

Chapter Eleven

Thoughts on *Terra Nullius*

Dr Geoffrey Partington

Disputes about the meaning and significance of words cannot always be resolved by resort to dictionaries. Words used very frequently in political discourse, such as “liberal” or “conservative” or “multiculturalism”, have had and still have very different meanings according to time and place. We cannot expect our own favoured stipulative definitions to gain universal usage, but it is very important that there should be some agreement on which meaning is being used at any one time. This is very much the case with *terra nullius*, a term used frequently in recent Australian controversies about land rights, but not current in 1788 or the early years of British colonization.

Definitions of *terra nullius*

Over centuries, indeed millennia, the human race followed what Walter Scott called, in *Rob Roy*, the “good old rule” of history: “The simple plan/That they should take who have the power/And they should keep who can”. Few invaders enquired about local customs, laws and property rights in lands they over-ran or conquered. By the late 18th Century, however, some international conventions had been formalized in Europe by which states might lay claim to new territories, and by which other states might accept or challenge those claims.

The most widely respected legal opinion in Britain in 1788 on such matters was that of the recently deceased Sir William Blackstone. Blackstone never used the term *terra nullius*, but he was largely responsible for the important legal distinction between conquered or ceded colonies, and colonies of settlement. In one version of his *Commentaries* he wrote:

“In conquered or ceded countries, that have already laws of their own, the king may indeed alter and change those laws, but till he does actually change them the ancient laws of the country remain, unless such are against the law of God, as in the case of an infidel country”.¹

In practice, in many conquered states regarded by Christians as infidel, the English Crown permitted the continuance for many years after the establishment of its sovereignty of not only existing property rights, but also of practices, such as polygamy and suttee, that were illegal in England. Ceded or conquered territories were usually parts of organised states, often ones recently defeated in war. On the other hand, Blackstone maintained, that in “colonies of settlement”, or “plantations”, all the English laws “are immediately in force”.²

Blackstone wrote that “colonies of settlement” included all cases when “an uninhabited country be discovered and planted by English subjects”, but his definition also included lands very sparsely populated, lands without sovereignty or property rights, and lands lacking cultivation of the soil. Justice Blackburn held in 1971, in *Milirrpum v. Nabalco Pty Ltd and The Commonwealth of Australia*, that Blackstone’s definition of “desert and uncultivated”, or colonies of settlement, had “always been taken to include territory in which live uncivilized inhabitants in a primitive state of society”, not simply or mainly territory which is unoccupied.³ Wilfred Prest suggested in 2005 that “this was the longstanding legal interpretation or fiction which (Henry) Reynolds sought to overthrow”.⁴

Emerich de Vattel, in his 1758 *Law of Nations*, and before him John Locke, held that failure to cultivate the soil meant there was no pre-existing title to land. Vattel considered that:

“Nations incapable by the smallness of their numbers to people the whole, cannot exclusively appropriate to themselves more land than they had occasion for”.⁵

Locke wrote:

“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”.⁶

Blackstone's opinion was close to those of Locke and Vattel. This category of settled colony was also very similar to what a century later was called *terra nullius*.

Blackstone recognised, of course, that any actual classification of the population and culture of any particular territory might well be open to dispute. When Cook sailed for the Pacific in August, 1768 he was instructed, like earlier British explorers in that ocean, such as Byron, Wallis and Carteret:

“... with the Consent of the Natives to take possession of Convenient situations 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”.

Blackstone wrote all the versions of his *Commentaries on the Laws of England* before the 1788 British colonization of New South Wales. He never expressed an opinion on how New South Wales should be classified. During his lifetime there had been many European discoveries, conquests and claims to sovereignty. It was often very difficult for statesmen or lawyers in Europe to determine from reports of explorers and mariners whether, or to what extent, previously unknown places were populated or fell under the sovereignty of an identifiable state or ruler. Before the construction of the telegraph, many months might pass before the colonizing government received reliable information about conditions in far away lands and could make decisions about whether to claim sovereignty over them and how to classify them.

Being unoccupied was in itself insufficient for a new claim to sovereignty: Britain would have strenuously objected to an attempt by another power to occupy one of the Hebrides or Shetlands on grounds of there being no permanent occupants. Neither Cook nor any Aboriginal coastal dwellers had any knowledge of what the interior of Australia might be like. British lawyers and statesmen tried to apply the distinctions made by Blackstone fairly. Where, as in parts of West Africa and New Zealand, the best information was that identifiable political units exercised sovereignty, then claims to possession were based on conquest or cession, usually after formal treaties.

In 1926 M F Lindley defined *territorium nullius* as follows, but it also applies to *terra nullius*:

“... if a tract of country were inhabited by isolated individuals who were not united for political action, so that there was no sovereignty to exercise there, such a tract would be *territorium nullius* ... 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”.⁷

Lindley was mistaken in talking about “isolated individuals”, since Aborigines were very much members of tribes rather than isolated individuals, but his point about sovereignty was valid.

Alan Frost's explanation in 1970 was:

“... if the indigenous 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*, in which they might gain permanent title by first discovery and effective occupation”.⁸

Those definitions are quite compatible with Blackstone's “settled” colony, provided that it is understood that they do not apply only to completely uninhabited land. There was little justification for Michael Connor to condemn Blackstone as “unclear in language” and “limited in scope”, or to refer dismissively to “the familiar and limited Blackstone classifications which had hindered legal thinking”.⁹

Henry Reynolds asserted in his *The Law of the Land* that sovereignty and land ownership could be torn apart and treated separately. Michael Connor commented, “In our beginning, the British government assumed sovereignty over the territory and Crown ownership of the land at the same time”.¹⁰ Reynolds was right that sovereignty and land ownership could be separated by the Crown, as in its Indian conquests, but Connor was right that no such separation was made in New South Wales or in other Australian colonies. New Holland was considered an exemplary case of a settled colony: land without identifiable territorial units or recognisable forms of government, and virtually devoid of cultivation of the soil or domestication of animals. This was the type of territory later described as *terra nullius*.

