"THE TIDE OF HISTORY":

Australian Native Title Discourse in Global Perspective

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DISCLAIMER

This thesis is the product of my own original research and has not been previously submitted for academic accreditation.

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SYNOPSIS

Australian native-title law has many inconsistencies and contradictions. Emanating from the Mabo decision is the central contradiction that the Crown's acquisition of sovereignty in Australia was illegitimate but valid. This thesis attempts to identify the underlying structures beneath this and other contradictions and inconsistencies by tracing the features of a recent determination of a native title claim back through time. In 1994, the Yorta Yorta people of south-east Australia made a claim under the *Native Title Act* of 1993. The Court framed its determination of the claim within the metaphor of the 'tide of history'. To make his decision, Justice Olney reconstructed the Yorta Yorta people's ancestors as native inhabitants from within expansionist ideology. Within that ideology, the term 'native inhabitant' is synonymous with inferiority, incompetence and externality. This thesis argues that these representations justified the processes of cultural modification. Modification is a feature of colonisation that seeks to make natives resemble Europeans. This thesis argues that these processes are linked to dispossession and are the essence of the 'tide of history'. A feature of expansionist ideology is the sovereign imperative to maintain exclusive power to make, enforce and suspend law. This thesis argues that the sovereign need for exclusivity in Australia is central to the *Native Title Act* and the Yorta Yorta decision. To trace the 'tide of history', this thesis begins with the early Roman Church and follows its development as it pursued the Petrine mandate. It continues into the secular era of discovery and considers how the 'tide of history' manifested in North America and produced the Marshall judgements. It follows the 'tide of history' into Australia from the Crown's claim to discovery and considers its role in the Mabo decision and the *Native Title Act*. It analyses the Yorta Yorta people's claim for native title through the logic that underpinned the majority judges' reasoning. This thesis concludes that the 'tide of history' that washed away the Yorta Yorta people's native title is a product of European expansionist ideology. From within that ideology, the judiciary and the legislature imposed a two-way loss on the Yorta Yorta people, which enhanced the Crown's exclusivity, rendering benign the conception of the Crown's acquisition of sovereignty as illegitimate but valid.

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INTRODUCTION

The character of Australian native title law is typified by inconsistencies and contradictions. Judicial statements in native title claims appear to defy logic. They suggest that the Crown's acquisition of sovereignty in Australia was illegitimate but valid. They uphold discovery as a legitimate mode of territorial acquisition in inhabited territory. The judiciary rejected *terra nullius* and acknowledged pre-existing law then extinguished what it had just recognised. The Crown bypassed existing structures and constituted its own mode of acquiring territorial sovereignty and the judiciary provided legitimacy though the same structures. The Courts upheld English land-law principles by maintaining the doctrine of occupancy whilst refusing to acknowledge Aboriginal occupancy as possession. The legislature called Aboriginal land rights 'native title' when those rights are clearly not a feudal form of land tenure. Judges maintained that the character of a society is irrelevant to native title then demanded that Aborigines' social formations be recognisable to common law. Judicial processes disqualified some Aborigines from legally being Aboriginal through representing them as Aborigines. The legislature demands that Aborigines embody an historical exemplar yet be untouched by history. The legislature also claimed to retreat from past injustice. Judges then use the cumulative effect of past injustice, that is, the 'tide of history', to continue dispossession by extinguishing most Aborigines' native title rights in Australia.

C. B. Macpherson[1] and Giorgio Agamben[2] have shown that, where there are contradictions and inconsistencies, there can be solid and consistent social logic beneath them. This thesis attempts to identify the underlying structures beneath these contradictions and inconsistencies by tracing some of the features of a recent determination of a native title claim back through time. In 1994, the Yorta Yorta people of south-east Australia made a claim for the recognition of native title under the *Native Title Act* of 1993. The area involved in this claim straddles the Murray River and includes areas around large towns in New South Wales and Victoria. On 18 December 1998, the Federal Court of Australia determined that the "tide of history has indeed washed away"[3] the Yorta Yorta people's native title rights and interests.

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[1] Macpherson, C. B. (1964).
[2] Agamben, G. (1998).
[3] Olney in *Yorta Yorta* (1998) at 129.

The Yorta Yorta people appealed to the Full Bench of the Federal Court and then to the High Court of Australia without success.

The claim was made in a closely settled area. 'Closely settled' means that the Crown has taken legal possession of the land and has transferred most of it into non-Indigenous ownership. The Crown assumes that it has acquired exclusive possession of the area. Although limited by the *Native Title Act* and its validation of Crown grants within the claim area, the Yorta Yorta people's claim challenged the Crown's assumption of exclusive possession. The Federal Court trial incorporates the Crown's response to the Yorta Yorta people's challenge.

