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Abstract

The fiction of Australia as 'terra nullius' was officially discarded by the High Court of Australia in *Mabo v Queensland (No 2)* (1992), so far as the preexisting rights to land of Indigenous Australians were concerned.

But an alternative fiction continues to perform a similar role, and continues to influence public discourse. It, too, would justify the continuing displacement of what may remain of Indigenous peoples' property rights. The fiction is usually expressed in the catchphrase 'land management is a prerogative of the States'. This fiction is given ample accommodation in the Native Title Amendment Bill 1997 ('the NTAB').

Native Title, Fictions and 'Convenient Falsehoods'

Garth Nettheim

Introduction

The fiction of Australia as 'terra nullius' was officially discarded by the High Court of Australia in *Mabo v Queensland (No 2)* (1992), so far as the pre-existing rights to land of Indigenous Australians were concerned.

But an alternative fiction continues to perform a similar role, and continues to influence public discourse. It, too, would justify the continuing displacement of what may remain of Indigenous peoples' property rights. The fiction is usually expressed in the catchphrase 'land management is a prerogative of the States'. This fiction is given ample accommodation in the Native Title Amendment Bill 1997 ('the NTAB').

The Bill has been passed by the House of Representatives but amended by the Senate to an extent which the Lower House resolved, on 6th December 1997, was unacceptable. The Bill will be re-introduced in March 1998. The possible resolution of any continuing disagreement between the House could take the form of a double dissolution election in which native title would be an important issue.

On Sunday, 30th November 1997, the Prime Minister, in a televised address to the nation argued that the Senate should enact his Government's NTAB. At the

same time, he stressed 'the fulsome commitment of my Government to the process of reconciliation'. He stressed, also, that 'we must continue our efforts to improve their [Indigenous Australians'] health, their housing, their employment and their education opportunities'.

The message remains unaltered since colonial times. Professor Henry Reynolds in *The Law of the Land* writes about responses in the Australian colonies to Imperial concerns for Aboriginal people. Such responses included

supporting such purely humanitarian aspects as protection of life and tight-fisted charity while rejecting the central emphasis on legal equality and land rights. ... Aborigines could have 'protection', they couldn't have land (Reynolds 1987: 151).

Terra Nullius

For over two centuries, one fiction was said to oppose any legal acknowledgement of the pre-existing land rights of Indigenous Australians. That was expressed in the phrase 'terra nullius' - land belonging to no one.

Reynolds has demonstrated how this notion became applied to Australia on the basis of misinformation and surmise. In *The Law of the Land* he sets out the testimony of Sir Joseph Banks to the House of Commons Committee on Transportation in 1785 (Reynolds 1987: 31-32, 53-54). He comments: 'It all would have been so easy if Banks had been right - that apart from the coastal fringe Australia was uninhabited, literally a *terra nullius*. But he wasn't.' (Reynolds 1987: 32).

Yet the settlement of the eastern part of the continent proceeded on the assumption that Banks had been right.

Some forty to fifty years later, when the Colonial Office in Britain tried to put things to rights, it achieved some partial success in requiring that pastoral leases should co-exist with Aboriginal rights of access to land, at least in the newer colonies of Western Australia and South Australia and what is now the Northern Territory. It proved more difficult to achieve explicit legal recognition of this proposition in the older, eastern colonies. Settlement had proceeded on the basis that there was simply no need to take account of Aboriginal rights in relation to land. This fiction was too convenient to be foregone. In *Coe v. Commonwealth* (1979), the late Justice Murphy said of the proposition (as restated in a Privy Council decision) that it 'may be regarded as having been made in ignorance, or as a convenient falsehood to justify the taking of Aborigines' land' (412).

And so the fiction survived, despite the common law's recognition of 'native title' in the USA from as early as the 1820s, and its recognition in other lands settled by the British.

It was only in 1971 that there was a direct legal challenge to the doctrine, in the first court action brought by Indigenous Australians to assert their ownership of land: *Milirrpum v. Nabalco Pty Ltd* (1971). Justice Blackburn of the Northern Territory Supreme Court felt bound to read the Australian common law position in accordance with dicta in several earlier appellate decisions for Australia, to the effect that Australian law did not recognise pre-existing Indigenous land rights. It was only in 1992 that the High Court of Australia had the opportunity to rule on the matter. In *Mabo (No. 2)*, six of the seven Justices ruled that the common law of Australia, like the common law in other countries, did accommodate 'native title'. But they also held that the survival of

native title was subject to the possibility of extinguishment by government acts which are clearly inconsistent with the continued exercise of such rights and interests. This effectively legitimated two centuries of non-Indigenous land grants. (There remained a question as to titles granted since commencement of the *Racial Discrimination Act* 1975 (Cth) - one function of the *Native Title Act* 1993 (Cth) was to validate such 'past acts').

