by which the interests of Indigenous inhabitants in land were treated as 'non-existent' was justified by a policy 'which has no place in the contemporary law of this country'.<sup>841</sup> As we have seen, the definition in s 223(1) of the Native Title Act provides that the expression *native title* or *native title rights and interests* means the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where 'the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders'.<sup>842</sup> It is clear that while the Australian common law is declaratory of this 'native title', the common law does not constitute it: Native title is generated by traditional laws and customs of the relevant Indigenous peoples, and owing nothing to the common law.

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<sup>840</sup> I would argue that, like the common law native title doctrine, it already has been *received* into the constitutional foundations of New Holland, it merely needs to be excavated.

<sup>841</sup> *Mabo (No 2)* (1992) 175 CLR 1, 42.

<sup>842</sup> *Native Title Act 1993* (Cth) s 223(1)(a).

In the wake of the *Mabo (No 2)* decision, some commentators asked whether it was defensible that the territorial sovereignty of the modern Australian state should rest on such an odious proposition that its Indigenous peoples were too low on the 'scale-of-civilisation' to be acknowledged as possessing any form of pre-existing sovereignty. Rather than positing New Holland as occupied under the seemingly-rejected enlarged *terra nullius* notion, might not other modes of acquisition be available in the international law to justify – *ex post facto* but more soundly – the assertions of British sovereignty? The principal mode argued is Conquest, which would provide good title under the extant international law of that time, and also provide certainty as to the consequences of the British acquisition under this mode, and the principles are well-settled. This argument, however, has found very little support in the Anglo-Australian jurisprudence because of the lack of historical buttressing and, also, because there is a decided preference for the Australian historical and legal narratives to be 'peaceful'. The vista of a conscious invasion, with Great Britain unleashing its superior technological and military capacity on the unsuspecting aboriginal peoples of New Holland, *alla Avatar*, is not attractive to either the historiography or the jurisprudence.<sup>843</sup>

The alternative position, Prescription, likewise has little legitimacy. It was asserted by a body of parliamentary lawyers in 1983 that although New Holland was inhabited, it was then 'occupied' by the British, seemingly initially unlawfully, and that this once-extra-lawful 'title' had been perfected because of a peaceful and undisputed occupancy over the ensuing two centuries. It may have some credence at the external sovereignty level, but not at the internal sovereignty level where, grasping

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<sup>843</sup> Seemingly, the Australian jurisprudence has been more accepting of colonial frontier violence than the historiographers, who have waged a long and savage battle in the History Wars.



at insecure historical and legal scaffolding, it lacks persuasiveness because the Indigenous peoples still assert that they had forms of sovereignty or autonomy when the British asserted their over-arching radical titles.

Both these alternative modes, Conquest and Prescription, lack persuasiveness when critically examined, and another mode may be necessary to interpret that past.

In this thesis, while re-examining the orthodox Anglo-Australian theory, we reviewed the issue of whether the Indigenous societies were possessed of 'sovereignty' consistent with the definition in the international jurisprudence and practice of the late 18<sup>th</sup> and early 19<sup>th</sup> centuries. *Circa* 1800, applying the Inter-temporal Rule, the definition in the then-emerging international law is that if a society had no allegiance or duty owed to another outside that territory it was sovereign. This definition of sovereignty was accepted by the European nations in the late 18<sup>th</sup> and early 19<sup>th</sup> century, and it is clear that at the relevant times of the assertions of sovereignty by Great Britain, New Holland was occupied by hundreds of Indigenous societies, seemingly autonomous, each possessed of a defined territory. These Indigenous peoples had resided in their *countries* on mainland New Holland and Van Diemen's Land for hundreds, if not, thousands of years. The proposition that New Holland was a 'sovereign'-less vacuum in 1788, or at other times relevant to the assertion of British sovereignty, is – and remains – a decidedly hollow assertion. The answer based on the Inter-temporal Rule and our present knowledge of the facts is that these Indigenous societies were sovereign, and should be regarded as such, then and now.

In the *Yorta Yorta* decision, discussed in Chapter V, the High Court of Australia illuminated the doctrine of the intersection of normative systems, its ramifications, both to the historical circumstances surrounding the

acquisition of New Holland and the 200+ determinations of native title since 1992 which have exposed a vast network of other non-Anglo-Australian *Law* in the current Australian jural landscape.

In Chapter VI, we applied the conceptual framework of the *Yorta Yorta* doctrine, by which some of these unresolved foundational issues in the *Yorta Yorta* doctrine might be addressed, in cobbling together a new coherent and congruent legal-historical narrative and an alternative vision of Anglo-Australian sovereignty in New Holland. This construct is based on our present knowledge and appreciation of the fundamental facts and fuses the historical and legal underpinnings. Their Honours' 'jurisprudential analysis' explored some of the constitutional questions left unanswered in *Mabo (No 2)*, permitting another vision, as outlined in Chapter VI, of how the Indigenous peoples of New Holland were brought under the constitutional umbrella of the Imperial British Crown.

