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A short legal justification for a treaty between Australia and its Indigenous peoples — Part 1

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In *Yanner v Eaton*,[1] the High Court established the jurisprudence of property law in Australia on a different basis. Previously, Blackstonian notions of dominion and control had dominated legal thinking about how to make claims to property. The Crown in right of the State of Queensland had difficulty establishing to the satisfaction of their Honours a legal relationship or right to the property it claimed it had vested in a crocodile under the Fauna Conservation Act 1974 (Qld). That relationship to property in the crocodile was said to ground the Crown's right to prosecute an Indigenous man who took that crocodile in accordance with his traditional laws and customs. The court held that the Crown could not establish that legal relationship sufficient to overturn the man's honest claim of right to take the crocodile by exercising his native title right to hunt the crocodile.

Likewise, the history of land law in Australia is one of difficulty in establishing exactly how the Crown in right of the states establishes a legal relationship to land such that it exercises lawfully its right to grant, demise or dispose of land. The *Mabo v Queensland (No 2)*[2] (*Mabo*) judgment has done much to put those claims onto a more secure foundation, but as one author has put it, the "radical title fiction" has simply replaced the "feudal fiction".[3]

And of course, *Mabo* could say nothing about the acquisition of sovereignty over Australia's land mass and territorial seas. It was not a question justiciable in a court deriving its power from the Commonwealth Constitution, whose authority derives from that very sovereignty.[4]

So claims of a legal relationship to land by the states remain compromised. After the Uluru Statement from the Heart, the Commonwealth's recognition of Aboriginal sovereignty is also now under the spotlight. This article seeks briefly to survey some of the voluminous literature on these related topics. It asserts that treaty-making between the Commonwealth, the states and Indigenous Australians has a legal justification. This article seeks to articulate that justification for a general legal readership.

It is divided into two parts. The first part examines the difficulties of the natural law arguments in *Mabo* to deal with the sovereignty and land management issues that will not go away, and explores the origin and role of *terra nullius* in creating those difficulties. The second part sets out the legal argument for a compact/Makkerata or recognition of prior sovereignty in Indigenous Australians, based both on Part 1 and the New Zealand precedent.

Several propositions derived from the literature can be baldly stated, and then examined more closely:

1. *Terra nullius* (land without an owner) has its origins in Roman natural law, as does *territorium nullius* (country with no internationally recognised sovereign).
2. Initially the concept was used to justify indigenous rights to land, because as early as the 16th century, land inhabited by Indigenous peoples was not considered "desert and uninhabited" for the purposes of international sovereigns' acquisition of territory.
3. In the scramble for Africa in the late 19th century, the 16th century formulation was turned on its head using a property framework: land could nevertheless be considered *terra nullius* if it was inhabited by Indigenous peoples who were:

> … so low in the scale of social organisation that their usages and conceptions of rights and duties are not to be reconciled with the institutions or the legal ideas of civilized ssociety.[5]

Andrew Fitzmaurice has very usefully explained the origins of *terra nullius* in the Roman law idea of the first taker — that which is captured by the first taker becomes his or her property. If applied to territory inhabited by Indigenous peoples, the original law of nations provided that "goods which belong to no owner [that is, no sovereign] pass to the occupier."[6] On this view, a mainly Continental European one, dispossession of first nation peoples was wrong. The English, citing Locke, inverted it: those who mixed their labour with the soil and with things available in nature were entitled to a first claim to property rights in those things, a sort of first taker as first fashioner.[7]

These two results from the different understandings of *terra nullius* fought for supremacy in the 19th century. Eventually the scramble for Africa in the

late 19th century saw the English formulation temporarily win out.[8] But by 1975, in international law, the anti-dispossession view of *terra nullius* was re-established:

> "Occupation" [being legally an original] means of peaceably acquiring sovereignty over territory otherwise than by cession or succession; it was a cardinal condition of a valid "occupation" that the territory should be *terra nullius* [a territory belonging to no one at the time of the act alleged to constitute "occupation".] [Those] territories inhabited by tribes or peoples having a social and political organization were not regarded as *terrae nullius*.[9]

Thus we can state proposition 6.

