

Chapter Eleven

Old Colonisations and Modern Discontents: Legacies and Concerns

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The delineation and filling of space is central to European culture. Boundaries of various kinds are raised, not only to exclude but also to include. Title to a housing block, for example, cannot be given until the block is surveyed. A farmer knows which are his crops according to where his farm begins and ends. Law cannot function without the area of its jurisdiction being defined. A nation does not exist without boundaries that differentiate it from its neighbours.

Once they have defined/created a space, Europeans proceed to fill it with the evidences of their culture. This process involves, variously, acts of consecration; the implanting of the archetypes of (European) cosmos – houses, roads, farms, parks, gardens, cities; the development of systems of administration; the elaboration of bodies of law; and the evocation of this now humanized world in literature and art.

Lacking any of the accustomed signs of human transformation, Europeans found New South Wales in 1770 or 1788 to be undifferentiated in time and space, exhibiting only those basic geographic forms familiar to their imagination – harbours and bays, mountains, valleys, water courses, plains, and spaces without trees. While these constituted the raw materials from which cosmos might be wrought, humanized reality was latent only. New South Wales was effectively a 'Virgin Mould, undisturbed since the Creation'; or, as Lieutenant James Cook put it, with the precepts of the Natural Law writers in mind, 'We are to Consider that we see this Country in the pure State of Nature, the industry of Man has had nothing to do with any part of it'; so that the one thousand persons who landed at Sydney Cove as January turned to February 1788 faced what was for them a primal landscape. They were first colonists, and the world was all before them.

The colonists' initial task, therefore, was to define the space to be transformed. Phillip began to do this on the morning of 26 January 1788, when he landed a party of convicts and marines on the shore of Sydney Cove, and had them fell some trees. Then, hoisting a flag in the middle of the space, he took formal possession of the site, with his officers toasting the health of the sovereign and the success of the venture. The marines fired a 'feu de joie', all those on shore gave three cheers, which were returned by the crew of the Supply. Phillip repeated this ceremony in the evening, when the whole convoy had arrived.

Two weeks later, led by the band and with colours flying, the marines marched into what was now their parade ground and encircled the seated convicts; Phillip stood bareheaded in the centre, in the company of his principal officers; and all heard the Deputy Judge-Advocate formally establish the colony and Phillip's governorship of it, by reading his commission and the royal Letters-Patent establishing the law courts. The marines discharged their muskets at intervals, and the band played 'God Save the King'. Phillip concluded this initial process of cosmosising ritual on 4 June, on the occasion of the King's birthday, when he and his officers toasted the County of Cumberland, the limits of which he set as Broken Bay to the north, Botany Bay to the south, and the Lansdowne Hills (Blue Mountains) to the west.

With the colony's space delineated, the colonists set to implanting their culture's archetypes in it. In the first days and weeks, they felled trees, blew up stumps, cleared stones, fenced, erected

tents, turned ground, planted vegetables, planted trees and vines, built a simple wharf, landed stores, built storehouses, barracks, a hospital, a governor's house. Inevitably, the business was at first disordered, but, as one person present observed, the confusion will not be wondered at, when it is considered that every man stepped from the boat literally into a wood. Parties of people were every where heard and seen variously employed; some in clearing ground for the different encampments; others in pitching tents, or in bringing up such stores as were more immediately wanted; and the spot which had so lately been the abode of silence and tranquillity was now changed to that of noise, clamour, and confusion.

And sure enough, order did 'gradually' prevail. After three months, the camp covered just over one acre. And while its buildings were crude ones, these and the first plantings did give the landscape an elementary European form, create a tentative European presence. In the next weeks, months and years, the colonists continued this process, erecting substantial buildings, such as the first Government House; extending the settlement to Parramatta, then further over the Cumberland Plain; making farms, and forming tracks to link them to the townships; raising crops, raising herds and flocks; forming a society, whose children knew no other 'home'. When the Malaspina expedition called at Sydney in March 1793, its officers found that, approaching Parramatta,

the land changed in appearance, the view was delightful because of the number of cultivated plots. It delights the spirit to see the happy change in conduct of some men who, if they had been enemies of society, were today useful to their country by their application to work and because of the constant efforts by which they transformed a rough and uncultivated country into a pleasant garden. It had been in existence for hardly five years and yet had the appearance of an old establishment.