The Court framed its response within the metaphor of the 'tide of history'.[4] Because Australia is a settler-colonial state that owes its existence to European expansion, the 'tide of history' cannot be comprehended as contained, either spatially or temporally, within Australia's borders. It is only to be expected that the European ideological structures that facilitated the founding of Australia would underpin its social and legal institutions. The Australian judiciary and legislature rely on these ideological structures to produce the social, political and legal representations of the native inhabitants.

Justice Olney's reconstructions of the Yorta Yorta people's ancestors as native inhabitants contained elements from earlier expansionist philosophy. A central element of this philosophy is derived from the Spanish Dominican Francisco de Vitoria's proposition that native inhabitants have rights to their possessions but these rights are relative to the native inhabitants' personal characteristics.[5] This philosophy entered Australia through the first representations of Aborigines made by Dampier, Cook and Banks. As will been seen, in settler-colonial terms, 'native inhabitant' is synonymous with inferiority, incompetence and externality.

The reconstitution of the Yorta Yorta people's ancestors through these means enhances the justification for processes of cultural modification. As will be seen, the charge of modification has been justified through the interpretations of the medieval

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[4] Brennan in *Mabo* (1992) p. 43.
[5] See Vitoria, F. de (1535) p. xii; Anghie, A. (1999) p. 92.

Petrine mandate authorising proselytization.[6] Later, as the Western world became more secularised, natural-law interpretations authorised the processes to uplift native inhabitants from their 'primitive' states.[7] Modification processes flourished in Australia through settlement, missionary activity and legislative acts.[8] The processes of modification encourage native inhabitants to abandon their traditional practices.

'Modification', as the term is used in this thesis, imposes a two-way loss on colonised people. On the one hand, colonisation seeks to change the native inhabitants to make them resemble Europeans. On the other hand, if the natives succeed in mimicking Europeans, they no longer qualify for the entitlements that accompany native status. Either the natives persist in their primitive state, which justifies their expropriation, or they become "white but not quite",[9] a condition that removes such rights as international law makes available to them. The European propensity to modify applies in both sacred and secular realms, spanning the gap between the Petrine mandate and the *Native Title Act*. Upon modification - which is to say, upon conversion to European mores- the native ceases to be a native and becomes condemned to being not quite European.

Justice Olney's interpretation of how traditional practices are abandoned in this case suggests that the Yorta Yorta people's ancestors eventually embraced the advantages of settler society and came to resemble Europeans. By embracing 'civilisation' the Yorta Yorta people lost their character as native inhabitants and the rights that this status conferred. The judges declared the abandonment of traditional practices in the Yorta Yorta case, which severed Yorta Yorta connection to a legislatively defined Aboriginality. This thesis will argue that these processes of representation and modification became linked to dispossession and are the essence of the 'tide of history'.

The ideological structures of European expansion also underpinned the development of Australia's legal system. Its foundations are based on established discourses such

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[6] Hanke, L. (1949) p. 54; Erdmann, C (1977) pp. 10-11.
[7] Locke, J. (1698) Bk II, 182, 184.
[8] Rowley, C. D. (1970) p. 21; Christie, M. (1979) p. 205.
[9] This term comes from Homi Bhabha (1994) p. 89. The difference from Europeans that is expressed in the idea of "not quite" makes all the difference.

as the rules that govern territorial acquisition developed by seventeenth-century jurists such as Samuel Pufendorf.[10] This thesis will show how these rules, together with the representations of Aborigines, produced the doctrine of *terra nullius*. The doctrine provided the Crown with what C. D. Rowley described as a legal *tabula rasa* upon which it could inscribe its own legal forms.[11] Australia's land law is based on the English feudal fiction of the Crown's radical title.[12] After the rejection of *terra nullius,* the judiciary and the legislature retained this legal formula. In the *Native Title Act,* the legislature reanimated the rights and interests of native inhabitants within this legal construct. This thesis will argue that the *Native Title Act* is the product of expansion ideology and, contrary to the accepted legal opinion, that native title is the product of European rather than Indigenous legal forms.