6. The justification by European powers for the acquisition of African territories using a concept of *terra nullius* turned on its head lost momentum at least by the time of the Advisory Opinion of the International Court of Justice on Western Sahara in 1975. It was clear that land could only be settled if there were no Indigenous inhabitants at all. At this point, Paul Coe began to prepare his statement of claim for *Coe v Commonwealth*,[10] which argued that *terra nullius* had grounded British justifications for the acquisition of the absolute beneficial ownership of the land by the Crown. But, as we have seen from proposition 3, this was never the case as *terra nullius* was never mentioned in the 19th century British historical records about Australia. And it was not mentioned in the case law either.

As Connor has pointed out, it was the Advisory Opinion of the International Court of Justice on Western Sahara in 1975 which led directly to the idea of *terra nullius* taking hold of the historical and legal imagination in Australia. Paul Coe's statement of claim in *Coe v Commonwealth* used the concept expressly, and it was taken up by historians such as Reynolds and others.[11] Thus it is now necessary to put proposition 4:

4. *Terra nullius* was not used by the British Crown to justify the acquisition of territory in Australia.

There is no reference to *terra nullius* being the basis for settlement in 19th century historical sources relating to the settlement of Australia. The second part of this essay will address the basis as it appears in the archive.

At law, commencing with *Attorney-General v Brown*[12] and then by assertion in subsequent cases (see proposition 7), occupancy of the Crown by settlement of British subjects in the new colony of New South Wales grounded absolute beneficial ownership. To use the Roman law concepts here, the occupancy of the Aboriginal people was not considered sufficient to make them first taker and thus property owner of the land in the new colony. The Crown's title, through settlement (or to put it another way, through the occupancy of British settlers), gave them the status of first taker in the eyes of the Supreme Court of New South Wales:

> … in a newly-discovered country, settled by British subjects, the occupancy of the Crown … is no fiction … Here is a property, depending for its support on no feudal notions or principle.[13]

But this case must not be wrenched from its historical context. In *Attorney-General v Brown*, a landowner tried to take coal from his granted land where a reservation clause in the grant provided for Crown ownership of the coal. The case took the form of a Crown information against the defendant landholder Brown for intruding into the coal seams and trespassing on the Crown's rights to the coal in the soil. Brown's intrusion was a direct attack on the Crown's albeit fictional feudal right as ultimate holder of the title to the waste lands. The attack went further:

> The defendant's counsel maintained that there was a material difference between *dominion*, or the right of sovereignty over the soil and country, which were unquestionably in the Crown, and the *possession* or the *title to the possession* in or of that soil, with power to grant the same at her discretion, which title he broadly denied.[14]

In *Cooper v Stuart*,[15] a landholder sought to prevent the Crown from resuming 10 acres reserved in the original grant in 1823 of the Waterloo estate for a public park. In passing, their Lordships referred to New South Wales as "a colony which consisted of a tract of territory practically unoccupied, without settled inhabitants or settled law, at the time when it was peacefully annexed to the British dominions." In this sense, the comment was more akin to *obiter* than a *ratio*. The case was about the reception of English law into the new colony and only en passant does it address the issue of indigenous rights to land. As we shall see, that was a right of occupancy readily acknowledged by successive governors of New South Wales. Where the Indigenous peoples were in "actual occupation", however, was a question to which the facts on the ground did not readily admit an answer.

But, we shall see in Part 2, these cases were all to attack or defend the Crown's prerogative against settlers "pushing the envelope" to narrow that prerogative so as to enlarge individual rights in a colony far from the centre of British metropolitical power. They did not mention indigenous rights at all, except to appear to argue, interesting in hindsight, that such Aboriginal rights were allodial in nature.[16] This legal statement can only be reconciled to the historical record using the propositions discussed in Part 2.

Each of the cases (*Attorney-General v Brown* and *Cooper v Stuart*) in the 19th century were designed to guard the Crown against the unwarranted overreach of powerful and wealthy colonists' intent on challenging

the skeleton of principle underpinning English land law and the exercise of the Crown's prerogative through governors in granting land before any representative assembly was established. *Attorney-General v Brown* must, as we shall see, be viewed in light of the battle Governor Gipps ultimately lost in exercise of the Crown's prerogative to protect the lands beyond the limits of location from the unlawful encroachment by squatters. The Crown in London gave up the fight to stop leases being given to those who had simply spread out beyond the limits of location, and passed the 1846 waste lands legislation providing for leases of Crown land. This was not because necessarily indigenous rights were ignored. They were simply not relevant to the parties to the proceedings in the two cases. But nevertheless, *Cooper v Stuart* mandates the statement of proposition 6 because in 1971 Blackburn J still considered himself bound by it:

5. The key Australian decision from the Privy Council in *Cooper v Stuart* was heavily influenced by this reversal of argument previously used to protect indigenous rights in the face of colonial acquisition of territory. Importantly, *Cooper v Stuart*, through the doctrine of *stare decisis*, prevented Blackburn J in *Milirrpum v Nabalco Pty Ltd*[17] from recognising indigenous rights to land in the Northern Territory.