The plantation of British subjects on the continent of New Holland was not Occupation, not Conquest and not Cession in international law. It was an assertion of *imperium* by a European nation of far superior military and technological strength over territories inhabited by Indigenous peoples over time through a process of Domination. There was no declaration of war or Conquest but there was bloodshed and large-scale dispossession.<sup>844</sup>

The issue will remain a live one for as long as it remains unaddressed.

New Holland was not 'sovereign'-less, and this alternate legal-historical narrative is proposed:

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<sup>844</sup> This is beyond argument. It was accepted judicially in *Mabo (No 2)* and has been accepted in legislation in the ATSIC Act. The historiography of the violence of the colonial Australian frontier was pioneered by Henry Reynolds in *The Other Side of the Frontier* and sparked an ever-expanding corpus of literature in the past three decades exposing what had hitherto been largely unexplored. See also Roger Milliss, *Waterloo Creek* (Sydney: McPhee Gribble, 1992), which details a large massacre of Kamilaroi people in New South Wales in 1838.

- British sovereignty did not instantly sweep across vast swathes of New Holland in 1788, 1824 or 1829, but incrementally as Great Britain took effective control of the continent and Van Diemen's Land.
- By a process of Domination, an internationally accepted mode of territorial acquisition, during the period 1788–1900 an external sovereignty was secured and perfected (such that the external sovereignty is now inviolable and unchallengeable under the Act of State doctrine).
- The Indigenous population of New Holland did not become British subjects in 1788, 1824 or 1829, but incrementally as Great Britain took effective control of the continent of New Holland.
- As the British acquired territorial sovereignty, the common law of England was extended to these Indigenous societies and their territories.
- The dominant British sovereignty did not overwhelm, at these moments, the normative systems of the Indigenous societies of New Holland, their self-governance or their societal structures. These societies retained an inherent 'internal' sovereignty.
- Indigenous laws and customs survived the assertions of sovereignty by the British and residuums of inherent Indigenous normative systems, as sources of another 'law', are now re-emerging in the jural landscape in the native title era.
- The Indigenous laws and customs and their residuums of internal sovereignty are not within the formal Australian constitutional framework and these Indigenous 'sovereignties' must be accounted for within that framework.

There is reason to be pessimistic with the well-noted difficulties accommodating diversity within modern constitutional democracies and groups-specific formal recognition within,<sup>845</sup> particularly the formal Indigenous-Settler relationship.<sup>846</sup> However, given other pressures on the Australian constitution, the time may be right to re-imagine the Australian constitutional tradition,<sup>847</sup> as the parched 19<sup>th</sup> century document that is the Australian Constitution has clearly been outpaced by the modern circumstances. Moreover, federalism is more accommodating than other systems.<sup>848</sup>

In *Mabo (No 2)*, the reservation expressed in recognising the doctrine of native title in the Australian jurisprudence after such a lengthy period was that such acceptance must not 'fracture a skeletal principle of our legal system'.<sup>849</sup> Brennan J said that in declaring the common law of Australia, the High Court was not free to adopt rules that accord with contemporary notions if such rules 'would fracture the skeleton of principle which gives the body of our law its shape and internal consistency'.<sup>850</sup> The question may relevantly be asked whether re-considering the issue of Indigenous sovereignty and submitting that a residuum of sovereignty inures in these Indigenous societies, after such a hiatus, might potentially fracture some skeletal principle of the Australian legal system. The answer is that the orthodox sovereignty theory which underpins the Australian system is

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<sup>845</sup> See James Tully, *Strange Multiplicity: Constitutionalism in an age of diversity* (Cambridge University Press, 1995).

<sup>846</sup> Kymlicka has pointed out that it is not only indigenous populations that have these difficulties but minority groups such as the Basque and the Bretons; see Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford University Press, 1995).

<sup>847</sup> Some Australian philosophers and political scientists have begun this imagining; see, for example, Iveson, Patton and Sanders, above n 69.

<sup>848</sup> Ian Brownlie, 'The Rights of Peoples in Modern International Law' in James Crawford (ed), *The Rights of Peoples* (Clarendon Press, 1988), 1, 6.

<sup>849</sup> *Mabo (No 2)* (1992) 175 CLR 1, 43.

<sup>850</sup> *Ibid* 29.

already fractured beyond coherence and the acceptance of an alternate theory is remedial. Additionally, it is not contemporary notions which are at play but inter-temporal rules of international law of the relevant epoch.

The modern Canadian constitutional framework, as exemplified in the *Powley* decision, shows that fracture is by no means inevitable. Australia, like Canada, is a planted British society, and it too must acknowledge 'the fact that aboriginals lived on the land in distinctive societies, with their own practices, traditions and cultures' and reconcile this 'with the sovereignty of the Crown' in the modern Australian nation-state. The very reason that s 35 is found in the modern Canadian Constitution is because of a fundamental historical imperative, likewise shared by Australia, of sharing a country with pre-existing indigenous peoples. In neglecting that the Australian position is similarly driven, the danger is that the fractures remain untended, and the jurisprudence will continue to limp into the future. Far from fracturing the Australian legal system, it may be that the present state of Australian constitutionalism is under such gathering pressures, perhaps as yet not recognised as being acute, that the only way forward is a reconfiguration of relationship between the Indigenous peoples and the Australian State. Far from fracturing the basic law, it may cement it.