In the decades following, the colonists continued their humanising process, which now went forward exponentially. They built a city at Sydney, with streets, shops, imposing buildings, mansions; they built a village at Parramatta. When they had occupied all of the useable areas of the Cumberland Plain, they declared nineteen counties, and spread over them. Some, more desperate or more adventurous than their fellows, took their now-burgeoning flocks and 'squatted' beyond the limits of location. The parent society gave them instruments of administration and governance, and allowed them to develop local regulations.

By the 1830s, the transformation of New South Wales was such as to engender awe. That Sydney should after so short a time be 'a large and well built town, abounding with all the expensive luxuries of civilized life', Louisa Meredith thought, could not fail to 'strike a thinking mind with wonder and admiration. Behind Sydney were the gardens and orchards of the Cumberland Plain. John Dunmore Lang thought that the fruit groves could 'scarcely fail to remind the scholar of the gardens of the Hesperides'. Throughout the Nineteen Counties, and beyond the Great Divide, were regions which, in William Charles Wentworth's opinion, were clearly 'fit to be inhabited by civilized man' – a seemingly 'endless variety of hill and dale, clothed in the most luxuriant herbage, and covered with bleating flocks and lowing herds', crossed by roads, and studded with farms and houses. And beyond the limits of location were other, and vaster, regions awaiting transformation. In 'Australia Felix', Thomas Mitchell had a distinct sense of cosmic purpose:

As I stood, the first European intruder on the sublime solitude of these verdant plains, as yet untouched by flocks or herds, I felt conscious of being the harbinger of mighty changes; and that our steps would soon be followed by the men and the animals for which it seemed to have been prepared.

Clearly, the process of rendering European cosmos out of primal chaos in New South Wales could not now be stopped; and by this time, of course, that process was being re-iterated in other parts of the continent.

Of such were the sociology and renderings of reality of Europeans then. Knowledge gained in the past two hundred years, and attendant changes in consciousness, have given us other understandings. We know, for example, that the bush and grasslands about Sydney and the plains of the Western District were not silent of human voices. We know that, in places, the Aboriginal inhabitants of Australia were numerous and lived in permanent or semi-permanent villages; that they did, by 'firestick farming' and other means, to some extent manage some of the land's resources; that they did possess bodies of customary law and religious beliefs; and that they conceived of time, space and place in ways fundamentally different from European ones.

We also know that, variously through dispossession, murder, disease and cultural atrophy, there was a rapid, and massive, depopulation of these indigenous inhabitants from early in the nineteenth into the twentieth century. Awareness of these things, and the guilt they give rise to, have combined to create a very different sense of colonisation from that the early colonists themselves had, have caused some to conceive of the British (not to mention all Europeans) in the way of Swift's Lemuel Gulliver, who at the end of his Travels (1726) explained why he had not taken possession in the King's name of his discoveries:

To say the Truth, I had conceived a few Scruples with relation to the distributive Justice of Princes upon those Occasions. For Instance, A Crew of Pyrates are driven by a Storm they know not whither; at length a Boy discovers Land from the Top-mast; they go on Shore to rob and plunder; they see an harmless People, are entertained with Kindness, they give the Country a new Name, they take formal Possession of it for the King, they set up a rotten Plank or a Stone for a Memorial, they murder two or three Dozen of the Natives, bring away a Couple more by Force for a Sample, return home, and get their Pardon. Here commences a new Dominion acquired with a Title by Divine Right. Ships are sent with the first Opportunity; the Natives driven out or destroyed, their Princes tortured to discover their Gold; a free Licence given to all Acts of Inhumanity and Lust; the Earth reeking with the Blood of its Inhabitants: And this execrable Crew of Butchers employed in so pious an Expedition, is a modern Colony sent to convert and civilise an idolatrous and barbarous People.