And proposition 7 can be stated because it demonstrates just how flimsy the legal basis established in *Cooper v Stuart* was to justify the denial of indigenous rights to land:

7. In *Mabo*, their Honours Deane and Gaudron JJ critically examined the Australian cases which underpinned the original legal claim of the British Crown to absolute beneficial ownership of land in Australia. These were *Attorney-General v Brown, Williams v Attorney-General (NSW)*,[18] *Randwick Municipal Council v Rutledge*[19] and *Cooper v Stuart*.[20] The first thing that strikes you about all of these cases, as it struck their Honours, is that they are all based ultimately on "little more than bare assertion".[21]

So *terra nullius* was never part of the law of the land, and *Mabo* did not overturn it. Brennan J's decision recognised the indigenous right to occupancy of the land, sovereignty over which was acquired by the British Crown.[22] The occupancy of the Aboriginal people, in the absence of any claim to sovereignty, gave them ownership as first taker. At least that is what the law now says.

The problem is how to explain how that ownership appeared to be ignored when the law was based on mere assertion and could hardly ground a reasonable justification for Crown absolute beneficial ownership of land, and when that common law was promulgated in the context of battles over the extent of the Crown prerogative in the new colony of New South Wales without reference to indigenous interests. Part 2 will address this question and explain how the assertion of the law was contextualised as part of the colonial project to ignore indigenous claims to ownership as first taker. It will examine these further three propositions:

- 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 peoples 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 (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).
- As a result, neither conquest, cession by treaty, nor settlement establishes an uncontestable relationship to property of each state and territory in the land those jurisdictions encompass.
- 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. *Yanner v Eaton* (1999) 201 CLR 351; 166 ALR 258; [1999] HCA 53; BC9906413.

2. *Mabo v Queensland (No 2)* (1992) 175 CLR 1.
3. U Secher "The doctrine of tenure in Australia post-*Mabo*: Replacing the 'feudal fiction' with the 'mere radical title fiction' — Part 2" (2006) 13(2) *Australian Property Law Journal* 140.
4. *Coe v Commonwealth* (1979) 24 ALR 118; 53 ALJR 403; BC7900052; above n 2, at 31.
5. *Re Southern Rhodesia* [1919] AC 211 at 233–4.
6. A Fitzmaurice "The Genealogy of *Terra Nullius*" (2007) 38(129) *Australian Historical Studies* 1 at 7, quoting Francesco de Vitoria.
7. Above n 6, at 8.
8. Above n 5, at 232.
9. Advisory Opinion of the International Court of Justice on Western Sahara (16 October 1975), p 101.
10. *Coe v Commonwealth*, above n 4.
11. M Connor, *The Invention of Terra Nullius: Historical and Legal Fictions on the Foundations of Australia*, Macleay Press, 2005: This is a very interesting and well-researched book marred by its sometimes hectoring tone and enthusiastic embracement of the revisionist side of the History Wars. *Coe v Commonwealth*, above n 4; H Reynolds, *The Law of the Land*, 2nd edn, Penguin Books, 1992. See also above n 6.
12. *Attorney-General v Brown* (1847) 1 Legge 312 at 316.
13. Above n 2, at 27.
14. Above n 12, at 314.
15. *Cooper v Stuart* (1889) 14 App Cas 286 at 291; "In Equity: Cooper v Stuart" *Evening News* 17 August 1885 p 5; *Darling Downs Gazette* Saturday 6 April 1889; *The Daily Northern Argus* Rockhampton Monday 28 January 1889.
16. Above n 12, at 324.
17. *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141 at 242.
18. *Williams v Attorney-General (NSW)* (1913) 16 CLR 404; 19 ALR 378; BC1300029.
19. *Randwick Municipal Council v Rutledge* (1959) 102 CLR 54; 5 LGRA 127; BC5900400.
20. Above n 2, at 102.
21. Above n 2, at 103–4.
22. Exactly what the defendant's counsel in *Attorney-General v Brown* had argued: see above n 12.