The fiction of 'terra nullius' had thus been discarded in relation to Indigenous peoples' property rights though it remained intact in relation to their 'sovereignty' rights. (Reynolds, 1996)

Land Management

By this time, however, a newer legal catchcry had emerged, reflected in the oft-repeated mantra that 'land management' is a prerogative of the Australian States, as against any national power which might be claimed by the Commonwealth Parliament.

Much was heard of the proposition during 1993, in the 'debate' that followed the *Mabo* decision in the lead up to enactment of the *Native Title Act* 1993 (Cth) ('the *NTA*'). At the time the argument nearly prevailed, but, ultimately, found only limited scope in the *NTA*.

It emerged again, after the 1996 *Wik* decision. This time it found a Coalition Government more inclined to accept the proposition. This proposition is the central, informing theme of the NTAB.

Where did this notion come from?

We can trace it back - together with its connection to the fiction of *terra nullius* - to the crucial few years between Cook's exploration of the eastern coast of Australia in 1770 and Phillip's arrival in 1778 with 'The First Fleet'. The Admiralty's instructions to Cook, issued in 1768, were quite specific:

'You are also with the consent of the natives to take possession of convenient situations in the country ... or, if you find the country uninhabited take possession . . . as first discoverers and possessors.' (McRae, Nettheim & Beacroft 1997: 33)

Cook proceeded in accordance with the latter part of his instructions. By contrast, Phillip's instructions in relation to natives were merely to 'conciliate their affections'. And he was authorised to make grants of land. (McRae, Nettheim & Beacroft 1997: 33)

Indeed, the granting of land became a core objective in the establishment of the colony at Port Jackson and the later colonial settlements. As the penal settlements were supplemented by immigration and free settlers the revenue base for the colonies came to depend critically on the sale of land. This was seen necessarily to involve the dispossession and marginalisation of the Indigenous peoples.

This has been a key theme in the development of Australia. As Justice Brennan expressed it in *Mabo (No 2)*: 'Their dispossession underwrote the development of the nation' (69).

During the nineteenth century this imperative withstood the best endeavours of the Imperial Government to protect the interests of Aborigines (Reynolds 1987).

At the end of the nineteenth century, it withstood the move to nation-building in the new Federation. In comparable federations, the Constitution of the

United States of America, and the British North America Act of 1867 for Canada, both conferred on the federal legislatures the power and responsibility for Indigenous peoples. By contrast, the Constitution of the Commonwealth of Australia expressly preserved to the federating colonies (the States) the legislative power with respect to the people of 'the Aboriginal race in any State'.

In 1967 the electors supported a referendum to delete this exception from 'the race power' in the Constitution s 51 (xxvi). But the effect was to give the Federal Parliament a concurrent power with the States rather than an exclusive power.

By 1988, the bicentenary of British settlement, experience had been such as to support the proposition, articulated by Father Frank Brennan and Professor James Crawford, that there is 'a hidden Constitution' under which Commonwealth power has 'continued to be limited and residual' (Brennan and Crawford 1990: 63-64).

Indeed, State (and industry) resistance had been effective in 1984 to block the Hawke Government's proposals for national land rights legislation (Stokes 1987). In 1993, by contrast, the *NTA* was pushed through Parliament by the Keating Government against the determined opposition of States, particularly Western Australia. The mantra that 'land management is a State prerogative' was heard loud and often. Several States and Territories attempted 'go it alone' legislation to restore the prior situation of the 'defeasibility' of native title. Only Western Australia persevered to the extent of Constitutional 'showdown'. In *Western Australia v. Commonwealth* (1995), the High Court ruled, unanimously, that the State legislation was invalid. It had purported to extinguish native title and substitute statutory rights of traditional usage which would be 'administratively defeasible'.

This goal of the State was, in effect, to replace the majority decision in *Mabo (No. 2)* with Justice Dawson's dissenting view that Aboriginal rights amounted to nothing more than permissive occupancy. This goal could not be achieved in the face of overriding Commonwealth legislation - the *Racial Discrimination Act 1975* and the *NTA*.