As I wish to explain, the historical reality – or, at least, that of the later eighteenth century – is rather different from this now re-iterated view. And I wish to explain this, not only for history's sake, but because that history remains relevant to our nation's present quandaries where land rights, native custom, and the social rights of minority groups are concerned.

In 1493, believing that he held temporal lordship over islands and might therefore grant them to others, Pope Alexander VI divided the new oceanic world between Spain and Portugal, a division the Iberian nations formalised the next year by the Treaty of Tordesillas. Since it comprehensively excluded them, such a basis of title to overseas empire naturally displeased the northern European nations, whose spokesmen argued instead for title as a consequence of negotiation or purchase, or discovery and occupation. In the seventeenth century Grotius and Pufendorf, and in the eighteenth, Wolff and Vattel were particularly significant in the elaboration of an alternative basis of title to overseas lands.

By the mid-eighteenth century, the theoretical basis of a new convention of acquiring empire had emerged. If a European state ('a Christian Prince') had already established an effective possession of a region, another might acquire title to it only by formal cession (which might or might not involve outright purchase). If the region was not already possessed by a rival, then a state might acquire it in one of three ways, viz.:

– by persuading the indigenous inhabitants to submit themselves to its overlordship;

- by purchasing from those inhabitants the right to settle part or parts of it;
- by unilateral possession, on the basis of first discovery and effective occupation.

Two of these rubrics conceded the indigenous a right of possession, the third did not. Europeans determined the presence or absence of this right according to an amalgam of perceptions arising from the work of the writers on the law of nature and nations. From the author of the book of Genesis, from Grotius, Pufendorf and Locke, for example, they understood that after the Fall God gave the World 'to Mankind in common', 'to the use of the Industrious and Rational', and man first moved about it in an absolute state of nature, in which his only inherent individual property was the labour of his body. Though strictly limited in itself, this property gave man the means to acquire more. When he used it to gather the spontaneous produce of the earth, for example, the produce became his, because he mixed his labour with it. When he removed himself from the state of nature, locating himself in one place and enclosing and cultivating the earth, then his labour gave him further property:

As much Land as a Man Tills, Plants, Improves, Cultivates, and can use the Product of, so much is his Property. He by his Labour does, as it were, inclose it from the Common. Nor will it invalidate his right to say, Every body else has an equal Title to it; and therefore he cannot appropriate, he cannot inclose, without the Consent of all his Fellow-Commoners, all Mankind. God, when he gave the World in common to all Mankind, commanded Man also to labour, and the penury of his Condition required it of him. God and his Reason commanded him to subdue the earth, i.e. improve it for the benefit of Life, and therein lay out something upon it that was his own, his labour. He that in Obedience to this Command of God, subdued, tilled and sowed any part of it, thereby annexed to it something that was his Property, which another had no Title to, nor could without injury take from him.

If then, the inhabitants of a region over which a European state was interested in acquiring sovereignty had advanced beyond the state of nature and mixed their labour with the land so as to have enclosed and cultivated it, made roads and raised houses and towns; if they had formed themselves into a society exhibiting the use of reason in systems of customs, religion, and commerce; if they had developed a code of laws, and a government to administer this code; that is, if they had formed themselves into a polity, then they had established sovereignty over the region, and the would-be possessor had either to persuade them to accept overlordship, or to lease a portion.

However, if the indigenes had advanced beyond the state of nature only so far as to have developed language and the community of the family, but no further; if they had not yet mixed their labour with the earth in any permanent way; or if the region were literally uninhabited, then Europeans considered it to be terra nullius (ie, belonging to no one), to which they might gain permanent title by first discovery and effective occupation.

Europeans signified first discovery of a terra nullius by leaving proof of their presence (for example, stone crosses, cairns, inscriptions on trees and poles, gifts to inhabitants). They established a preliminary right to possess it if, carrying a commission from their sovereign authorising them to do so, they claimed it formally on his behalf, and accompanied their proclamation with symbolic acts of sovereignty, such as the raising of their flag and the firing of salutes. To render a preliminary right real, a state had to occupy the region effectively within a reasonable time. This it did when it either transferred a portion of its population, together with its customs and laws, to the region in an extensive colonisation, or when as a minimum, it settled one spot in the region, and sent representatives on regular patrols about the whole.