The *Native Title Act* confers a large measure of discretionary power on judges to ascertain the extent that modification processes have reduced Aboriginal rights. As this thesis will show, the judges in the Yorta Yorta case reinvigorated cultural pre-conceptions and a conventional historiography that have validated the illegitimate exercise of sovereign power in the past. The judiciary drew together expansionist ideology and its own discretionary power and restated the Crown's claim to exclusive possession of the Yorta Yorta people's ancestral lands. To ensure that colonial legal processes and the Crown's exclusive exercise of power are maintained, and that the effects of the 'tide of history' are preserved, the judiciary declared that the Crown's acquisition of sovereignty was an act of state and not reviewable. By these means, the judiciary validated the Crown's illegitimate assertions of discovery in inhabited territory. This thesis concludes that the 'tide of history' that washed away the Yorta Yorta people's native title is a product of European colonial ideology.

The solid and consistent logic of Australian native title law resides in social, political and legal structures that pre-date Australia. Chapter one begins with the early Roman Church and follows its development as it pursued the Petrine mandate and persisted with claims to spiritual sovereignty. On the way, it focuses on how the Petrine mandate functioned as a legitimising concept for the Church's expansion into infidel

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[10] Pufendorf, S. (1682)
[11] Rowley, C. D. (1970) p. 24.
[12] Brennan, p. 33; Deane and Gaudron, p. 60; Dawson, p. 9, in *Mabo* (1992)

lands and how it authorised proselytization. It observes the effects of the Church's authority as it waned with the Reformation and the Renaissance. It considers how the development of secular international law borrowed from the Petrine mandate to justify the dispossession and modification of natives subjected to European colonisation. It considers how this manifested in the discovery of North America and produced the Marshall judgements.

Chapter two follows the flow of these ideas into Australia. It focuses on the development of legal instruments and representations of Aboriginal people. Beginning with the concept of *terra nullius*, it examines the idea that the Crown acted illegitimately but maintained the validity of its acquisition of sovereignty through representations of Aborigines as inferior. The chapter notes the Crown's reliance on the pre-existing conceptions of territorial acquisition within the doctrines of discovery and settlement to establish colonial legal order. It then traces the development of Australian legal instruments that were applied in modification strategies. It examines the rejection of some of those instruments and the invention of new ones. It also examines how the idea of the 'tide of history' – that is, the idea that modification of Aborigines reduces their legal rights - gained legal force.

The application of these new expressions of old ideas is analysed through the Yorta Yorta people's claim for native title. Chapter three analyses the logic that underpinned the three Courts' reasoning. It considers the legal processes that allowed the judiciary to construct the 'tide of history' narrative that extinguished the Yorta Yorta people's rights as native inhabitants. It looks at how representations of the Yorta Yorta people as almost civilised and their ancestors as primitives were constructed. It concludes by examining how the judiciary confirmed the validity of Crown's acquisition of sovereignty in Australia.

1. THE 'TIDE OF HISTORY'

In the 1998 Yorta Yorta decision, Justice Olney determined that the 'tide of history' had washed away the Yorta Yorta people's native title.[13] Justice Brennan had earlier brought the metaphor into Australian law in the Mabo decision. In Australian legal usage, the 'tide of history' refers to the cumulative effects of European settlement on Aborigines over time.[14] In this thesis, it is argued that Justice Brennan's 'tide of history' has a deeper genealogy. Its components have antecedents that can be traced back to ancient times. It is the product of centuries of European power struggles.

In this chapter, the components of the 'tide of history' that were identified by Justice Olney are traced beyond Australian shores and the time that the British Crown acquired sovereignty over Australia. The following exploration of European history begins with the early Roman Church, moves through the Crusades and the Norman conquest of England. It then follows the salient features of those events into early Portuguese and Spanish expansion and the emergence of modern international law. It ends with a consideration of how these components manifested in the settler-colonisation of North America.

THE PETRINE MANDATE

Christian theology is a strong undercurrent of the 'tide of history'. Its legal principles, which underpinned colonial logic, can be traced to the early Roman Church through the Pope's Petrine mandate. Robert Williams described the mandate as "a powerful history-shaping concept."[15] The Petrine mandate is based on the idea that, in Christian theology, God made the world for mankind and Christians would inherit the Earth after the apocalypse. Saint Peter was God's representative on Earth and the Popes were his lineal successors.[16] As the spiritual leader of Christianity, the Pope's responsibilities included the mission to save human souls through conversion to the Christian faith. As part of this responsibility, the Pope asserted absolute ownership of all the world's resources and every human soul.[17] The Church asserted that it had a

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[13] Olney in *Yorta Yorta 1998*, at 129.
[14] Brennan in *Mabo*, p. 43.
[15] Williams, R. A. (1990) p. 15.
[16] Lecler, J. S. J. (1952) p. 6.
[17] Lecler, J. S. J. (1952) p. 5, suggests that although the Gospel characterises the Church's sovereignty as spiritual, it takes on a "social and organic form" in the prase 'the kingdom of Christ' that grows and develops on the earth. As I will argue, the idea of European entitlement to exploit the world's

distinct sovereignty over spiritual life. Papal interpretations of the mission to realise this universal Christian commonwealth and the Church's interaction with secular authority from this perspective produced some of the forces that became identified as the 'tide of history' by Justice Brennan. Papal assertions produced tensions between secular and Church authority that contributed to secular interpretations of the Church's role.