Australia is necessarily a prisoner to its history,<sup>851</sup> yet it should not remain captive to indefensible and implausible legal theory. Assertions that the British assumed the territorial sovereignty over the whole eastern half of New Holland in an instant at some date in early 1788 is a legal falsehood. And it is not a fictional tool which is intended to illuminate, as the law so often does, but a naked falsehood with an intent to obscure the past and,

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<sup>851</sup> Brennan J said that '[a]lthough our law is the prisoner of its history, it is not now bound by decisions of courts in the hierarchy of an Empire then concerned with the development of its colonies'; *Mabo (No 2)* (1992) 175 CLR 1, 29.

possibly, deceive the present. That Great Britain perfected its sovereignty over continental New Holland by other assertions in 1824 and 1829 are falsehoods likewise without legal or factual foundation. This is a *story* of sovereignty, and a wholly unpersuasive one.

That these fictions were doggedly defended with a colonial historiography and/or assertion posing as legal reasoning when the Anglo-Australian legal system remained part of the Imperial system is unexceptional. The law was bound by decisions of courts in the hierarchy of an Empire. That they could be presently defended, now that Australia is no longer bound to Empire, is doubtful.

This thesis has argued for the adoption and application of the acquisition by the Domination mode. This is a legal justification. It purports to adumbrate an incipient legal solution to two fundamental questions. These are firstly, what is the lawful justification for the assumption of territorial sovereignty by the Anglo-Australians and, secondly, how are the property and governmental rights of the Indigenous peoples reconciled with the territorial sovereignty of the Anglo-Australians? It is a vast inter-societal reconciliation of the respective interests of aboriginal and non-aboriginal Australians. The repercussions of the adoption and application of the doctrine are profound and this, it is submitted, cannot be avoided in any real accommodation.

The adoption of an alternate story of sovereignty is neither empty symbolic posturing nor an idle exercise in legal theory. It has enormous consequences. The most basal issue is whether the Australian legal system is to recognise the *fact* of sovereign Indigenous *societies* inhabiting the territories of New Holland and Van Diemen's Land prior to a European presence. It has already recognised the fact that Indigenous peoples inhabited the New Holland territories of New Holland, with territories of

their own, legal systems and with rights and interests in their land and waters. The next step, within the constraints of the modern Australian nation state, must be to accept that these small societies were composed of rights-bearing human beings who exercised a form of sovereignty in and over their respective *countries*. The challenge for Australian jurisprudence is to abandon the orthodox legal narrative that the Indigenous societies of New Holland were so low on the scale of civilisation so as not to possess any 'sovereignty', and to construct a coherent, historically congruent theory which incorporates the quiescent residuum of these Indigenous sovereignties into a 21<sup>st</sup> century jurisprudential framework.

## APPENDICES

### APPENDIX I

#### THE ROYAL PROCLAMATION OF OCTOBER 7, 1763

BY THE KING, A PROCLAMATION, GEORGE R. [...]

And whereas it is just and reasonable, and essential to our Interest, and the security of our Colonies, that the several Nations or Tribes of Indians with whom We are connected, and who live under our protection, shall not be molested or disturbed in the Possession of such parts of Our Dominions and Territories as, not having been ceded to or purchased by Us, are reserved to them or any of them, as their Hunting Grounds - We do therefore, with the Advice of our Privy Council, declare it to be our Royal Will and Pleasure, that no Governor or Commander in Chief in any of our Colonies of Quebec, East Florida or West Florida, do presume, upon my Pretence whatever, to grant Warrants of Survey, or pass any Patents for Lands beyond the Bounds of their respective governments, as described in their Commissions; as also that no Governor or Commander in Chief in any of our other Colonies or Plantations in America do presume for the present, and until our further Pleasure be known, to grant warrants of Survey, or pass Patents for any lands beyond the Heads or Sources of any of the Rivers which fall into the Atlantic Ocean from the West and North West, or upon any Lands whatever, which, not having been ceded to or purchased by Us as aforesaid. are reserved to the said Indians, or any of them.

And We do further declare it is Our Royal Will and Pleasure, for the present as aforesaid, to reserve under our Sovereignty, Protection, and Dominion, for the use of the said Indians, all the Lands and Territories not included within the Limits of Our Said New Governments, or within the Limits of the Territory granted to the Hudson's Bay Company, as also all the Lands and Territories lying to the Westward of the Sources of the Rivers which fall into the Sea from the West and North West as aforesaid:

And We do hereby strictly forbid, on Pain of our Displeasure, all our loving subjects from making any Purchase or Settlements whatever, or taking Possession of any of the Lands above reserved, without our especial leave and Licence for the Purpose first obtained.