This basis of title to overseas territory accorded far better than the earlier one with the needs of the northern European nations wishing to enjoy the fruits of the New World and the East; and Britain, France, and Holland both adopted it eagerly, and progressively forced Spain to do so.

We see this second basis being utilized in Africa and Asia, North America and in the Pacific Ocean from the mid-eighteenth into the mid-nineteenth century. Between 1763 and 1774, for example, Britain concluded perhaps a dozen treaties for trade and navigation rights, for alliance, and sometimes for the use, cession, or purchase of land for forts and factories with the Barbary States and a number of Asian principalities.

In North America when, early in the eighteenth century, the British began to expand their colonies on the New England seaboard, they encountered the powerful Iroquois League of the Six Nations, with which they negotiated for land and trading rights and, in times of conflict with the French, for alliances. When the Seven Years War left Britain dominant over her European rivals, she faced powerful opposition from the Indian confederations, so powerful in fact that by the Proclamation of (October) 1763, Britain conceded the right of 'the several nations or tribes of Indians with whom we are connected' to possess vast areas of land to the west of the Allegheny Mountains; and also that her nationals had no rights to settle in these areas without the Crown first purchasing land by consent of these Indians. Between 1763 and 1768 British officials negotiated a series of treaties (five in 1764 alone) with the League and with its counterparts south of the Ohio River, which were intended formally to differentiate respective domains and jurisdictions. This 'Treaty System' soon fell apart, as treaty provisions were turned into what became essentially a system for the transfer of title to lands, a process which accelerated after the United States gained their independence, and also into the nineteenth century, as the Americans spread westwards .

The 1763 Proclamation also recognized the area of the Great Lakes as Indian country; and in the 1780s British officials negotiated with the Algonquian tribes for the purchase (by once-only payment of trade goods) of land for refugee American Loyalists. From 1818, the government of Upper Canada changed the mode of purchase, by offering (in the manner of the French before them) annual rents or annuities in perpetuity. Between 1871-7, much of prairie Canada was ceded by the Metis and Indian peoples to the infant Dominion, in return for reserves, annuities, and the promise of security from hunger and disease. In the 1870s and 1880s, other arrangements were formalised in an Indian Act, designed essentially to 'civilise savages', which, even though some of its harsher provisions were amended in the 1920s and 1950s, has left bitter legacies.

By the early 1980s, the situation concerning Canada's indigenous peoples – Indians, Metis, Inuits – was most confused. There were approximately 180,000 people whose forebears had concluded treaties with the Dominion; and about 120,000 who, while not descended from treaty-makers, nonetheless had the 'status' of Indian. There were also some 700,000 native people who had neither 'treaty' nor 'status' identification. In 1982, impelled by a vision of 'an open society all of whose citizens would be protected by an entrenched bill of rights guaranteeing, among other things, their linguistic rights', Trudeau enacted the Charter of Rights. While its provisions fell short of his ambition for it, this did guarantee (among other things) civil and linguistic rights to women, native peoples, and the inhabitants of Quebec. In the 1970s and 1980s, Canadian courts have issued a number of decisions affirming that the title of indigenous peoples to land was not extinguished by treaty.

In 1835 James Busby, the British Resident in the North Island of New Zealand, became concerned that the French might annex the islands. He therefore induced thirty-four chiefs to sign a Declaration of Independence, and to petition William IV for protection, which request the Colonial Office acceded to. In 1839, as a prelude to obtaining sovereignty over the islands, Normanby accepted that Britain had thereby acknowledged New Zealand as a 'sovereign and independent state', and that the Crown would only claim sovereignty with 'the free and intelligent consent of the Natives, expressed according to their established usages'. From the British point of view, the Treaty of Waitangi (February 1840) involved the Maori chiefs

surrendering sovereignty to the British Crown, in return for guarantees of possession (including of land and mana). On the other hand, the British thereby also required that all future land sales by Maori be directly to the British Crown. Partly because of different connotations in the respective versions of the treaty, Maori developed different understandings of what it involved; and these differences have been significant in recent decisions to return title of certain lands.