The institution of the Christian Church grew from a patchwork of divergent groups when the Roman Empire was strong. The Empire had an official religion at the time and all people within Roman-held territory, including Christians, were required to pay due respect to the Roman deities. Authority over spiritual matters was part of the Emperor's power. Christian assertions that spiritual and secular life were distinct and governed by different laws threatened the exclusivity of the Emperor's sovereign power.[18] Although the Empire had a policy of tolerance for other religions,[19] these assertions provoked violent reactions and imperial authorities persecuted Christians.[20]

By the end of the second century, Roman persecution and the diversity within Christianity threatened its existence. To strengthen the religion's standing, leaders of the different Christian groups began to meet to discuss and determine Christian principles. They moved to centralise Christian authority. It was decided that Rome, the centre of imperial power and the place were Saint Peter died, was to be the centre of Christianity for the whole world.[21] The fledgling Roman Church struggled until the conversion of Emperor Constantine at the end of the fourth century. Christianity became the official religion of the Roman Empire. It was drawn into the Roman state's governmental structures.[22] The acceptance of Christianity within the Empire substantially increased the Church's power but also controlled its claims to separate

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resources remains a feature of Western European ideology and philosophy. It remains a feature of Australian law. It underpins respondents' submissions and the judge's conclusions in the Yorta Yorta claim.

[18] Lecler, J. S. J. (1952) p. 10

[19] According to Hale, M (1971) p. 53, Roman authorities believed that ruling occupied territories was easier if it allowed conquered people to retain their laws and religions. This Roman strategy later entered modern international law and English law as a guiding principle for the treatment of native inhabitants in territories acquired by conquest. See also Lecler, J. S. J. (1952) p. 8.

[20] Tierney, B. (1964) p. 8; Lecler, J. (1952) pp. 9-11. The Emperor's response is an early expression of the sovereign need for exclusivity.

[21] Goodman, E. (1995) pp. 139-140.

[22] Kelly, J. M. (1992) p. 80.

spiritual jurisdiction.[23] As Christianity became part of the Emperor's power, the threat to the Church's asserted distinctiveness was countered by its insistence of separate authority within the empire. The Church continued to assert its belief that it had divine authority over all human souls and drew distinctions between secular power and church authority.[24]

In the fifth century, St. Augustine[25] described Roman law as that of the 'city of men' intended to control the sinfulness of the secular world brought about by materialistic ideas of private property.[26] He argued that in the city of men, secular law properly governed Christians in their civil and material life but divine law governed their spiritual and moral life. The Pope and his bishops administered divine law, which Saint Augustine claimed to be superior to all other law.[27] His apparent disdain for Roman law was not universally accepted within the Church.[28] Many clergymen continued to respect secular authority and the Church adopted many Roman-law principles and administrative procedures. A most striking example is that the Church appointed the Pope in Rome using Roman principles of succession, particularly the practice of sitting Popes appointing their own successors.[29] Some clerics also adopted Roman administrative procedures and learned Roman methods of keeping meticulous records, particularly for land holdings.[30] The sharp dichotomy constructed by St. Augustine suggests the importance of jurisdictional boundaries in maintaining the Church's spiritual authority to further the Petrine mandate.

When Emperor Constantine moved the seat of Roman secular power to Constantinople, it signalled the decline of centralised power and split the Empire into

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[23] Lecler, J. (1952) p. 32.

[24] According to Lecler, J. (1952) p. 25, rather than a religion that was part of secular rule, as was usually the case, the establishment of the Church as the organization of Roman religion created a state within a state.

[25] According to Erdmann, C. (1977) p. 7, 8, St Augustine's thesis was written after the Goths had invaded Rome. He considered war evil and a creature of the 'city of men'. As will be seen, St Augustine's theology remained influential through the investiture crisis and later referred to and refuted by the scholastic theologian St Thomas Aquinas. St Thomas influenced social contract theorists who were, in turn influenced theologians and scholars during the discovery era.

[26] Tierney, B. (1964) p. 165.