Aborigines and the land

Keith Windschuttle overstated his case when he implied that the absence in Aboriginal languages of terms corresponding to western proprietorship of land shows that Aborigines had little or no sense of proprietorship. The problem was that the British could not detect from their ships, or after they landed, any clear links between people and fields, buildings, livestock or other goods that could identify stable Aboriginal groups or

political entities with whom treaties might be made or proprietorship defined.

Very soon after the British settlement of Australia began, some Aboriginal groups showed willingness, indeed eagerness, to leave their traditional areas in order to have access to the wonders introduced by the newcomers. W E H Stanner noted that the reported arrival of Europeans “was sufficient to unsettle aborigines still long distances away”, and that, “for every aborigine who, so to speak, had Europeans thrust upon him, at least one other had sought them out”.¹¹ Professor Stanner judged that Aborigines’ “appetites for tobacco and to a lesser extent for tea became so intense that neither man nor woman could bear to be without”, and as a result “individuals, families and parties of friends simply went away to places where the avidly desired things could be obtained”. Henry Reynolds agreed that:

“European goods like steel axes and knives; pieces of iron, tins, cloth and glass were all eagerly sought and used by Aboriginal tribes even before contact had been made with settlers on the advancing frontier. Western food, tobacco and alcohol also exerted a tremendous attraction”.¹²

Stanner considered that “voluntary movements of this kind occurred widely in Australia”, so that “we must look all over again at what we suppose to have been the conditions of collapse of Aboriginal life”. He concluded that:

“... disintegration following on a voluntary and banded migration is a very different kind of problem from the kind we usually picture—that of the ruin of a helpless people, overwhelmed by circumstances”.

One idea Stanner thought needed “drastic revision” was that “to part an Aboriginal from his clan country is to wrest his soul from his body”.¹³

Ron Brunton cited “instances of people who are known—from unassailable documentary sources—to have occupied new lands within the life-time of their elders, but who flatly deny that they, or their ancestors, lived anywhere else”.¹⁴ Identification of links between Aboriginal groups and land was soon made even more difficult by the smallpox epidemic of 1789, which killed many Aborigines and scattered many others. There is dispute still about whether the smallpox had moved southwards from Macassar contacts or had been brought by the British, but there is no dispute that the number of Aboriginal dead was very high.

Anthropologists have often been deeply divided about Aboriginal customs about land. For example, Radcliffe-Brown held that Aborigines usually had a “very rigid system”, characterized by a “small group of persons owning a certain area of territory, the boundaries of which are known, and possessing in common proprietary rights over the land and its products”.¹⁵ Tindale held that groups commonly occupied a “discrete territory with finite limits beyond which members have a sense of trespass”.¹⁶

Other scholars disagreed. Lauriston Sharp held that Yir-Yomont clans had “multiple countries which are not contiguous”, and exercise the “right of exclusion” only in “exceptional cases in which there is an actual or pretended drain on the resources of the land”.¹⁷ Sharp claimed that clans could:

“... forbid a man crossing clan territory to get from one of his own clan territories to another, but no example of such extreme action could be cited. People gather and hunt, ordinarily, in whatever country they will. Thus there is practically a standing permission which opens a clan’s country to all, but this permission may be withdrawn by the clan for those who are *persona non grata*”.

Peter Sutton called into question “the very concept of the self-contained tribe”. He claimed that, “while most of the [sacred] sites were clustered together, a significant number were separated by sites belonging to other descent groups, while some sites were owned by more than one descent group”.¹⁸ Ronald Berndt oscillated between a restricted definition of sacred sites as “secret-sacred” places believed to be dangerous and only to be visited by fully initiated Aborigines, and an extended one of land that was shaped by spirit beings. The extended definition might cover the entire continent.

Warfare was endemic in much of pre-1788 Australia, but was usually limited in scope, largely because captive males could not be put to work in hunter-gatherer societies. If the vanquished were allowed to hunt with the victors, they would very likely try to reverse their earlier defeat. However, women and young boys were often seized and attached to victorious groups. Sutton and Kingsley Palmer were among anthropologists who drew attention to inter-tribal violence among Aborigines. Sutton claimed that peoples such as the Warlpiri and Pitjantjatjara engaged in “imperialism”. Palmer described the Walmatjarri as “the greatest colonisers” of the Kimberleys.¹⁹ Few, if any, Aborigines appear to have envisaged any form of sovereignty of the conquerors over the defeated in battle.

The Finnis River case was the first time the Aboriginal Land Commissioner heard a case in which separate and rival groupings of Aborigines pressed claims to the same tract of land. The two opposed Aboriginal groupings were the Maranunggu and the Kungarakany/Warai, each claiming exclusive traditional ownership

of a defined area of land. The case hinged on whether takeover of land by an incoming group was possible in Aboriginal tradition. There was documentary evidence to show that the Maranunggu were interlopers, whereas the Kungarakany were indisputably descendants of a group who had held the contested area in traditional ownership at and after the time of first contact.²⁰

Sansom claimed that “the essential issue in the takeover of land in Aboriginal Australia is the process by which *de facto* use and occupancy by an incoming group are converted into ownership as of right and by which *de facto* use and occupancy can be converted into ownership as of right from time immemorial”. He observed that “the anthropology of Australian land rights” had recently become “less an applied anthropology of authoritative citation, and more a creative anthropology of inventive interpretation”.²¹

H C Coombs acknowledged that the idea of a single unified Aboriginal people is a recent one, and admitted that “it is well known that Aborigines rarely identify themselves simply as Aborigines, but rather as Nyungah, Wiradjuri, Warlpiri, Yolngu, Murri, Koori and so on”. Indeed the concept of a nation, with all its attributes, is clearly derivative, and a sense of common Aboriginality developed only out of a shared difference from white Australians. These considerations did not prevent Coombs from invoking a single Aboriginal Nation, with which the Commonwealth should make treaties.

Given that correct interpretation remains difficult even now for professional anthropologists, it was harsh of Reynolds to condemn the earliest British explorers and colonists for failing to understand the many differing Aboriginal customs on kinship. One can almost sympathize with the majority of the High Court of Australia when they decided to hand down their decisions in *Mabo* without troubling themselves too much with all the complications of Aboriginal ties to land, and instead confined detailed inspection to the very manageable Meriam Island.