In August 1768 – like Byron, Wallis, and Carteret before him – Cook sailed for the Pacific Ocean instructed

with the Consent of the Natives to take possession of Convenient Situations in the [Southern Continent] 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 Inscriptions, as first discoverers and possessors.

When he came to the eastern coast of Australia, Cook duly took possession of all of New South Wales in the name of George III – but without seeking the consent of the Aborigines. And in 1786-8, the Administration of William Pitt the Younger made effective this preliminary claim, by despatching the convict colony under Governor Phillip, without any instruction to him to seek the consent of the indigenous inhabitants.

Some people have lately seen in these different stances a curious aberration. To do so, however, is to make the mistake of supposing that the British perceived all indigenous peoples in the same way – which they manifestly did not. In Tunis, Morocco, Algiers and in India, for example, even as they understood that the societies differed greatly from their own, the British 'saw' peoples with developed urban centres and extensive productive hinterlands, peoples with kings and princes, administrations, legal systems, armies and navies, religions, literature and art. In North America, while the indigenous cultures were certainly less 'developed', the British also 'saw' material and social structures that had meaning for them – villages and agriculture, individual and group ownership, chiefs and priests, political alliances, tributary arrangements. In Polynesia, too, the British 'saw' these things. At Tahiti, Cook and his colleagues found villages, domesticated animals, gardens, temples, chiefs and priests and social hierarchies, armed forces, and a desire to trade. In the North Island of New Zealand, and at Princess Charlotte Sound at the head of the South Island, essentially the same situation obtained – fortified villages, gardens, war canoes, leaders, trade. And even though they did not possess metal, the Polynesians still had an intricate material culture, as evinced by their ceremonial cloaks and staffs, their artefacts, their weapons of war.

How differently the British 'saw' the people on the eastern coastline of Australia. The Aborigines whom Cook and Banks encountered there were few in number. They never saw more than '30 or 40 together', Banks said; and he therefore surmised that the vast interior districts were likely uninhabited. This sparse people enjoyed few material comforts. They had no clothes, not using even the skins of animals either to protect themselves from the elements, or to guard their modesty. Even the women went naked.

The Europeans found the Aborigines' houses to be of the most insubstantial construction. In some areas, Banks recorded,

a house was ... nothing but a hollow shelter about 3 or 4 feet deep built like the former and like them covered with bark; one side of this was intirely open which was always that which was sheltered from the course of the prevailing wind, and opposite to this door was always a heap of ashes, the remains of a fire probably more necessary to defend them from Mosquetos than cold.

To the Europeans, the Aborigines seemed

never [to] make any stay in [their houses] but wandering like the Arabs from place to place set them up whenever they meet with one where sufficient supplies of food are to be met with, and as soon as these are exhausted remove to another leaving the houses behind, which are framd with

less art or rather less industry than any habitations of human beings probably that the world can shew.

The Aborigines had not enclosed the country to depasture herds and flocks, nor had they wrought an agriculture upon it. And just as they did not labour in the sweat of their brow for their food, neither did they manufacture to any degree. Their few utensils, weapons, and ornaments were crude in the extreme – mere pieces of wood, stone, shell, bark, bone, or hair, fashioned in rudimentary ways to meet only basic needs. Having no items of trade (whether of growth or manufacture), the Aborigines also showed very little interest in those which the Europeans proffered. The Botany Bay people did not touch the 'Cloth, Looking glasses, Combs, Beeds Nails &ca' that Cook left for them. The Endeavour River people showed a similar disdain. As Banks later said, 'there was nothing we could offer that they would take except provisions and those we wanted ourselves'

And the Aborigines had scarcely begun to develop social, political, or religious organisations as the Europeans understood these things. True, they had advanced so far from the absolute state of nature as to use language (though neither Cook nor Banks nor Tupaia, by this time skilled at improvising in such situations, could at first understand 'one word they said'); and, true, they discernibly lived in families. Of larger structures, however, the voyagers found no signs. They noticed no social hierarchies, nor political institutions. As Banks later said, he and Cook had no information about the 'Government under which [the Aborigines] lived'. Nor had they found signs of organised religion. To them and to their contemporaries, the implication was clear – if they did so at all, the Aborigines possessed only rudimentary social structures.