[27] Lecler, J (1952) p. 5; Williams, R. A (1990) pp. 29-30.

[28] According to Lecler, J. (1952) pp. 5-6, the teachings and parables of Jesus Christ express the necessity for Christians to respect and abide by secular law.

[29] Goodman, E. (1995) p. 141. Goodman suggests that these Roman principles were derived from property law regarding inheritance.

[30] Lyon, B. (1960) p. 4.

east and west. The Church also split along similar lines.[31] With the decline of Roman power came continuous wars, uprisings, and population migrations across Europe and into England. Some groups migrated in search of better lands, while others were forced from their lands and migrated as refugees.[32] The Church's spiritual jurisdiction was not bound to Roman secular authority or within territorial borders. It sought friendly relations with conquering armies to maintain its existence,[33] which suggests that, although the Church saw itself as a distinct sovereign power, it was dependent on the goodwill of secular authority.

The Church's transcendence of political borders allowed it to grow within Europe through pilgrimage and conversion.[34] Pope Gregory I pursued the Petrine mandate and sent missionaries across Europe and into England to re-establish Christian unity late in the sixth century. Missionaries settled in non-Christian lands and attempted to convert the surrounding population.[35] They often met with hostility. Gregory examined ways to protect pilgrims and missionaries and the possibility of the Church instigating war. He concluded that the Church could wage war in self-defence.[36] He also suggested that subjugation of pagans, as a means of converting them, may be permissible. Missionaries persisted and were encouraged by their faith and the belief that the Petrine mandate justified their presence in infidel lands.[37] The Petrine mandate underpinned early Church expansionism.

After the fall of the Roman Empire, the Church lost a large measure of control over its own affairs in Europe, including England. Between the seventh and tenth centuries, it

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[31] Goodman, E. (1995) p. 129.
[32] Lyon, B. (1960) p. 19; Blackstone, W. (2001) p. 37.
[33] Goodman, E. (1995) p. 140.
[34] The Church's assertions of separateness and claims that its authority transcended physical boundaries, which were products of the Petrine mandate, allowed the Church to develop as a distinctive power in the Western world. As explored in more detail later in this chapter, its authority, even as it waned in the discovery era, played a major part in the way modern international law developed. English Protestant reformers such as Purchas and Hakluyt adapted the Church's assertions of divine authority, which provided legitimacy to English imperial aspirations, which manifested centuries later in the Crown's acquisition of sovereignty in Australia.
[35] The Christian propensity to modify pagans' ways of being and bring them to the faith is evident in this early expression of furthering the Petrine mandate
[36] Erdmann, C. 1977, pp. 10-11 Pope Gregory considered the circumstances where the Church could engage in justifiable war and was influential during the Crusade-era. See also Williams, R. A. (1990) p. 17; Goodman, E. 1995, p. 144.
[37] Erdmann, C. (1977) pp. 10-11. This justification of Christian presence in infidel lands is an early expression of the Christian doctrine that justified the Crusades and later secular expansion.

lost much of its power and wealth, particularly in landed estates, to conquering lords. The idea of paramount lordship that the conquering lord acquires ownership of everything and allows others use of the land in return for loyalty is the basis of feudalism.[38] The lords looked upon the clergy as tenants of their estates and made appointments to Church positions as rewards for loyalty rather than by Church rules.[39] This early feudal expression of secular power saw Church authority waning in a way that was reminiscent of the early Christian era when Roman Emperors had incorporated religion as part of their sovereign power. Many priests defied Church authority. They bought and sold their bishoprics (the sin of simony) and took wives and concubines to produce heirs for their estates.[40]

Although its authority was weakened everywhere, the Church maintained a precarious hold on its power in Rome.[41] The Pope entered into alliances with powerful armies and, with payments of gold, persuaded military opponents not to sack the Church.[42] The survival of the Holy See in Rome maintained a centralised focal point for Christianity, allowing the establishment of several reform movements.[43] During the tenth and eleventh centuries, there was ongoing debate within the Church regarding the power of secular authorities to interfere with Church affairs. Some argued that secular interference had corrupted Church structures and violated Church law, which weakened the Church's assertions of itself as a distinctive authority. Others in the Church maintained that Church and secular authorities needed to work together to strengthen the Church's capacity to exercise its authority. This led to the conflict within the Church known as the investiture crisis.[44] Although called the investiture crisis, it had less to do with the appointment and behaviour of priests than with the Church's assertion of separateness from the secular world.[45] For the Church to retain