And, We do hereby strictly enjoin and require all Persons whatever who have either willfully or inadvertently seated themselves upon any Lands within the Countries above described, or upon any other Lands which, not having been ceded to or purchased by Us, are still reserved to the Indians as aforesaid, forthwith to remove themselves from such Settlements.

And Whereas Great Frauds and Abuses have been committed in purchasing Lands of the Indians, to the Great Prejudice of our Interests, and to the Great Dissatisfaction of the said Indians; In Order, therefore, to prevent such irregularities for the future, and to the end that the Indians may be convinced of our Justice and determined Resolution to remove all reasonable Cause of Discontent, We do, with the advice of



our Privy Council, strictly enjoin and require, that no private person do presume to make any Purchase from the said Indians of any Lands reserved to the said Indians, within those parts of our Colonies where, We have thought proper to allow Settlement; but that, if at any Time any of the said Indians should be inclined to dispose of the said Lands, the same shall be Purchased only for Us, in our Name, at some public Meeting or Assembly of the said Indians, to be held for that Purpose by the Governor or Commander in Chief of our Colony respectively within which they shall lie; and in case they shall lie within the limits of any Proprietary Government, they shall be purchased only for the Use and in the name of such Proprietaries, conformable to such Directions and Instructions as we or they shall think proper to give for that Purpose; And We do, by the Advice of our Privy Council, declare and enjoin, that the Trade with the said Indians shall be free and open to all our Subjects whatever, provided that every Person who may incline to Trade with the said Indians do take out a Licence for carrying on such Trade from the Governor or Commander in Chief in any of our Colonies respectively where such Person shall reside, and also give Security to observe such Regulations as We shall at any Time think fit, by ourselves or by our Commissaries to be appointed for this Purpose, to direct and appoint for the Benefit of the said Trade:

And We do hereby authorize, enjoin, and require the Governors and Commanders in Chief of all our Colonies respectively, as well those under Our immediate Government as those under the Government and Direction of Proprietaries, to grant such Licences without Fee or Reward, taking especial Care to insert therein a Condition, that such Licence shall be void, and the Security forfeited in case the Person to whom the same is granted shall refuse or neglect to observe such Regulations as We shall think proper to prescribe as aforesaid.[...]

Given at our Court at St. James' the 7th Day of October 1763, in the Third Year of our Reign.

GOD SAVE THE KING

## APPENDIX II COOK'S ADDITIONAL SECRET INSTRUCTIONS (1768)

Secret

By the Commissioners for executing the office of Lord High Admiral of Great Britain & c<sup>a</sup>.

Additional Instructions for L<sup>t</sup> James Cook, Appointed to Command His Majesty's Bark the Endeavour

Whereas the making Discoverys of Countries hitherto unknown, and the Attaining a Knowledge of distant Parts which though formerly discover'd have yet been but imperfectly explored, will redound greatly to the Honour of this Nation as a Maritime Power, as well as to the Dignity of the Crown of Great Britain, and may tend greatly to the advancement of the Trade and Navigation thereof; and Whereas there is reason to imagine that a Continent or Land of great extent, may be found to the Southward of the Tract lately made by Captn Wallis in His Majesty's Ship the Dolphin (of which you will herewith receive a Copy) or of the Tract of any former Navigators in Pursuit of the like kind, You are therefore in Pursuance of His Majesty's Pleasure hereby requir'd and directed to put to Sea with the Bark you Command so soon as the Observation of the Transit of the Planet Venus shall be finished and observe the following Instructions. You are to proceed to the Southward in order to make discovery of the Continent abovementioned until' you arrive in the Latitude of 40°, unless you sooner fall in with it. But not having discover'd it or any Evident sign of it in that Run you are to proceed in search of it to the Westward between the Latitude beforementioned and the Latitude of 35° until' you discover it, or fall in with the Eastern side of the Land discover'd by Tasman and now called New Zeland.

If you discover the Continent abovementioned either in your Run to the Southward or to the Westward as above directed, You are to employ yourself diligently in exploring as great an Extent of the Coast as you can carefully observing the true situation thereof both in Latitude and Longitude, the Variation of the Needle; bearings of Head Lands Height direction and Course of the Tides and Currents, Depths and Soundings of the Sea, Shoals, Rocks &ca and also surveying and making Charts, and taking Views of Such Bays, Harbours and Parts of the Coasts as may be useful to Navigation. You are also carefully to observe the Nature of the Soil, and the Products thereof; the Beasts and Fowls that inhabit or frequent it, the Fishes that are to be found in the Rivers or upon the Coast and in what Plenty and in Case you find any Mines, Minerals, or valuable Stones you are to bring home Specimens of each, as also such Specimens of the Seeds of the Trees, Fruits and [first page] and Grains as you may be able to collect, and Transmit them to our Secretary that We may cause proper Examination and Experiments to be made of them. You are likewise to observe the Genius, Temper, Disposition and Number of the Natives, if there be any and endeavour by all proper means to cultivate a Friendship and Alliance with them, making them presents of such Trifles as they may Value inviting them to Traffick, and Shewing

them every kind of Civility and Regard; taking Care however not to suffer yourself to be surprized by them, but to be always upon your guard against any Accidents.