Coombs believed that all Aborigines, including those who have no recollection whatsoever of any particular land, have land rights. He noted that:

“While Aboriginal land-owning groups are predominantly made up of those who share a common patrilineal descent, this is not always so. There will also be real, if imprecise rights vested in a range of other persons outside that group”.²²

Coombs conceded that “much of the politicking of Aboriginal society seems to have been and probably still is concerned with the development and extension of claims to the land of other groups”. In recent enquiries into native title, conflicting claims have often been made by competing Aboriginal groups, guided and supported by professional anthropologists. In many cases the claimant groups had lost contact with the disputed lands, and depended on accounts of land and traditional knowledge garnered by anthropologists many years ago and now given new currency by their successors.

Evidence from the Northern Territory over recent decades suggests that land rights as such do little to make Aboriginal people more autonomous. In fact, in many areas Aborigines had significantly less employment than before land rights were conceded. Royalties combined with welfare payments are often sufficient to make wage labour or self-employment on the land unattractive. Few of the small Aboriginal businesses set up with government subsidies have had much chance of success, even when Aborigines were eager to make them succeed, because they are situated in remote locations in which the most resourceful entrepreneurs would have found it difficult to survive. Large groups of Aborigines in country towns remain unemployed, not only because many refuse any work, but also because such communities cannot generate the number of jobs required. Most other Australians when unemployed finally move, even if reluctantly, to places where there are jobs, although they would otherwise prefer to stay where they are. If Aborigines will only take jobs which they really like and which permit them unlimited time off for ceremonial and family occasions, and only in places where they most want to be, they may simply commit themselves to permanent unemployment. That would be a strange path towards autonomy.

The separation, whether voluntary or compelled, of many Aborigines from the lands their ancestors had traversed before the colonial era was a major reason why British sympathizers, such as Earl Grey and T F Buxton, did not support attempts to base some form of native title on pre-contact occupancy. Instead they recommended a pursuit of a benevolence that could only be exercised if the Crown held radical title to the land.

South Australia

During the half century between the British settlement of New South Wales and those of South Australia and Western Australia, uncertainty persisted about the relationship between Aboriginal peoples and the land.

In 1835 James Stephen told the South Australian Commissioners, who were responsible for the mechanics of colonization, that the venture “presupposes the existence of a vacant Territory and not only recognizes the Dominion of the Crown, but the Proprietary right to the soil of the Commissioners or of those who shall purchase lands from them...”²³

Stephen, acting for Sir George Grey, was concerned that there was no limit on the distance inland of this new South Australia, so it might be that it might prove to include territory with a dense population living in organised states, although no rumour had been heard of them. Colonel Torrens replied for the Commissioners that there was no need to worry, since the whole tract consisted of “waste and unoccupied lands”, at any rate for legal purposes. Torrens claimed that “it has invariably been assumed as an established fact that the unlocated tribes have not arrived at that stage of social improvement in which a proprietary right to the soil exists”.²⁴ Torrens assured Lord Glenelg that he would “protect the Natives in the unmolested enjoyment of their right of property in Land, should such a right be anywhere be found to exist”, which it nowhere would. Perhaps Torrens was disingenuous, but hopes that Aborigines would take quickly and successfully to modernity had already been grievously disappointed and grounds for optimism were slight.

For their part, the South Australian Commissioners recommended that colonization “by industrious and virtuous settlers, so far from being an invasion of the rights of the Aborigines, is a necessary preliminary to the displacement of the lawless squatters, the abandoned sailors, the runaway convicts, the pirates ... the worse than savages that now infest the coasts and Islands”.²⁵ This consideration was, doubtless, not the major one for the Commissioners, but the problem was real, even though many lawyers and academics today seem unaware that random violence and anarchy were a serious danger.

Savagery

The descriptions most often applied in the late 18th and much of the 19th Centuries to the peoples of New Holland and Van Diemens Land were “Stone Age people”, “barbarism” and “savagery”. Savagery did not necessarily denote ferocity. Some tribes were considered to be peaceful savages, but others not so. Some western thinkers such as Montaigne and Rousseau thought in terms of “the noble savage”, but more agreed with Thomas Hobbes, in *Leviathan* (1651), that without sovereign power there could be “no arts; no letters; no society; and which is worst of all, continual fear and danger; and the life of man, solitary, poor, nasty and brutish”.

Some of James Cook’s comments on Aborigines virtually defined what was then thought to constitute savagery:

“Their houses are mean small hovels not much bigger than an oven ... we see this country in the pure State of Nature, the industry of Man has had nothing to do with any part of it”.

Cook wrote that the people he saw “do not appear to be numerous, neither do they seem to live in large bodies, but dispersed in small parties along by the riverside”.

Cook’s claim that along the eastern coast of New Holland “we never saw one inch of Cultivated Land” became a common justification for British occupation. Yet Cook also held that, despite their wretched appearance, the Aborigines “were in reality more tranquil and far happier than Europeans”.²⁶ Cook’s relatively warm appreciation of Aboriginal life may have owed something to his adverse reaction to the indolent luxury of Tahiti, and to the courage shown by the first Aborigines he encountered at Botany Bay.

Sir Joseph Banks wrote that the Aborigines he met “seem to have no fixed habitation but move about from place to place like wild beasts in search of food”, and:

“Of Cloths they had not the least part but naked as ever our first father was before his fall; they seemed no more conscious of their nakedness than if they had not been the children of Parents who eat the fruit of the tree of knowledge”.²⁷

Yet Banks at one point came close to the “noble savage” position:

“Thus live these I had almost said happy people, content with little, nay, almost nothing. Far enough removed from the anxieties attending riches. From them appear how small are the real wants of human nature”.

