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A short legal justification for a treaty between Australia and its Indigenous peoples — Part 2

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Leading up to 9 July 1840, Governor George Gipps pored over papers relating to the law of recognition of Indigenous rights to land. He examined Marshall CJ's famous American judgments on the subject, Story's *Commentaries on the Constitution of the United States*,[1] Kent's *Commentaries on American Law*[2] and various Colonial Office documents relating to an attempt by William Wentworth to purchase land from Māori people directly and without the involvement of the Crown.[3] The 9 July proceedings centred on the Claims to Grants of Land in New Zealand Bill, which was designed to render null and void Wentworth and others' purported purchase of Māori land.

His Excellency's conclusions were clear:

- European colonists could not acquire land from Indigenous peoples; only the Crown could effect that.
- Discovery gave title to the Crown, subject only to the fact that the Indigenous inhabitants "were admitted to possess a present right of occupancy, or use in the soil, which was subordinate to the ultimate dominion of the discoverer".[4] As Marshall CJ had noted:

  > It has never been doubted, that either the United States, or the several States, had a clear title to all the lands within the boundary lines described in the treaty [with Great Britain after independence was won], subject only to the Indian right of occupancy, and that the exclusive power to extinguish that right, was vested in that government …[5]

- As Kent's *Commentaries on American Law* pronounced:

  > The peculiar character and habits of the Indian nations, rendered them incapable of sustaining any other relation, with the whites than that of dependence and pupilage. There was no other way of dealing with them than that of keeping them separate, subordinate, and dependent, with a guardian care thrown around them for their protection.[6]

The original Indian nations, despite being acknowledged by the discoverers as the proprietors of the soil, had no power of alienation except to the governing power of the discoverers.

It is not difficult to see how Henry Reynolds could assert that native title was recognised by the Crown in the 1840s, through the provision of reserves, the insertion of reservation clauses in pastoral leases to recognise practically the right of occupancy on "runs", and provision in cl 20 of the Waste Lands Act 1842 (Imp) of 10% of the land fund being devoted to Aboriginal welfare. The right of occupancy asserted by Gipps's examination of legal commentaries looks like native title as we understand it from *Mabo v Queensland (No 2)*[7] (*Mabo*) and the title in the Discoverer (that is, the relevant European power acquiring the territory) looks like radical title.

But there is anachronism in this. As Hannah Robert has shown, the story is more complex and the central problem is how occupancy as a concept played out. Both in the Select Committee report on New Zealand in 1844[8] and in the South Australian Letters Patent, the word "actual" qualified the Indigenous right to "occupation":

> **Provided Always** that nothing in those our Letters Patent contained shall affect or be construed to affect the rights of any Aboriginal Natives of the said Province to the actual occupation or enjoyment in their own Persons or in the Persons of their Descendants of any Lands therein now actually occupied or enjoyed by such Natives.[9]

The South Australian Colonization Commissioners followed this up with instructions to the Protector of Aborigines, narrowing "the legal meaning of Aboriginal rights in land" to "cover only lands used for cultivation, fixed residence or 'funereal purposes'."[10] Land "not actually occupied" by Aboriginal people was beneficially owned by the Crown.

Of course, deciding where nomadic peoples "actually occupied" the land was a nonsense, but it grounded the colonial project in Australia and New Zealand. It is this founding phrase that justified the creation of reserves, the reservation clauses being placed in pastoral leases and the establishment of a fund for Aboriginal welfare from sales of "waste lands". It was applied in the Australian colonies and in New Zealand, regardless of the existence of treaties (be it Batman or Waitangi).

There was no recognition of common law native title: only a recognition of a right of occupancy fatally qualified in the southern hemisphere colonies by the word "actual". The effect was of course to force an "actual" occupancy by the policy mechanisms just described, thus wresting Aboriginal people from their spiritual connection to country. This is summed up by proposition 8:

> 8. To justify the acquisition of land in Australia, the British combined the common law notion of settlement (from Blackstone), an argument of Indigenous rights to land where the Indigenous people were in "actual occupation", and a scale of civilisation framework borrowed from both the Lockean idea of property rights being generated from labour mixing with the soil and the Scottish moral philosopher's four stages of civilisation arising out of political economy (hunter-gatherers, agriculture, mercantilism and industrialisation). Despite the Treaty of Waitangi, this idea of actual occupation coupled with the labour theory of property was applied not just by British settlers but by the Crown in New Zealand as well as Australia (where no treaties were made by the Crown).

In Canada and America, the domestic dependent nation status of Indigenous peoples produced perhaps no less injustice than in the south. The difference of course has been that where there were treaties, a modern clawing-back has taken place to re-establish the honour of the Crown in Canada, America and New Zealand. The lack of treaties in Australia is one more obstacle to such a re-establishment in Australia.

The consequence of the settlement doctrine producing a justification of Crown full ownership of most of the land in Australia in this way is, as Mick Dodson has pointed out, that the "sovereign pillars of the Australian state are arguably, at the very least, a little legally shaky".[11] Neither conquest, cession nor settlement provides a proper legal basis for the establishment of the Crown's legal relationship to property in land. Even Blackstone himself remarked that the "American plantations" were:

> … obtained in the last century [that is, the 17th century] either by right of conquest and driving out the natives (with what natural justice I shall not at present inquire) or by treaties.[12]

Blackstone was not sure of the legality of what occurred, but with an unwarranted delicacy declined to examine the issue of Indigenous rights further.