You are also with the Consent of the Natives to take Possession of Convenient Situations in the Country in the Name of the King of Great Britain: Or: if you find the Country uninhabited take Possession for his Majesty by setting up Proper Marks and Incriptions, as first discoverers and possessors.

But if you shall fail of discovering the Continent beforemention'd, you will with upon falling in with New Zealand carefully observe the Latitude and Longitude in which that Land is situated and explore as much of the Coast as the Condition of the Bark, the health of her Crew, and the State of your Provisions will admit of having always great Attention to reserve as much of the latter as will enable you to reach some known Port where you may procure a Sufficiency to carry You to England either round the Cape of Good Hope, or Cape Horn as from Circumstances you may judge the Most Eligible way of returning home.

You will also observe with accuracy the Situation of such Islands as you may discover in the Course of your Voyage that have not hitherto been discover'd by any Europeans and take Possession for His Majesty and make Surveys and Draughts of such of them as may appear to be of Consequence, without Suffering yourself however to be thereby diverted from the Object which you are always to have in View, the Discovery of the Southern Continent so often Mentioned.

But for as much as in an undertaking of this nature several Emergencies may Arise not to be foreseen, and therefore not to be particularly to be provided for by Instruction beforehand, you are in all such Cases to proceed, as, upon advice with your Officers you shall judge most advantageous to the Service on which you are employed.

You are to send by all proper Conveyance to the Secretary of the Royal Society Copys of the Observations you shall have made of the Transit of Venus; and you are at the same time to send to our Secretary for our information accounts of your Proceedings, and Copys of the Surveys and discoverings you shall have made and upon your Arrival in England you are immediately to repair to this [second page] Office in order to lay before us a full account of your Proceedings in the whole Course of your Voyage; taking care before you leave the Vessel to demand from the Officers and Petty Officers the Log Books and Journals they may have Kept, and to seal them up for our inspection and enjoying them, and the whole Crew, not to divulge where they have been until' they shall have Permission so to do.

Given under our hands the 30 of July 1768

E<sup>d</sup> Hawke

Piercy Brett

C Spencer

By Command of their Lordships

[SIGNED]

Ph<sup>p</sup> Stephens

### APPENDIX III OPINIONS OF COUNSEL (1836)

#### CASE FOR OPINION<sup>852</sup>

The accompanying report, No. 1, gives a detailed account of the occupation by Mr. Batman of certain tracts of land situated at the south-western extremity of New Holland, and in the vicinity of a port marked upon the English charts as Port Philip [sic].

The documents, Nos. 2 and 3, are copies of Deeds of Feoffment in favour of Mr. Batman, executed by the Chiefs of the native tribe, living at and contiguous to Port Philip.

The document, No. 4, is copy of a letter addressed by the Members of the Association for forming a settlement upon the tracts of land in question to the Secretary of State for the Colonies, soliciting a confirmation on the part of the Crown of the tracts of land granted by the deeds, Nos. 2 and 3. This letter has not yet been delivered to the Colonial Secretary.

The tracts of country in question are within the limits of Australia, as defined in the maps, of which the line extends from the Australian Bight to the Gulf of Carpentaria, but they are situated some hundred miles from New South Wales, which is only part of Australia.

Port Philip was named after Governor Philip, the first Governor of New South Wales, who formed a temporary settlement there, which was immediately abandoned, and no act of ownership has since been exercised by the Crown.

The natives are, as appears by the Report, an intelligent set of men, and the grants were obtained upon equitable principles, of which the reservation of the tribute is strong evidence, and the purport of the deeds was fully comprehended by them.

The gentlemen composing the Association have possessed themselves of the tracts of country in question, and have flocks and other property there of the value of at least £30,000.

The following documents are added as tending to illustrate the present situation of the colonists, as well as their views and intentions.

No. 5. Copy answer returned through the office of the Colonial Secretary of Van Diemen's Land to Mr. Batman's Report, addressed to the Lieutenant-Governor.

No. 6. Map of the ceded territory.

No. 7. Copy of indenture made by John Batman, Charles Swanson, and others, for defining the objects of the parties who propose to establish a settlement on the ceded territories.

No. 8. Copy Conveyance of the ceded territories made by Mr. Batman, and the relative declaration of trust.

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<sup>852</sup> Extracted from James Bonwick, *Port Phillip Settlement* (Sampson, Low et al 1883), 375-80.

Your opinion is requested.

1. Whether the grants obtained by the Association are valid?
2. Whether the right of soil is or is not vested in the Crown?
3. Whether the Crown can legally oust the Association from their possessions?
4. What line of conduct or stipulations would you advise the Association to pursue and make with the British Government; in particular, ought they offer Government any specific terms, and ought the whole of the documents now laid before you to be at once communicated to Government, or ought such communication to embrace only part of them, and if so what part?