Cook and Banks's reports, then, indicated that the Aborigines had attained the 'first stage' only of civilisation, that of

a small society whose members live by hunting and fishing, and know only how to make rather crude weapons and house–hold utensils and to build or dig for themselves a place in which to live, [who possess] a language with which to communicate their needs, and a small number of moral ideas which serve as common laws of conduct; [and who live] in families, [and conform] to general customs which take the place of laws.

In not having reached the stages of domesticating animals or of maintaining an agriculture, especially in not offering a political entity capable of negotiating on behalf of the whole society, in European eyes the Aborigines had not subdued and cultivated the Earth so as to obtain 'dominion' over it. In Locke's description, New South Wales was one of those great Tracts of Ground ... which (the Inhabitants thereof not having joyned with the rest of Mankind, in the consent of the Use of their common Money) lie waste, and are more than the People, who dwell on it, do, or can make use of, and so still lie in common.

In Cook's words, it was 'in the pure state of Nature, the Industry of Man [having] had nothing to do with any part of it'.

To Cook (and to Banks and their contemporaries), then, eastern New Holland was terra nullius. Was he its first European discoverer? As he himself knew clearly, he certainly was not of the northern, western, and southern coasts, which Dutch navigators had run along in the seventeenth century. But contemporary maps and charts carried no valid representation of the eastern coast; and as Cook progressed along it, he found no evidence (no cairns, plaques, weapons, iron keys or silver spoons) of any previous European presence.

As the first European discoverer, then, and carrying a regular commission to do so, Cook might claim this terra nullius for his sovereign. And this he did particularly and generally. While at Botany Bay, he 'caused the English colours to be display'd ashore every day and an inscription to be cut out upon one of the trees near the watering place seting forth the Ships name, date &ca'.

He repeated these gestures at intervals along the coast. Then, on 22 August 1770, when at the entrance of Torres Strait, rightly thinking that he might therefore land no more upon this 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, 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 us, and Notwithstanding 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 possession of the whole Eastern Coast from the above Latitude down to this place by the name of New South Wales, together with all the Bays, Harbours Rivers and Islands situate upon the said coast, after which we fired three Volleys of small Arms which were Answerd by the like number from the Ship.

When the Pitt administration despatched Phillip, a handful of civil officers, some two hundred marines and 750 convicts to form a settlement at Botany Bay, 'or some other place contiguous thereto' and this party did so at Port Jackson, the ministers followed up Cook's first discovery and formal proclamation with effective occupation within a reasonable time. According to the decorum then emerging between European states, they thereby confirmed Britain's right to possess the eastern third of Australia.

So as James Stephen, the legal adviser to the Colonial Office afterwards observed, the British acquired New South Wales 'neither by conquest nor cession, but by the mere occupation of a desert or uninhabited land'. As David Collins, the colony's first legal officer, effectively elaborated this gloss,

we were confined along the coast of this continent to such parts of it solely as were navigated by Captain Cook, without infringing on what might be claimed by other nations from the right of discovery. Of that right, however, no other nation has chosen to avail itself. Whether the western coast is unpromising in its appearance, or whether the want of a return proportioned to the expense which the mother-country must sustain in supporting a settlement formed nearly at the farthest part of the globe, may have deterred them, is not known, but Great Britain alone has followed up the discoveries she had made in this country, by at once establishing in it a regular colony and civil government.