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[38] Blackstone, W. (2001) pp. 37-39. The conquering lord retains title akin to radical title, which is also a fundamental aspect of the Petrine mandate. The difference between the conquering lord's and Pope's title is that the Pope's authority is derived from divine law rather than military might in feudalism,
[39] Tierney, B. (1964) p.24.
[40] Tierney, B (1964) pp. 24-26.
[41] According to Erdmann, C (1977) p. 316, Pope Urban II lost control of Rome in the late eleventh century. His experience of conquest contributed to the development of his theory on just war and justification for the Crusades.
[42] Erdmann, C, (1977) p. 310, 311.
[43] Tierney, B. (1964) p. 26.
[44] Tierney, B. (1964) p. 33. Investiture in the Church relates to land grants to priests. This crisis was related to the behaviour of priests and their relationships with secular authorities.
[45] Goodman, E. (1995) p. 195.

its distinctive authority over the spiritual lives of Christian people, it was imperative that it regained and maintained its power to pursue the Petrine mandate.

The politics of the investiture conflict produced a need within the Church for solid logical and authoritative grounds to refute and extend arguments. This need reinvigorated the intellectual life of the clergy and brought a revival in legal studies. Universities were established in Bologna, Paris and Oxford.[46] Contact between Christian pilgrims and Jewish and Islamic scholars in Sicily and Spain reintroduced the works of Aristotle.[47] The surviving texts of Roman law possibly came to Paris and Bologna from Constantinople with migrating refugees.[48]

After about 100 years of conflict and debate, the investiture crisis was resolved. Pope Leo IX held synods in Rome to discuss the most important issues concerning the sins committed by priest and made decrees outlawing their actions. He then travelled throughout Europe holding councils with local clergy.[49] The decrees of the Reform Councils of Pope Leo in 1049 regulated clerical appointments, outlawed simony and prohibited priests from bearing arms. In 1059, the Church legislated to reclaim its authority over spiritual matters. It restricted secular power to material matters. A decree in 1075 dictated the supreme authority of the Pope.[50] The Church began to renew its authority[51] as kingdoms became more settled and secular legal structures became more formalised.[52] The Church's power to make law was also expressed more formally.

Through the revitalisation of scholarship and the Papal decrees that sought to re-establish the division of spiritual and secular power, Church law was codified and systemised, making it more logical and accessible. Gratian's *Decretum,* published in the middle of the twelfth century, was a compilation of canon and Papal decrees. It

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[46] Witte, J. (2002) p. 204.
[47] Aristotle's philosophy became increasingly influential with humanist theologians, including the scholastics. The influence of his philosophy is discussed in more detail later.
[48] Kelly, J. M. (1992) pp. 119-123.
[49] Tierney, B. (1964) p. 27.
[50] Translation of the decrees and legislation are in Tierney (1964) pp. 42-44, 113, 124-125, 131-136.
[51] The Church's renewed authority in England was significant during the Norman Conquest, discussed later.
[52] Although the turmoil after the fall of the Roman Empire receded, there was continuing conflict within the Church and throughout Europe.

was revised and published in 1234 in a work called the *Decretales.*[53] The resolution of the investiture crisis provides an example of the intimacy between knowledge production and law in the establishment and maintenance of sovereign authority.[54] The knowledge produced and laws enacted legitimised and justified Papal action and formed a solid reference for application to new situations.[55]

The division between secular and spiritual life continued to be examined and theorised by many within the Church. One of the most influential was the scholastic theologian Saint Thomas Aquinas.[56] He considered the role of law in regulating relations between spiritual and secular authorities and between kingdoms. Like many others of his time, he was strongly influenced by the ancient texts of Aristotle.[57] St Thomas equated authority with law and proposed that there were four distinct but interrelated systems. These were eternal, divine, natural and human laws. He based his proposals on the idea that everything was part of the wholeness of eternal law. He proposed that eternal law was God's plan for the universe and that natural law was the basis of divine and human law. His view of the structure of this legal hierarchy portrays law as essentially above and outside human control.[58]

Following what he believed to be the teachings of Jesus Christ,[59] he emphasised the division between the spiritual and secular worlds but insisted that they should work together. He argued that people are naturally communal and that secular government and human law were necessary to serve common interests. Christian

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[53] Tierney, B. (1964) p. 150.

[54] Sovereignty, in this context, refers to the power to make and enforce laws.

[55] The nexus between law and knowledge production remains a feature of Western juridical orders. As will be seen, it was evident in Protestant reform and its evocation of natural law. Knowledge production in response to controversies has been credited with making the Mabo decision possible. Its legislative response, the *Native Title Act*, requires the judiciary to rely on knowledge production in various forms to make determinations. The judge in the Yorta Yorta case relied heavily on knowledge produced outside the legal sphere to ascertain the facts of the case.