#### OPINION

1 and 2. I am of opinion, that, as against the Crown, the grants obtained by the Association are not valid, and that, as between Great Britain and her own subjects, as well as the subjects of foreign states, the right to the soil is vested in the Crown. It has been a principle adopted by Great Britain as well as by the other European states, in relation to their settlement on the continent of America, that the title which discovery conferred on the Government, by whose authority or by whose subjects the discovery was made, was that of the ultimate dominion in and sovereignty over the soil, even whilst it continued in the possession of the Aborigines. Vattel, B.2. c.18. This principle was reconciled with humanity and justice towards the aborigines, because the dominion was qualified by allowing them to retain, not only the rights of occupancy, but also a restricted right of alienating those parts of the territory which they occupied. It was essential that the power of alienation should be restricted. To have allowed them to sell their lands to the subjects of a foreign state would have been inconsistent with the right of the state, by the title of discovery to exclude all other states from the discovered country. To have allowed them to sell to her own subjects would have been inconsistent with their relation as subjects.

The restriction imposed on their power of alienation consisted in the right of pre-emption of these lands by that state, and in not permitting its own subjects or foreigners to acquire a title by purchase from them without its consent. Therein consists the sovereignty of a dominion or right to the soil asserted and exercised by the European Government against the aborigines, even whilst it continued in their possession. The Commission granted by England to Cabot, the charter to Sir Humphrey Gilbert in 1578, and which was afterwards renewed to Sir Walter Raleigh, the charter to Sir Thomas Gates and others in 1606, and to the Duke of Lennox and others in 1620, the grants to Lord Clarendon in 1663, and to the Duke of York in 1664, recognize the right to take possession on the part of the Crown, and to hold in absolute property, notwithstanding the occupancy of the natives.

The cession of 'all Nova Scotia or Arcadia, with its ancient boundaries,' made by France to Great Britain by the 12th Article of the Treaty of Utrecht in 1703, and the cession of other lands in America, made at the peace of 1763, comprised a great extent of territory which was in the actual occupation of the Indians. Great Britain on the latter occasion surrendered to France all her pretensions to the country west of the

Mississippi, although she was not in the possession of a foot of land in the district thus ceded. But that which Great Britain really surrendered was her sovereignty, or the exclusive right of acquiring and of controlling the acquisition by others of lands in the occupation of the Indians.

On the cession by Spain to France of Florida, and by France to Spain of Louisiana, and on the subsequent retrocession of Louisiana by Spain to France, and the subsequent purchase of it by the United States from France, these powers were transferring and receiving territories, the principal parts of which were occupied by the Indians.

The history of the American colonization furnishes instances of purchases of land from the Native Indians by individuals. The most memorable is the purchase made by William Penn. It has, however, been observed by Chief Justice Marshall, in the case of *Johnson v. M'Intosh*, 8 Wheaton's Rep. 570, that this purchase was not deemed to have added to the strength of his title. Previously to this purchase the lands called Pennsylvania, and which comprised those subsequently purchased by him, had been granted by the Crown to him and his heirs in absolute property, by a charter in 1681, and he had title derived from James II. when Duke of York. He was, in fact, as a proprietary governor, invested with all the rights of the Crown, except those which were specially reserved. Another instance is the purchase from the Narragansetts Indians of the lands which formed the colonies of Rhode Island and Providence. They were made by persons whose religious dissensions had driven them from Massachusetts. The state of England at this period might account for this transaction having escaped the attention of the government. It is evident, however, that the settlers were not with the title acquired by this purchase, for on the restoration of Charles II. they solicited and obtained from the Crown a charter, by which Providence was incorporated with Rhode Island. The grant is made to them 'of our Island called Rhode Island,' and of the soil as well as the powers of Government. The judgement of Lord Hardwicke in the case of *Penn v. Lord Poltimore*, 1 Ves. 454, is not inconsistent with, but in many respects, supports this view of the rights of the Crown and its grantees.

In all the colonies which now constitute the United States, the crown either granted to individuals the right in the soil, although occupied by the Indians, as was the case in most of the proprietary governments, or the right was retained by the Crown, or vested in the Colonial Government. The United States at the termination of the Revolution acquired the right to the soil which had been previously vested in the Crown, for Great Britain by treaty relinquished all claim 'to the proprietary and territorial rights of the United States'. The validity of titles acquired by purchases from the Indians has been on several occasions the subject of decision in the courts of the United States. The judgement of Chief-Justice Marshall in the case of *Johnson v. M'Intosh*, contains the elaborate opinion of the Supreme Court, that the Indian title was subordinate to the absolute ultimate title of the Government, and that the purchase made otherwise than with the authority of the Government was not valid. A similar doctrine was given by the same court in the case of *Worcester v. the State of Georgia*, in January 1832. 3 Kent's Com. 382, and the case referred to in the note, p.385

3. I am of the opinion that the Crown can legally oust the Association from their possession.

The enterprise manifested by the expedition, -the respectability of the parties engaged in it,- and the equitable and judicious manner in which they conducted the intercourse with the native tribes, and made their purchase, afford a strong ground for anticipating that the Crown would, in conformity with its practice on other occasions, on a proper application, give its sanction to, and confirm the purchase which the Association has made. Lord Hardwicke, in the case which has been referred to expressed a very strong opinion, that the possession of persons making these settlements ought to receive the fullest protection.