As well as the absence of agriculture, animal husbandry and settled dwellings that generally denoted the state of savagery, some Aboriginal beliefs seemed to confirm their lowly classification. Some Aborigines believed British ships were “huge winged monsters” or trees growing in the sea; that the British were their dead kinsmen who had “jumped-up” white; that they themselves might return to earth after death as whites with all their powers and goods; and that smallpox and other epidemics were the work of sorcerers from other

Aboriginal groups, who could kill, even from a distance, with bullocks' teeth, sheep jawbones and fragments of glass.²⁸ White medical practitioners found it very hard to help sick Aborigines, many of whom would not take recommended medicines at all, or, if convinced of their value, would insist on swallowing the whole lot at one gulp. Anthropologist Josephine Flood has suggested that among some Aboriginal groups religious taboos restricted attempts to change their modes of life because they had been created in the Dreamtime.²⁹ Flood drew attention to marriage practices such as the ritual deflowering of girl brides given in marriage to much older men. Among some groups a bride's new women kinsfolk pierced her hymen with a digging stick before presenting her to her new husband.

In 1837 a Select Committee of the House of Commons described the Aborigines of New South Wales as:

"... 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 of even the rudest forms of civil policy, that their claims, whether as sovereign or proprietors of the soil, have been entirely disregarded".³⁰

In 1854, at the laying of the first stone of the State Library of Victoria, Sir Redmond Barry said:

"Seventeen years have scarcely elapsed since the foundation of the colony which was then inhabited by savages. Probably in the world's history no country has attempted to found both a university and a Public Library within a score of years of its first settlement".³¹

Lord Stanley, then Whig Colonial Secretary and later, as Lord Derby, Conservative Prime Minister, wrote in 1844:

"There are many gradations of 'uncivilized inhabitants', and practically, according to their state of civilization, must be the extent of rights which they can be allowed to claim, whenever the territory on which they reside is occupied by civilized communities. And it cannot be denied that, among the 'uncivilized nations', the New Zealanders hold a very high place, certainly above the inhabitants of the other Australian Colonies ... The aborigines of New Holland generally are broken into feeble and perfectly savage migratory tribes, roaming over boundless extents of country, subsisting from day to day on the precarious products of the chase, wholly ignorant of or averse to the cultivation of the soil, with no principles of civil government, or recognition of private property...".³²

Such comparisons were not confined to English Whigs and Tories. The American anthropologist Lewis Henry Morgan considered the Aborigines were "several strata below barbarism into savagism, and are nearer to the primitive condition of man than any other investigated".³³ Frederick Engels followed Morgan in dividing the human past into "three main epochs, savagery, barbarism and civilisation", and in dividing savagery into a "lower", "middle" and "upper" stage. No direct evidence remained, they held, of the lower stage of savagery, which had to be postulated as a transitional stage from ape-like ancestors, but "the Australasians and many Polynesians are to this day in this middle stage of savagery".³⁴ Until the 1970s pre-historians, including the Australian Marxist archaeologist V Gordon Childe, used terms such as "savage" and "barbarian" in much the same way as 19th Century anthropologists and social scientists had done. In 1965 Professor D P O'Connell of the University of Adelaide wrote, "Since the Australian Aborigines were held incapable of intelligent transactions with respect to land, Australia was treated as *terra nullius*".³⁵ In 1968 Elizabeth Evatt wrote of Aborigines in 1788 as "scattered unorganised tribes".³⁶

The opening sentence of Manning Clark's *History of Australia*, published in 1962, is: "Civilization did not begin in Australia until the last quarter of the eighteenth century". By July, 1988 in an essay entitled *The Beginning of Wisdom*, Clark was complaining that:

"We were all dupes of the myth of the beneficial role of British civilization. The British, we were told, brought civilization to a country where hitherto barbarism had prevailed for thousands of years".

Clark added sarcastically that Australia had supposedly "received the gift of free institutions, the rule of law, civil liberty, tolerance—and the British virtues of justice, decency and fair play". Yes, that is what most Australians supposed, and still suppose.

Clark paid special tribute to Henry Reynolds for having "nailed the lie" that "before 1788 Australia was a land of no people", although Clark did not name any of those who told that lie. Clark praised Reynolds and other historians who had ensured that "the descendants of the British have discovered the evil in their past", so that "the horrors are being faced". As a result, Clark said with pride:

"In all the history departments of the universities and colleges of advanced education, teachers and students are burrowing away in libraries to find more examples of white barbarism and cruelty against the Aborigines".

This is still true, and extends to many courses in English, Geography, Sociology and the various forms of social studies and social sciences.

Political correctness has made it hazardous to discuss why Australian Aborigines' ways of life seem to have changed so little over many millennia. The French philosopher Montesquieu held that it was in temperate zones of moderate fertility, neither too severe nor too bountiful, that human genius most flourished, whilst abundance too easily gained inhibited intellectual rigour and physical exertion, and encouraged indolence and decadence. Harsh environments such as equatorial forest, tundra or desert made it very difficult to cross the ditch. However, although much of the Australian continent is hostile to human comfort, many areas are much better favoured.

The rising of the seas and the submergence of the land bridges between Australia and Asia, and between what are now Tasmania and the Australian mainland, made diffusion of ideas and techniques much more difficult. However, Arnhem Landers learned a few new artifacts and techniques, including dugout canoes, from Macassan traders from across the Torres Strait seeking trepang (sea slugs). Some Aborigines adopted new cultural practices as well, including pipe smoking, songs, wooden sculpture and other art forms. Josephine Flood argues that "Australian soils and climate permit modern agriculture and were amenable to Stone Age horticulture: plants available included taro, arrowroot, yams, wild rice and native millet". Animals that might have been domesticated included brush turkeys, ducks and geese.³⁷ If these advances had occurred, and had the British made their first Australian colony in Arnhem Land, the land might not have been regarded as a colony of settlement, but one of conquest.

What should have been done?

No Aboriginal group had formal educational institutions, since all the practical knowledge required in adult life was acquired by observation and imitation. The nearest approaches to formal education were rites of passage at puberty, when the young were initiated into the religious lore of the group. Initiation was often a painful procedure that might include tooth avulsion, nose piercing, circumcision, fire ordeals and removal of fingernails.³⁸ Future warriors had to be able to withstand pain, as had future mothers. No questioning of traditional belief was permitted in traditional Aboriginal upbringing.