[56] St Thomas' work influenced many jurists and social contract theorists into the discovery era, especially in relation to the limitations to sovereign power and justification for the modification of non-Christian people. Although St Thomas probably advocated limited secular authority to protect the Church's spiritual authority, the idea was later adapted by Protestant theorists such as Locke. With other New World entrepreneurs, he espoused the moral authority of the people over the king. The English Privy Council produced the 1722 Memorandum in response, which enabled the foundation of Australian law, discussed in the next chapter.

[57] Kelly, J. M. (1992) pp. 124-126; Tierney, B. (1964) p. 165.

[58] Weinreb, L. (1987) pp. 555-63.

[59] Aquinas, T (1952) pp. 209-213. According to Lecler, J. (1952) Jesus Christ taught that Caesar existed because of divine will and ought to be obeyed, pp. 5-8.

acknowledgement of the authority of the king was imperative but the king's authority should be limited to avoid tyranny.[60] He believed that man had to learn virtue and proposed that a positive avenue to obtain virtue was through labour to provide the necessities of life. Those who were depraved and prone to vice could learn virtue through forced labour and fear, with the discipline of law and the establishment of missions.[61]

The reform movements that emerged during the investiture crisis and the revival of scholasticism within the Church provided opportunities for the scrutiny of other controversial aspects of Christian doctrine. Continuing conflict within the Church and throughout Europe renewed interest in theoretical perspectives on justifiable war. The Church could not instigate war for itself because the idea of Christians taking up arms was contrary to Christian doctrine and missionary duty.[62] This avoidance of warfare, however, was becoming increasingly difficult for Church authorities to maintain. Invasion of Christian-held territory by the Normans and Hungarians, and Muslim attacks on Christians pursuing the Petrine mandate,[63] put pressure on Church adherence to the doctrinal requirement to remain peaceful.[64] Church authorities sanctioned the idea of Christian knighthood. The role of the knights was to defend Christian territory and possessions. As knighthood became crucial to the survival of Church authority and its pursuit of the Petrine mandate, its role was extended to protect pilgrims.[65]

Up until the eleventh century, pilgrimage and conversion were the Church's main instruments of expansion into non-Christian lands. Pilgrims and missionaries had a special legal status that conferred many privileges within the Church because it was a dangerous activity. Many pilgrims were attacked and robbed when passing through

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[60] Aquinas, T. (1952) pp. 210-211; Tierney, B. (1952) p. 165.

[61] St Thomas' influence extended into Spanish colonial justifications for the modification of Indians and Las Casas' social experiments. These modification processes sought to make Indians more like Europeans, which effected their claims as natives
A similar ideology led to the Victorian *Aboriginal Protection Act* in 1869, which directly impacted on Yorta Yorta people's ancestors. It became part of the 'tide of history' that washed away their land rights.

[62] Erdmann, C. (1977) pp. 4, 5, 8. The object of missionary duty was conversion and not subjugation.

[63] According to Erdmann, C. (1977) p. 25, Normans, Hungarians and Muslims were not always the enemies of Christian knights. They also made alliances with Christian knights when the circumstances were mutually beneficial.

[64] This doctrine was strongly influence by St Augustine.

[65] Erdmann, C. (1977) pp. 25-27.

other peoples' lands and missionaries were driven away when they attempted to settle and convert the surrounding populations.[66] Pope Urban II, influenced by Pope Gregory I's sixth-century discourse on holy war,[67] transformed the idea of pilgrimage by combining the pilgrim and the Christian knight into the figure of the crusader.[68] The objectives of protection and expansion of the faith remained but its philosophical underpinnings no longer contained the element of peace. Pope Urban called for a crusade to Christianity's most holy place. In Jerusalem,[69] Christian pilgrims were subject to frequent attack from the mainly Muslim population.[70] In his proclamation, Urban declared that the Church and other holy places were being desecrated and destroyed. The Pope urged Christians to crusade to protect Christian establishments.[71]

Pope Urban's call to war is significant. It represented the Church's strongest exercise of sovereign power over the spiritual life of Christians. Theoretically, Christians were bound together by spiritual affiliation and the Roman Church had achieved an extra-territorial sovereignty that claimed power over the life of its subjects.[72] In reality, the call to crusade also brought to light the difficulties the Church had in building an effective army. Although religious passions and the promise of eternal life enticed many to crusade, pressures from within their secular worlds discouraged others. In addition, the philosophy of just war and crusade remained controversial with many clergymen continuing to question the legality of Christians taking up arms.[73] The Church resorted to material incentives to encourage Christians to crusade, rather than

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[66] Christian justification for encroaching on others' land and lives was derived from the Petrine mandate.