There is not ground for considering that the lands comprised in this purchase are affected by the act erecting South Australia into a Province, 4 and 5 W.IV., c. 95. They are clearly not within the boundaries assigned to the territory which is the subject of the act, and therefore the Crown is not precluded from confirming the purchase.

4. I am of the opinion that the Association should make an application to the Government for a confirmation of the above purchase, and accompany it with a full communication, not only of all the documents now laid before me, but of every other circumstance connected with the acquisition.

(Signed) WILLIAM BURGE

Linc. Inn, 16th Jan. 1836.

We have perused the extremely able and elaborate opinion of Mr. Burge, and entirely concur in the conclusions at which he has arrived upon each of the queries submitted to us.

(Signed) THO. PEMBERTON W.W. FOLLETT Jan. 21, 1836.

#### OPINION BY DR. LUSHINGTON

1. I am of the opinion that the grants obtained by the Association are not valid without the consent of the Crown.

2 and 3. I do not think that the right to this territory is at present vested in the Crown; but I am of opinion that the Crown might oust the Association: for I deem it competent to the Crown to prevent such settlements being made by British subjects if it should think fit.

4. I think the most advisable course the Association can pursue is to give the Crown the fullest information on all points. I think it unwise and unsafe to hold back any document or information whatever. Indeed, the so doing, if in an important particular, might invalidate the security the Association might derive from the grants or acts of the Crown.

I further think that it would not be expedient, in the first instance, to propose specific terms. The best course would be, after giving full information, to request the countenance, sanction, and aid of the Crown; of course afterwards the security of the lands by confirmation or grant from the Crown must be obtained; under what conditions or restrictions must be matter for subsequent negotiation with Government.

This present plan is, truly speaking, the planting of a new colony, and nothing can safely or effectively done but by the authority of the Crown.

(Signed) STEPHEN LUSHINGTON

Great George Street,

Jan. 18, 1836.<sup>853</sup>

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<sup>853</sup> Dr Lushington was a Member of Parliament, Chairman of the British East India Company and was elevated to the Judicial Committee of the Privy Council in 1838.



## APPENDIX IV PROCLAMATION OF GOVERNOR BOURKE (1835)

### PROCLAMATION

By His Excellency Major-General Sir Richard Bourke, K.C.B., Commanding His Majesty's Forces, Captain-General and Governor-in-Chief of the Territory of New South Wales and its Dependencies, and Vice-Admiral of the same, &c. &c. &c.

Whereas, it has been represented to me, that divers of His Majesty's subjects have taken possession of vacant Lands of the Crown, within the limits of this colony, under the pretence of a treaty, bargain, or contract, for the purchase thereof, with the Aboriginal natives; Now therefore, I the Governor, in virtue and in exercise of the power and authority in me vested, do hereby proclaim and notify to all His Majesty's subjects and others whom it may concern, that every such treaty, bargain, and contract with the Aboriginal Natives as aforesaid, for the possession, title, or claim to any Lands lying and being within the limits of the Government of the Colony of New South Wales, as the same are laid down and defined by His Majesty's Commission; that is to say, extending from the Northern Cape or extremity of the coast called Cape York, in the latitude of ten degrees thirty-seven minutes south, to the southern extremity of the said Territory of New South Wales, or Wilson's Promontory, in the latitude of thirty-nine degrees twelve minutes south, and embracing all the country inland to the westward, as far as the one hundred and twenty-ninth degree of east longitude, reckoning from the meridian of Greenwich, including the islands adjacent in the Pacific Ocean within the latitude aforesaid, and including also Norfolk Island, is void and of no effect against the rights of the Crown; and that all Persons who shall be found in possession of any such Lands as aforesaid, without the license or authority of His Majesty's Government, for such purpose, first had and obtained, will be considered trespassers, and liable to be dealt with in like manner as other intruders upon the vacant lands of the Crown within the said Colony.

Given under the hand and seal, at Government House, Sydney, this twenty-sixth day of August, one thousand eight hundred and thirty-five.

(Signed) Richard Bourke.

By His Excellency's Command,

(Signed) Alexander McLeay.

GOD SAVE THE KING!