Roger Sandall has familiarized us with the concept of "crossing the ditch", the huge gap between hunter-gathering and tribalism on one side and agriculture, domestication of animals, permanent dwellings, literacy and division of labour on the other.³⁹ That ditch had not been crossed by any Australian Aborigines before 1788. Once New South Wales became organised sufficiently to consider how to educate the children of convicts and free settlers, thoughts were addressed to what, if any, provision should be made for Aboriginal education. Officials and missionaries often started with feelings of optimism, sometimes fuelled by the facility many Aborigines showed in acquiring the English language and in translating one Aboriginal language into another. Their tracking abilities and skill with horses were also recognised. Governor Macquarie believed that, if "cultivated and encouraged", Aborigines would quit their "Wild wandering and Unsettled Habits" and "live in a State of perfect Peace, Friendliness and Sociality".⁴⁰ However, early optimism about the prospects of sharing modern ideas and techniques with Aborigines was usually soon quenched, although a number of Aborigines "crossed over" the ditch without being counted. Excessive hope was succeeded by excessive despair.

The American psychologist Jerome Bruner identified two major types of thinking: the narrative and the paradigmatic (or analytical or logico-scientific).⁴¹ The first is concerned to tell a story, the second to analyse experience through empirical induction or deductive logic. The first emerged historically long before the second, just as it precedes it in the individual development of each child. The first is universal, although it may wither or degenerate in some conditions, but the second relatively rare and recent. Story telling is adequate in societies with little or no division of labour that rely on what another American psychologist, Mervyn Donald terms biological memory: recollection of personal experience and oral traditions. However, in more complex societies external memory becomes necessary, as storage devices are developed that can only be utilised by means of intellectual tools forged in disciplined study rather than derived from everyday experience.⁴²

Donald noted that:

"The first step in any new area of theory development is always anti-mythic: things and events must be stripped of their previous mythic significance before they can be subjected to what we call 'objective' theoretical analysis".

He added:

“Nothing illustrates the transition from mythic to theoretic culture better than this agonising process of demythologisation, which is still going on, thousands of years after it began. The switch from a predominantly narrative mode of thought to a predominantly analytic or theoretic mode apparently requires a wrenching cultural transformation”.⁴³

Many Aborigines were skilled in narrative, but their cultures had little or no place for this second mode of thought. Abstract knowledge developed slowly and gradually in other continents, whereas the Aborigines were suddenly confronted with techniques and ideas very difficult to accommodate within traditional belief systems. It would have been very difficult for Aborigines to “cross the ditch”, even had all the colonists been outstanding examples of western civilization. The period of transition was traumatic, but evasion of its challenges has been, and remains, tantamount to accepting perpetual disadvantage. One major dilemma has been that, in order to enable a new generation to transcend tribal thinking, it seems essential to “catch them early”; but to do this, however scrupulously, may lead to denunciations of kidnapping, racism, even of “cultural genocide”.

Many of our politically correct commentators hold that the British settlers and governments were always wrong, whatever policy they adopted. If they tried to share their knowledge with Aborigines, the colonists are accused of wilful undermining of traditional Aboriginal customs; but failure to help Aborigines to cope with modernity is used as evidence of contempt for Aborigines and neglect of their welfare.

Professor Geoffrey Bolton in his 1981 *Spoils and Spoilers* set very high standards. He blamed British colonists and officials in London for being “unequipped to guess at the subtlety and complexity of traditional Aboriginal adaptations to their environment”. The colonists also failed in his opinion to appreciate that Aborigines “communicated across distance with a speed suggesting telepathy”. Bolton conceded that “sympathetic and patient observers conducted interviews, compiled vocabularies, and wrote down what they could discover about Aboriginal myths and legends”, but he regretted that “the recorders were not trained to ask the right questions or to understand the implications of what they were told”. And, “too often Aboriginal folklore was seen as merely picturesque and fanciful, and not as an account of practical responses to environmental problems”.⁴⁴

The core of Aboriginal policies of Australian governments from the mid-19th Century to the end of the Second World War consisted of protection and segregation. However, as so often occurs, there was a big difference between government policy and the flow of life. Aborigines and non-Aborigines often interbred, and many of their offspring moved into the mainstream of Australian life.

For two decades from the 1950s onwards new policies, articulated most prominently by Paul Hasluck, aimed at greater integration of Aborigines, especially part-Aborigines, into that mainstream. The careers of Sally Morgan, Kathy Freeman, Charles Perkins, Pat O’Shea, Doug Nicholls, Lois O’Donoghue, Gordon Briscoe and John Moriarty are among many stories of success. Hasluck noted that during about forty years from 1930 onwards the question of land rights was seldom raised by Aborigines or whites. He held that:

“The concept of land belonging to the Crown was valued by most Australians because in the history of land settlement it had been the principle by which land-grabbing had been checked, the squatter had been restrained, the free settler and small selector had been given a chance to obtain land, and citizens had found security of tenure”.⁴⁵

From the 1970s onwards, many anthropologists and other social scientists decided that policies of integration or assimilation undermined traditional Aboriginal culture. Instead of helping Aborigines to cross over the ditch, much Aboriginal education was redirected to strengthening their “Aboriginality”. The very use of words such as “uncivilized” and “primitive” became politically incorrect and grounds for accusations of racism. All peoples at all times were deemed civilized, and no society was to be deemed primitive, scattered or unorganized. Articles and books appeared with “Aboriginal civilisation” in their title.