In their occupation of New South Wales, the British followed carefully the convention of acquiring overseas territory which had emerged over the previous two hundred years, the general adoption of which they had done most to foster. This convention did provide for negotiation with an indigenous population for access to land; and, had Pitt and his advisers known that the Aborigines were not truly nomadic, that they had indeed mixed their labour with the land, and that they lived within a complex social, political, and religious framework – that is, had the British not seen New South Wales to be terra nullius, then I believe they would have negotiated for the right to settle the Botany Bay area.

Cook and Banks were percipient, tolerant of racial and cultural difference, and empathetic to a remarkable degree, far beyond the generality of their contemporaries. Pitt, Dundas, Mulgrave, W.W. Grenville, and Nepean made strenuous efforts to give their consciousness of the integrity of non-European cultures legislative and practical effect. Phillip, too, was moved by the same ideals as those who despatched him, and in the face of grave difficulty he made great efforts to have European and Aborigines co-exist peacefully about Port Jackson. If any group of Europeans of this time might have adjusted their perceptions and modes of procedure so as to accommodate the fact of the Aborigines, it was this one, but the Aborigines were simply too un-European for the British to comprehend them truly. Rather than evil intent or callous disregard, however, this failure shows most the limitations that even a diverse culture can place on the most flexible of its members.

Inevitably, historical circumstances leave legacies for the future. Now, when knowledge accumulated over two hundred years has given the Australian descendants of the first European colonists a much more comprehensive understanding of Aboriginal culture, we as a nation are perplexed to remedy the facts of dispossession and disadvantage. How is this best to be done? There is the legal way, of granting Aborigines title to (tribal) lands. This way has been followed by governments of various persuasions and with varying degrees of enthusiasm over the past two decades, and has resulted in Aborigines acquiring large areas of land. Recently, in the Mabo case, the High Court of Australia has restored title to the Murray Islands in Torres Strait to the Meriam people.

As I have read only newspaper reports, not the judgment itself, I can offer only a very qualified view – and one qualified also by the fact that generalisations about Aboriginal culture are often of limited usefulness. However, given that the culture of the Meriam people has strong Melanesian elements, including the habit of gardening, with the concomitant one of the inheritance of family plots, I doubt that this decision need in itself have general applicability. Again, it will take time for the implications of the Full Bench's decision to banish the doctrine of terra nullius from Australian common law; but if to future claims the justices apply the same criteria as in the Mabo case, I don't see that the results should be revolutionary.

On the other hand, I don't think we should argue against reasonable Aboriginal land rights where historical continuities are clear. Aborigines need land to sustain their culture(s); without land, they are as sailors cast adrift without rudder or compass. The loss of cultural identity, the loss of self-identity as a consequence of the loss of culture, may well create greater problems for society as a whole than does the granting of title.

In many ways, Canadian circumstances provide the most instructive parallels with Australian ones. In Canada, First Nations people constitute some 3% of the population, yet the social problems arising variously from their poverty, ill-health, lack of education and dislocation from family and culture in alien cities bulk very much larger. These problems have led to high youth suicide rates, and high crime rates, with native peoples constituting up to 43% of prison populations. In recent interviews, 'prisoner after prisoner said that what was needed was not more courses in prison about welding or mechanics, but programs to help them find a lost sense of themselves and their native identity'. They asked for:

- 'more support and interest from the chiefs and elders of their communities and not [to] be left to "rot in a cell"'.
– 'youth retreats with elders to help native youths when they first begin to get into trouble'.
– 'more native police, and natives on the parole board'.
– 'more halfway houses for native offenders who are released
– not only in the cities but also in northern communities'.

The parallels in Australia are clear.

There have also been proposals for political rectifications of past injustices, in particular that a 'treaty' or 'instrument of reconciliation' be concluded with the Aborigines. I am dubious about the merits of this proposal, for three general reasons. The first is that I doubt that such a step can really right old wrongs, many of which are so old as to be irretrievable. The second involves a point which is technical, but not the less important for that. With whom would the majority of Australia deal in effecting this treaty? With the various bands or linguistic units scattered over the continent? With urban 'spokespeople'? Or with Aboriginal representatives selected by some set of criteria which will inevitably be more European than Aboriginal in their nature? Almost inevitably, 'representation' gives rise to bureaucracy, which tends to become solipsistic, self-justifying, and the consumer of large sums of public money. In other words, to pursue a treaty now would very likely involve the majority culture creating an opposing interface with which to

deal, one which may not well reflect the opinions and needs of particular Aboriginal groups, so that the nation would be left with yet another unsatisfactory outcome.