## APPENDIX V THE BARUNGA STATEMENT (1988)

[Part A. Assertion]

We, the indigenous owners and occupiers of Australia, call on the Australian Government and people to recognise our rights:

- To self-determination and self-management, including the freedom to pursue our own economic, social, religious and cultural development;
- To permanent control and enjoyment of our ancestral lands;
- To compensation for the loss of use of our lands, there having been no extinction of original title;
- To protection of and control of access to our sacred sites, sacred objects, artefacts, designs, knowledge and works of art;
- To the return of the remains of our ancestors for burial in accordance with our traditions;
- To respect for and promotion of Aboriginal identity, including the cultural, linguistic, religious and historical aspects, and including the right to be educated in our own languages and in our culture and history;
- In accordance with the Universal Declaration of Human Rights, the International Convention on Civil and Political Rights, and the International Convention on the Elimination of All Forms of Racial Discrimination, rights to life, liberty, security of person, food, clothing, housing, medical care, education and employment opportunities, necessary social services and other basic rights.

We call on the Commonwealth to pass laws providing:

- A national elected Aboriginal and Islander organisation to oversee Aboriginal and Islander affairs;
- A national system of land rights;
- A police and justice system which recognises our customary laws and frees us from discrimination and any activity which may threaten our identity or security, interfere with our freedom of expression or association, or otherwise prevent our full enjoyment and exercise of universally recognised human rights and fundamental freedoms.

We call on the Australian Government to support Aborigines in the development of an international declaration of principles for indigenous rights, leading to an international covenant.

And we call on the Commonwealth Parliament to negotiate with us a Treaty recognising our prior ownership, continued occupation and sovereignty and affirming our human rights and freedoms.

[Part B. Response]

1. The Government affirms that it is committed to work for a negotiated Treaty with Aboriginal people.

2. The Government sees the next step as Aborigines deciding what they believe should be in the Treaty.
3. The Government will provide the necessary support for aboriginal people to carry out their own consultations: this could include the formation of a committee of seven senior Aborigines to oversee the process and to call an Australia-wide meeting or Convention.
4. When the Aborigines present their proposals the Government stands ready to negotiate about them.
5. The Government hopes that these negotiations can commence before the end of 1988 and will lead to an agreed Treaty in the life of this Parliament.

12 June 1988

## APPENDIX VI BRENNAN J'S NINE PRINCIPLES (1992)

After this lengthy examination of the problem, it is desirable to state in summary form what I hold to be the common law of Australia with reference to land titles:

1. The Crown's acquisition of sovereignty over the several parts of Australia cannot be challenged in an Australian municipal court.
2. On acquisition of sovereignty over a particular part of Australia, the Crown acquired a radical title to the land in that part.
3. Native title to land survived the Crown's acquisition of sovereignty and radical title. The rights and privileges conferred by native title were unaffected by the Crown's acquisition of radical title but the acquisition of sovereignty exposed native title to extinguishment by a valid exercise of sovereign power inconsistent with the continued right to enjoy native title.
4. Where the Crown has validly alienated land by granting an interest that is wholly or partially inconsistent with a continuing right to enjoy native title, native title is extinguished to the extent of the inconsistency. Thus native title has been extinguished by grants of estates of freehold or of leases but not necessarily by the grant of lesser interests (e.g., authorities to prospect for minerals).
5. Where the Crown has validly and effectively appropriated land to itself and the appropriation is wholly or partially inconsistent with a continuing right to enjoy native title, native title is extinguished to the extent of the inconsistency. Thus native title has been extinguished to parcels of the waste lands of the Crown that have been validly appropriated for use (whether by dedication, setting aside, reservation or other valid means) and used for roads, railways, post offices and other permanent public works which preclude the continuing concurrent enjoyment of native title. Native title continues where the waste lands of the Crown have not been so appropriated or used or where the appropriation and use is consistent with the continuing concurrent enjoyment of native title over the land (e.g., land set aside as a national park).
6. Native title to particular land (whether classified by the common law as proprietary, usufructuary or otherwise), its incidents and the persons entitled thereto are ascertained according to the laws and customs of the indigenous people who, by those laws and customs, have a connection with the land. It is immaterial that the laws and customs have undergone

some change since the Crown acquired sovereignty provided the general nature of the connection between the indigenous people and the land remains. Membership of the indigenous people depends on biological descent from the indigenous people and on mutual recognition of a particular person's membership by that person and by the elders or other persons enjoying traditional authority among those people.

7. Native title to an area of land which a clan or group is entitled to enjoy under the laws and customs of an indigenous people is extinguished if the clan or group, by ceasing to acknowledge those laws, and (so far as practicable) observe those customs, loses its connection with the land or on the death of the last of the members of the group or clan.

8. Native title over any parcel of land can be surrendered to the Crown voluntarily by all those clans or groups who, by the traditional laws and customs of the indigenous people, have a relevant connection with the land but the rights and privileges conferred by native title are otherwise inalienable to persons who are not members of the indigenous people to whom alienation is permitted by the traditional laws and customs.

9. If native title to any parcel of the waste lands of the Crown is extinguished, the Crown becomes the absolute beneficial owner.<sup>854</sup>

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<sup>854</sup> *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 69-70.

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