Confusion and self-contradiction

Keith Windschuttle and Michael Connor have exposed many examples of academic self-contradiction on *terra nullius* and related issues.⁴⁶ Bain Attwood claimed that Windschuttle “has not provided any evidence that academic historians have compared the British colonization of this country to Nazi Germany’s treatment of Jews”, even though Attwood himself in 2000 had described Australian treatment of Aborigines as “what can be and should be called a holocaust”.⁴⁷ In her *The Original Tasmanians*, Professor Lyndall Ryan claimed the original Tasmanians were “victims of a conscious policy of genocide”.⁴⁸ Lloyd Robson claimed that the Aborigines were “dispossessed and destroyed by their invaders and conquerors in an impressive example of extermination”.⁴⁹

Dr Dirk Moses, too, claimed that “no Australian historian contends there was an Australian holocaust”. That was in 2003, but three years earlier he had written that “Australia had many genocides, perhaps more than any other country”. Dr Moses surmised that:

“... the extremism of statements by (Ron) Brunton, (Hugh) Morgan and Windschuttle suggests that this analysis should be extended by asking whether such figures experience castration anxiety, that is a fantasised danger to their genitals”.⁵⁰

Only a few months separated two contradictory claims made by Cassandra Pybus. In 2002 she told Channel Nine viewers that:

“The Aboriginal people of Tasmania were all but wiped out. I mean it was one of the clearest cases of genocide that we know of and recognised as such at the time”.

In 2003 she said of the Tasmanian Aborigines, “I don’t want to call it genocide, but I’m not going to tidy it up either”.⁵¹

However, first prize for self-contradiction should go to Henry Reynolds. Some thirteen years ago I drew the attention of a Samuel Griffith Society conference to a large number of inconsistencies in Reynolds’ opinions on British and international law at the time of British colonization of Australia, and on whether some form of native title was accepted in Australia between 1788 and the 1992 *Mabo* judgment. To the best of my knowledge, neither Reynolds nor his supporters have ever tried to deny my charges.⁵²

Was Britain justified by prevailing concepts of international law in claiming sovereignty over eastern Australia in 1788? “Yes”, wrote Reynolds:

“The British claim of sovereignty over the whole of Australia was not surprising given the attitudes of European powers. It would have been unexceptional at any time in the nineteenth century”.⁵³

And “No”, he wrote:

“... since Grotius in 1738, Heineccius in 1743 and Wolff and Vattel in the 1760s held that British sovereignty could only extend to the power of keeping out other European or ‘civilized’ powers, and only then ‘as far as the crest of the watershed flowing into the ocean on the line of the coast actually discovered’ “.

Was there native title in Australia after 1788? Of course not, Reynolds explained. His statements included:

- “The official view is clear. The British claimed not only the sovereignty over New South Wales—then comprising the whole eastern half of Australia—but also the ownership of all the million and a half square miles contained therein”.
- “Mr Justice Isaacs ... declared: ‘So we start with the unquestionable position that, when Governor Phillip received his first Commission from George III on 12th October 1786 the whole of the lands of Australia were already in law the property of the King of England’ “.
- “The commonly accepted view has always been that the Aborigines had no land rights because they were not farmers, did not enclose the land and did not till the soil”.
- “Further research may eventually turn up a relevant case or two, but it is reasonable to assume that no colonial court ever defended the Aboriginal right of occupancy”.⁵⁴

On the other hand, according to Reynolds:

- “The fact that the blacks were the prior owners of Australia was accepted by many settlers and received official recognition in both Britain and the colonies in the 1830s”.⁵⁵
- “The mainstream view has been that native title arose from the incontrovertible fact of occupation”.⁵⁶
- “It is beyond doubt, then, that the doctrine of native title was well known and understood in leading legal and political circles in the 1830s and 1840s. Moreover, it was ‘fully admitted’ to be part of the colonial common law which applied throughout the Empire”.⁵⁷
- “Australia started with the land owned by the Aborigines under English common law”.⁵⁸

Reynolds was just as ardent in arguing that native title had always been recognised in Australia, as he was in claiming that it had never been acknowledged. You pay your money and you take your choice. Reynolds claimed that his 1981 book, *The Other Side of the Frontier*, was “based on extensive research among a vast array of historical records”, but he conceded that it:

“... was not conceived, researched or written in a mood of detached scholarship. It is inescapably political, dealing as it must with issues that have aroused deep passions since 1788 and will continue to do so into the foreseeable future”.⁵⁹

Despite being caught out in errors of citation by reporters Andrew Stevenson⁶⁰ of *The Sydney Morning*

Herald and Christopher Bantick⁶¹ of *The Mercury*, Reynolds accused Windschuttle of the very faults of which he himself was guilty. Most ludicrous, in the light of the passages I have cited, he attacked Windschuttle as particularly flawed on “views about Aboriginal land ownership current among the colonists of the nineteenth century”.⁶²

The invented *terra nullius*

Michael Connor’s *The Invention of Terra Nullius* cites numerous Australian historians and others who, following Reynolds, denounced the idea of *terra nullius*. These included Henry Reynolds, Alan Atkinson, Paul Coe, Charles Rowley, Neville Bonner, Barbara Hocking, Greg McIntyre, Rosemary Hunter, H C Coombs, Ann McGrath, Tim Rouse, Peter Read, Stuart Macintyre, Anna Clark, Felicity Collins, Therese Davis, Melanie Lazarow, Lisa Jackson, Jeanette Ward, Chris Cunneen, Jim McAllister, Genevieve Ward, Ben Wadham, Irene Watson, Melissa Nursy-Bray, Christopher Kelen, Merete Borch, Dorothy Parker, Barbara Miller, Martin Crotty, Paul Delfabbro, Andrew Day, Steve Mickler, Lyndall Ryan and Lionel Murphy. Several, although by no means all of these asserted that British claims to Australia were based on the false belief or pretence that in 1788 the land was *terra nullius* in the most radical sense of being unpopulated.

Melissa Nursy-Bray claimed that:

“The declaration of *terra nullius* or ‘land of no people’ by Captain Cook in 1788 gave a mandate for ‘white’ Australians to ignore indigenous rights”.

It is pleasing to learn that James Cook survived what had been thought a fatal attempt on his life in Hawaii several years earlier.⁶³

Paul Coe told the High Court of Australia in 1978 that before British colonization Australia “was occupied by the sovereign Aboriginal nation”. His claim for the renewal of that sovereignty was rejected by the then Justice Mason as “inconsistent with the accepted legal foundation of Australia”.⁶⁴ Just what our former Chief Justice considers now to be the legal foundation of Australia, I do not know.