The goal of restoring 'land management' - and Aboriginal dispossession - to its rightful place at the centre of State politics could only be achieved by gaining access to Commonwealth legislative power.

That opportunity arose with the March 1996 election of the Howard Coalition Government. By June 1996, the Government published the NTAB. Further provisions were publicised in October 1996. But the *Wik* decision in December 1996 provided the pretext for the Government to proclaim, in effect, a national emergency such as to justify a drastic recasting of the *NTA*.

The major thrust of the Ten Point Plan and the NTAB is to restore to State and Territory governments their colonial-era prerogative of promoting the development of land, and where deemed necessary, displacing any native title holders. It is less national legislation than 'States' rights' legislation.

Some of the principles features of the NTAB are noted:

- A new definition of 'extinguish' provides that any extinguishment of native title is permanent so that native title may not revive if the extinguishing event ceases to operate. This is almost certainly inconsistent with the common law position and with the reasoning of the majority of the High Court in the *Wik* decision.
- The Bill establishes a category of 'previous exclusive possession acts' dating back, conceivably, as far as 1788. States and Territories may 'confirm' that such acts have permanently extinguished native title. Many of the 'acts'

would not, on closer analysis, have been so inconsistent with native title as to extinguish it for all time.

- The Bill provides for a blanket validation of ‘intermediate period acts’ by governments in the period from the commencement of the *NTA* (1 January 1994) to the date of the *Wik* decision (23 December 1996). These ‘acts’ that fall within Category A (the list is similar to the list of ‘previous exclusive possession acts’) permanently extinguish native title.
- For ‘future acts’ the Bill provides for the validity of various ‘acts’ by governments on land subject to native title whether or not such acts might also be done in relation to land held under freehold title. This is a departure from the ‘freehold test’ in the *NTA*.
- In particular, provision is made for a widely expanded range of ‘primary production’ activities to be conducted on (or off) non-exclusive agricultural or pastoral leases, notwithstanding any effects on native title.
- There are provisions which would authorise the upgrading of non-exclusive pastoral or agricultural leases so as to confer exclusive possession, or to extend term leases to perpetual leases, or to convert leasehold to freehold titles, with consequent effects on any native title.
- Governments will be authorised to grant interests in water or ‘living aquatic resources’ or airspace without regard to native title rights.
- Governments will also be authorised to permit, on native title land, a lengthy list of services to the public.
- The ‘right to negotiate’ currently applies to future act proposals to grant, vary or extend mining interests, or to compulsorily acquire land for the benefit of others. It is to be substantially eliminated, in some cases by deference to State/Territory processes. It will not apply separately to

mining exploration and extraction. It will not apply in the inter-tidal zone. It will not apply in towns or cities. And it can be side-stepped altogether at the discretion of a Minister.

- Before the 'right to negotiate' and some other processes apply at all, native title holders will have to satisfy a stringent and retroactive registration test.
- Provisions for negotiated Indigenous Land Use Agreements would be valuable additions to the current *NTA*, but will have reduced value when the 'right to negotiate' is so substantially undermined.
- All applications will be lodged with the Federal Court rather than the National Native Title Tribunal. The processes are, generally, to be more narrowly-confined and legalistic.
- A six year 'sunset clause' is to be imposed on applications for determinations of native title and/or compensation.
- Provisions to enhance the responsibilities of Representative Aboriginal/Torres Strait Islander bodies would also be useful. However the Commonwealth Minister will undertake a process of recognising all representative bodies and the areas for which they are to function.

Conclusion

The terra nullius fiction cannot be revived. But it served its purpose for over two centuries and remains deeply embedded in the psyche of State and Territory politicians and bureaucrats. Its place has been taken by conceptualising any moves to recognise the relationship of Indigenous Australians to their land and waters as running counter to the prerogative and imperatives of 'land management'.

What is perhaps surprising is that this way of perceiving the issue has been subject to such limited challenge. The land is treated merely as a unit in the economic system, as real estate whose sole purpose is to generate wealth. The vision of the land as timeless, as fragile, as the source of life, spirituality and culture, remains beyond the imagination. Even the more limited human rights perspective, that Indigenous peoples are entitled to their property rights on a non-discriminatory basis, remains beyond the comprehension of too many Australians.

The fiction of *terra nullius* is dead. But the colonial era attitudes that supported it for over two centuries remain as potent today as they were in the 1830s.

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