As a result:

> 9. Neither conquest, cession by treaty nor settlement establishes an uncontestable legal relationship to property of each state and territory in the land those jurisdictions encompass.

There has been some excellent work published in the last few years on developing a treaty with Australian Indigenous people.[13] I have little to add to them suffice to say that there is little obstacle to effecting a treaty from a precedent standpoint, as New Zealand and Canada have shown from the 1980s.[14] The latest of this work from Professor Megan Davis has demonstrated how grassroots Indigenous people across the country want an Indigenous body to advise the Commonwealth Parliament, and want to work more slowly towards a national treaty.[15] Nevertheless, Victoria and South Australia have started consultation towards provincial treaties.[16] Proposition 10 is the consequence:

> 10. A political compact or settlement which addresses past wrongs, establishes a proper basis for the acquisition of land by the Crown, and settles the compensation which is required to seal that compact between the states, the territories and the Commonwealth on the one hand, and the Indigenous peoples of Australia on the other, should now be actively debated by Australian society at large, not just by academics and elites. Only then can the Crown in each of its capacities in Australia establish a legal relationship between its claims to sovereignty and rights in the land.

On this view, *Mabo* is only a step on the path to the establishment of that legal relationship. Without it, Australia cannot claim to be a post-colonial landscape.

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Footnotes

1. J Story, *Commentaries on the Constitution of the United States*, Hilliard, Gray and Co, Boston, 1833
2. J Kent, *Commentaries on American Law*, O Halsted, 1826.
3. NSW Legislative Council *Votes and Proceedings* No 13 (9 July 1840).
4. *US Congress Debate*, Indian Appropriation Bill (1 February 1837).
5. *Johnson v M'Intosh* 21 US 543, 585 (1823).
6. Above n 2, Lecture 50.
7. *Mabo v Queensland (No 2)* (1992) 175 CLR 1.

8. See Great Britain Parliament House of Commons Select Committee on New Zealand *Select Committee on the State of the Colony of New Zealand Report* (1844) reproduced in "Accounts and Papers [of the] House of Commons", 1844 (9) vol XIII, *British Parliamentary Papers-Colonies New Zealand Irish University Press*, 5ff; see J Fulcher "The Wik judgment, pastoral leases and Colonial Office policy and intention in NSW in the 1840s" (1998) 4(1) *Australian Journal of Legal History* 33 at 41.
9. Letters Patent establishing the Province of South Australia (19 February 1836).
10. H Robert, *Paved with Good Intentions: Terra Nullius, Aboriginal Land Rights and Settler-Colonial Law*, Halstead Press, ACT, 2016, p 50.
11. Quoted in S Brennan, L Behrendt, L Strelein and G Williams, *Treaty*, The Federation Press, 2005, p 72.
12. Cited in above n 7, at 34–5. *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141 at 202.
13. Examples include above n 11; M Mansell, *Treaty and Statehood: Aboriginal Self-Determination*, The Federation Press, 2016.
14. H Watson, unpublished paper, 2018:

> The case that recognised the Treaty of Waitangi principles was the Lands Case (*New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641). The Waitangi Tribunal was set up by the government in 1975 by the Treaty of Waitangi Act 1975. Its authority to deal with claims was backdated from 1975 to 1840 in 1985 (Treaty of Waitangi Amendment Act 1985 (NZ), s 3). The Tribunal gives recommendations to the Crown, and often these recommendations are not binding (they have capacity to make binding recommendations in relation to Crown Forest Licence, or land subject to a memorial, but it is not often used. (Treaty of Waitangi (State Enterprises) Act 1988 (NZ); Treaty of Waitangi Act 1975 (NZ), ss 8A–8HJ). The Tribunal cannot conduct negotiations. The Treaty of Waitangi (State Enterprises) Act 1988 (NZ) amended the Treaty of Waitangi Act and gave power to the Tribunal to recommend that the Crown conduct negotiations to provide redress to the Maori as a result of suffering caused (see ss 5(1)(a) and 6(3) of the Treaty of Waitangi Act). Each of the settlement is incorporated into an Act for each Maori group and includes the Crown Apology.

Canada inserted s 35 into its Constitution in the 1980s, thus embedding Indigenous rights into the foundational structure of the nation.

15. S Zillman "Symbolic constitutional recognition off the table after Uluru talks, Indigenous leaders say" *ABC News* 27 May 2017 www.abc.net.au/news/2017-05-27/uluru-calls-for-treaty-puts-constitutional-recognition-off-table/8565114; see also M Davis, "'Political Timetables Trump Workable Timetables': Indigenous Constitutional Recognition and the Temptation of Symbolism over Substance" in *Constitutional Recognition of First Peoples in Australia: Theories and Comparative Perspectives*, S Young, J Nielsen and J Patrick (eds), The Federation Press, 2016; speech at University of Queensland, 20 April 2018.
16. Advancing the Treaty Process with Aboriginal Victorians Bill 2018 (Vic); Aboriginal Victoria, Treaty, 1 June 2018, www.vic.gov.au/aboriginalvictoria/treaty.html; South Australia's new government has just halted talks on a treaty: C Wahlquist "South Australia halts Indigenous treaty talks as premier says he has 'other priorities'" *The Guardian* 30 April 2018 www.theguardian.com/australia-news/2018/apr/30/south-australia-halts-indigenous-treaty-talks-as-premier-says-he-has-other-priorities.