Notable efforts have been made by others, particularly through The Samuel Griffith Society and the Bennelong Society, to challenge separatism in Aboriginal policy, but Keith Windschuttle has been at the forefront in combating both separatist policies and racketsy research. Some academics and publicists were shocked that such ideas should get a public hearing. Alan Atkinson expressed concern that the views of Michael Connor and Windschuttle “should be presented as they have been, with such brazen ease” to a wider public. Atkinson claimed that Windschuttle “turns all to excrement and venom” in his critiques of “black band” Australian history.⁶⁵

Mabo

The majority in *Mabo* claimed that major errors of fact had been made in the legal underpinning of the British colonization of Australia—errors both about the existence of laws among Aborigines and about whether the land was occupied or not.⁶⁶ Brennan J urged his colleagues on the High Court to “overrule the existing authorities, discarding the distinction between inhabited colonies that were *terrae nullius* and those that were not”.⁶⁷ He claimed that by *terra nullius* “the indigenous inhabitants of a settled colony were thus taken to be without laws, without sovereignty and primitive in their social organisation”.⁶⁸ Aboriginal peoples were not assumed by all the colonial authorities to be without laws, but many of their laws were difficult to understand and some, such as group vengeance, were repugnant to English law once they were understood. And Aborigines were then “primitive in their social organisation”, even though Brennan J claimed that it was “discriminatory denigration” to suggest that they “were lower in the scale of social organisation” than Meriam Islanders.

Brennan J urged that International Law be used to put right the defects of Australian courts, especially when international law declares the existence of universal human rights. It is very likely that Brennan J believes that education ranks among “universal human rights”. But does he believe that Aborigines enjoyed this universal human right to education during the millennia before 1788? Does he think that traditional initiation of the young into tribal custom, and into the skills of the chase or of food preparation, fulfilled that universal human right?

Toohy J⁶⁹ recommended an African concept advanced by Mr Bayona-Ba-Meya, a diplomat from Zaire: “the ancestral tie between the land, or ‘mother nature’, and the man [sic] who was born therefrom and must one day return thither to be united with his ancestors...”. All very spiritual, although not very favourable to multiculturalism. It would bring migration practically to a standstill.

Deane and Gaudron JJ gave great emphasis⁷⁰ to “two propositions” that played a major role, they claimed, “in the dispossession and oppression of the Aborigines”. One of these propositions was “that the territory of New South Wales was, in 1788, *terra nullius* in the sense of unoccupied or uninhabited land, for legal purposes”; the second was that “full legal and beneficial ownership of all the lands of the Colony was vested in the Crown, unaffected by any claims of the Aboriginal inhabitants”. Their Honours alleged that acceptance of these propositions led to Aborigines being treated as a “different and lower form of life whose very existence could be ignored for the purpose of determining the legal right to occupy and use their traditional homelands...”.

However, the Crown did not assert that New South Wales was unoccupied or uninhabited, but that it lacked sovereignty, identifiable boundaries, cultivation of the soil and the rudiments of civil society. The second proposition does accord with what was held in 1788, but arose from the absence of evidence of property rights that the Crown could identify. Aborigines were certainly treated as though they were different from the colonists in customs and social organisation, but they were very different. If in 2007 anyone proposed that Aborigines should be expected to live as their ancestors did in 1788, Justices of the High Court would be among the first to condemn that as forcing them to live a “lower life”.

Deane and Gaudron JJ⁷¹ held that, had *Mabo* been “any ordinary case, the Court would not be justified in reopening the validity of fundamental propositions which have been endorsed by long-established authority and have been accepted as a basis of the real property law of the country for more than one hundred and fifty years”. Apparently, however, “past injustices” had still so heinous an effect on Aborigines that their reform was too urgent to leave to Parliaments or electorates. It was necessary for the High Court to proclaim that “the lands of this continent were not *terra nullius* or ‘practically uninhabited’ in 1788”. It seemed to be a matter of regret for their Honours⁷² that “the validity of the act of State establishing a new Colony cannot be challenged in the domestic courts”. That day may yet come.

Deane J and Gaudron J did not try to conceal that they had repudiated what they termed “a basis of the real property law of this country for more than one hundred and fifty years”. The essence of what they rejected was the legal doctrine that the original British claim of sovereignty extinguished all prior rights to property, so that after 1788 all titles, rights and interests whatsoever in land were the consequence of some grant from the Crown. Their Honours referred to “the conflagration of oppression and conflict which was, over the century, to spread across the continent to dispossess, degrade and devastate the Aboriginal peoples and leave a national legacy of unutterable shame”. They concluded that “the nation as a whole must remain diminished unless and until there is an acknowledgement of, and retreat from, those past injustices”.

Schools and universities

Earlier I quoted Manning Clark’s claim that:

“In all the history departments of the universities and colleges of advanced education, teachers and students are burrowing away in libraries to find more examples of white barbarism and cruelty against the Aborigines”.

That remains the case (apart from the elevation of Colleges of Advanced Education into universities), but the burrowing seems to have become less enthusiastic and very little distinguished scholarship has resulted from it.

In 2006 the Commonwealth Minister of Education, Julie Bishop, convened a “summit conference” on Australian history in our schools. I was invited to take part and was able to do so. Julie Bishop did not invite several of the main combatants in “the history wars” to this “summit” on the grounds that they are extremists. I believe that the Minister ought to have invited them, but the academic Left seemed well represented, as it was almost bound to be, given the ideological balance in our schools and universities.