My third reason is the most substantial one. The negotiation of a treaty carries the implication of equality of the parties – ie, to negotiate a treaty with Aboriginal Australia implies a nationality equivalent to that of Australia as a whole. There are signs that, largely as a consequence of extended contact with European culture, Aborigines about the continent are developing a sense of shared identity. However, it may well not be in our whole interest to formalize this development by way of treaty. That is, whether or not it is regrettable that the British did not conclude treaties with Aborigines in the past, for Australians to do so now might well be both to create a political entity that has no historical reality; and to engender a large legacy of political, social, economic, and educational problems – problems which may well become so massive that the ill effects of a treaty would far outweigh its benefits.

It is at this point that recent developments in Canada and New Zealand are instructive. Canada is presently mounting a Royal Commission on Aboriginal Peoples which is to run for three years – something akin to our recent enquiry into Black Deaths in Custody, but considerably more comprehensive, given that it is to address questions of land tenure and title, native justice, social welfare, education, health. 'We will want to look at things like the homeless', said the justice heading the commission, '[at] aid and employment, housing, the migratory patterns, disability, racism, addiction, cultural situation, social assistance, family violence'.

This enquiry has been instituted in part because of demands by First Nations spokesmen that customary law should have priority over the provisions of the Charter of Rights. Among the most vigorous opponents of this idea are native women, who have pointed out with harrowing detail that their cultures are intensely patriarchal; that under the old Indian Act they and their children suffered from poverty, hunger, physical and sexual abuse; and that the Charter of Rights gives them a protection (at least in theory) that would not be available to them under customary law.

In New Zealand, there have recently been very extensive transfers of land under the provisions of the Treaty of Waitangi back to the Maori. Running parallel has been the growth of a powerful Maori nationalism. Given that demographic projections indicate that the European and Maori populations will become equal by about the middle of the next century, this development may well prove impossible to reverse. Already, it is becoming mandatory that education proceed in Maori equally as in English, a development which brings with it both technical and social problems – for example, how well can western scientific concepts be enunciated in Maori? How well can Maori status and European administration join?

It is difficulties of these sorts that I foresee if we begin to give latent divisions in our society the formality of law. We should be one nation, all of us simply Australians, with equal rights, freedoms and obligations, without formal divisions based on race or ethnicity. We should also be willing to tolerate diversity – and I believe that in recent times Australian society has developed this tolerance to a very considerable degree. However, there must be points beyond which the centre will not hold, beyond which our society will fragment into disparate, conflicting groups. One of the great tasks before us now is to identify these points accurately. Another is to be unafraid to say so when we see we are reaching them. Some of the points certainly lie latent in matters pertaining to Aborigines, but they do not reside there only. It will take tact, goodwill, and compromise from all parties to avoid huge problems.

As platitudes like this last one are seldom very useful, I should like to conclude with one specific point. A few years ago, the distinguished anthropologist Ken Maddock said of traditional Aboriginal life, that it was

conducted at different levels, or rather within different degrees of inclusiveness, ranging from what we may think of as universalism at one extreme and acute particularism at the other. It may

well have added up to a subtle system of relationships, remarkably well adapted to the land, as Mr Justice Blackburn thought in the Gove Land Rights Case of 1970-71, but it does not lend itself at all well to being connected up with the social and political structures introduced by European settlement. The difficulty of making a connection may have been as fateful as assumptions about the land being thinly peopled or about the Aborigines leading an unsettled life.

As I have sought to show, this was the historical situation. I believe the difficulty remains into the present. If, in the next years, we were able to establish different political and administrative ways of communicating with Aboriginal groups, I think we would go far towards solving some of our present problems.