A keynote paper was presented by Professor Greg Melleuish, one of our ablest historians. In line with the Prime Minister’s argument that students need a strong sense of narrative that includes knowledge of key events, issues, dates and people, Melleuish set out what he believes all Australian students should be taught about Australian history. Dr Kevin Donnelly has described the Melleuish paper as “a clear, succinct and convincing outline of what constitutes essential learning in Australian history”. Donnelly was disappointed that, “Instead of detailing essential understanding and skills that all students should be taught in relation to Australian history, the majority of the participants agreed to define the curriculum by a series of open-ended questions”.⁷³ Dr Mark Lopez, who attended the conference, claimed that the meeting had been hijacked by the “Left establishment view” of history teaching.⁷⁴

Keith Windschuttle praised Melleuish's paper as "a perfectly accurate and eminently teachable model, but a caucus at the summit successfully dumped it in favour of a curriculum based not on narrative and politics but on 'issues and questions' ".⁷⁵ Windschuttle regretted that the majority at the summit "agreed to define the curriculum by a series of open-ended questions", such as, "How did convict society change into a free society?", and "What were the relationships between settlers and Aborigines?". Richard Allsop of the Institute of Public Affairs commented that:

"In rejecting the narrative approach of the Melleuish paper in favour of a question-based model proposed by Professor John Hirst, the participants demonstrated that they were largely content to see the collectivist assumptions behind much of what is taught in our schools remain unaddressed".⁷⁶

Greg Melleuish expressed his disappointment at the outcome of the "summit" in *The Australian*:

"To me the questions approach is just another version of the issues and themes approach that the summit was meant to remedy. It is the lowest common denominator form of history. My paper, it is claimed, is too advanced and sophisticated. Does this mean that we have to move to a boneheaded approach to the study of Australian history?".⁷⁷

If a left-wing "caucus" hijacked the conference, I was unaware of it. To me the remarkable feature of the gathering was that some critics of the left-wing grip on history teaching got a reasonable hearing for once. With support from John Hirst, I argued that Melleuish's proposed syllabus was too detailed for its purpose. Its adoption might improve breadth of content, but would also ensure superficiality, unless school timetables gave history far more time than at present or in the past. I also argued that narrative logically follows the framing of significant questions. As an example, I suggested some questions on which to base teaching of Australian pre-Contact history:

- How long have Aboriginal peoples lived in what is now Australia? Did they migrate from elsewhere, perhaps when there was a land bridge between Australia and South-East Asia?
- What were their means of livelihood? Did these differ in various parts of Australia? Did these change over the generations?
- What were their family and group structures? Did these change over the generations?
- What did they believe about the origins of life and its meaning?

Do such questions imply a collectivist outlook or bone-headedness? Different questions might be asked, but we must have some questions in mind before we can narrate coherent stories or histories. It is strange that some of our most able liberal-conservative historians should press for detailed central control of the content of history syllabuses in our schools. Of course, "bottom-up" reform is slow and unspectacular, but "top-down" policies are likely to play into the hands of political activists. Those who have done most to politicize our schools and universities are quick to allege that any attempt at reform constitutes unacceptable political intervention. Many other teachers, too, however, would legitimately resent detailed prescription of the content of history courses.

Summary conclusions

In 1788 the British government annexed New South Wales as a "colony of settlement". This concept was very similar to the meaning most often applied over a century later to the term *terra nullius*. It was a mixture of mischief and ignorance that led to the farcical assertion that the Crown and British colonists had denied the very existence of Aborigines in New Holland. Once that straw man was erected, the next step of progressive academics was to prove that Aboriginal people did indeed exist then and continue to do so. How could the British have been so stupid as not to notice them?

The British government did not maintain in 1788 that there were no human inhabitants of New South Wales. What they did believe was that the territory possessed no settled population, no cultivation of the soil, no political units with which negotiations could take place or treaties be signed, and none of the attributes of civilization. If it had been possible in 1788 to identify political units with determinate boundaries and to make treaties with them, and/or to attribute land ownership to particular individuals or corporate bodies, this would probably have been attempted, and it was carried out in New Zealand and parts of West Africa. By the time traditional relationships between Aboriginal peoples and land were more clearly identified, many of those links were already rapidly dissolving. Earl Grey and many philanthropic minds held that it would have added further injustice to past injuries to make continuity of connection with the land the determining factor in the future of Aboriginal peoples, since fortuity played so great a part in continuity or severance of traditional links with land.

If early attempts to provide a significant number of Aboriginal children with some of the knowledge and skills required to cross the ditch had been more successful, far more Aborigines would have been much more fully integrated into the wider Australian society, yet still able, if they wished, to retain some important features of traditional customs. Some significant advances were made in the “Hasluck era” from the early 1950s until the early 1970s, but since then the separatist ideas advanced by H C Coombs have generally prevailed, although they have enjoyed but little success. It is hard to find anyone who believes that, even with massive governmental financial support, there have been minor, let alone significant, advances in Aboriginal education, health, employment or quality of life during the last twenty years or so.

Most Australians value the national past and are proud that large numbers from every other continent wish to become Australians. Many of us resent the vile treatment the country receives from many of its historians. Before 1788, so far as we can ascertain, the ways of life of Australian Aborigines had scarcely changed for many thousands of years, during which time great transformations had taken place elsewhere in the world. The great geographical discoveries of the 18th Century were bound to bring Australia into a world system. Whichever country had colonized Australia, the period of transition would have been extremely difficult for the Aborigines, and not very easy for the colonists either. Yet today it would be hard for Aboriginal people, or any other Australians, to name a country with greater potentiality than their own to assist their cultural and material advancement.

Concentration on grievances, and expressions of contempt for the many advantages in law and grants of money that Aboriginal people have now received for more than a generation, will not lead to better and happier lives. Other Australians possess no special land rights, but many families have become prosperous and optimistic by embracing opportunity whenever it presents itself. Many ethnic groups that entered Australia as refugees with very few possessions have made great successes of their lives. Several groups suffered great pain and misery before entering Australia but, whilst not forgetting the past and respecting many traditional values, they looked forward to a better future and have succeeded in achieving it. Most of the early British emigrants to Australia were poor, and many were criminals, but within a century of 1788 Australians enjoyed one of the best standards of living in the world. Most Aborigines missed out on that, much to the regret of that large majority of their fellow citizens. Yet two hundred years is not a long time span in the history of the human race, and there is time enough left for Aboriginal Australians to seize some of the wonderful opportunities for a better life that are available to us. Let past misfortunes inspire us to make a better future, rather than lament what we cannot undo.

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