[67] As discussed earlier, according to Erdmann, C. (1977) pp. 10, 11, 307. Gregory I actively pursued the Petrine mandate and encouraged missionary work. He theorised the possibility of the Church instigating a holy war, extending the idea of just war to a strategy of expansion. Later in this chapter, the reliance of Spain and Portugal on similar reasoning to justify war during the discovery era is examined. In Australia, the idea of justifiable war was evident in early relations between Aborigines and settlers but was not declared. This is discussed in more detail in the next chapter.

[68] Erdmann, C. (1977) p. 316.

[69] Jerusalem was also strategically important as part of the trade route to China via the Silk Road.

[70] Breheir, L. (1964) p. 45.

[71] Munro, C, D. (1964) p. 9.

[72] The significance of the crusades is also in their scope. The Church had this power over life prior to this, for example, in pilgrimages. The Crusades called on all Christian men to participate.

[73] Erdmann, C. (1977) pp. 24-25.

relying solely on spiritual motivations. These difficulties ultimately restricted the Church's exercise of this essential component of sovereign power.[74]
The Church's inability to completely establish its spiritual sovereignty after pursuing it for many centuries suggests that two sovereign powers cannot co-exist on the same territory. It appears that when secular power was centralised in the Roman Empire, Church authority remained subordinate. When secular power was dispersed among warring monarchs and lords, the Church's power was again subordinated. The absolute power to make and enforce law cannot by shared regardless of how two authorities organise their boundaries.[75] The Church's spiritual authority was incorporated into secular sovereignty.

The Crusades to the Holy Land focused Pope Innocent IV's attention on the central philosophical and legal problems of Christian instigation of warfare on non-Christian people. In 1250, in his commentary on *Quod Super His*,[76] Innocent IV considered the circumstances in which non-Christian people could be dispossessed of their lands and personal property. Influenced by the Ancient Roman *Ius Gentium*,[77] his comments included a discussion of non-Christian people's natural-law rights to their possessions. He believed that these natural rights were qualified by the Pope's Petrine mandate. Through this reasoning, he believed, the Church could legitimately interfere with the secular affairs of all the Church's subjects, even those not yet converted to Christianity.[78]

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[74] In this thesis, the term 'sovereignty' refers to legal jurisdiction, that is, the absolute power to make, enforce and suspend laws. In this context, the term includes the power of the sovereign over the life and death if its constituents, following Giorgio Agamben's (1998) ideas.
[75] As will be discussed in more detail later in this chapter, the interaction between European and non-European sovereign powers that characterised much of the discovery era was essentially the struggle of one sovereign power to dominate the other, usually with military force accompanied by legal strategies. Church authority lent support to European kingdoms. In the next chapter, the Mabo decision in Australia is examined as a legal strategy that maintains the Crown's exclusive sovereignty in Australia.
[76] *Quod Super His* was written by Pope Innocent III, who, according to Thorne, S. E. (1965) p. 23, supported King John in England in the twelfth century and condemned Magna Carta.
[77] *Ius Gentium* is a Roman law term translated as 'the law of peoples'. It is sometimes used as the 'law of nations' referring to modern international law's Roman law ancestry. As Borkowski, A. (1994) p. 79 and Goodman, E. (1995) p. 133 observe, the term can be understood as the laws that are common among all nations rather than as governing between nations.
[78] A translation of Innocent's commentary is in Tierney, B. (1964) p. 155. The idea Innocent expresses is characteristic of the Christian duty to modify non-Christian people. He suggests that the mere existence of the Petrine mandate modifies non-Christian rights to their possessions. Within the mandate, pagans and infidels began to lose their externality by becoming potential Christians (which is to say, becoming modified in the sense explained in the introduction). Innocent's commentary also links natural-law rights to this potentiality. As will be shown later in this chapter, Vitoria refines this idea.

Over centuries of conflict and reflection, the Church had not realised its ambitions to supreme spiritual sovereignty. In the processes of struggle, it produced knowledge about non-Christian people that was refracted through the lens of the Petrine mandate. The knowledge underpinned the Church's claims to non-Christian peoples' possessions, including their liberty and labour. It developed the concept of just war. The mandate justified Christian-European presence in non-Christian territory on the premise of liberating human souls from infidelity and primitiveness. How international-law jurists and early colonists adapted this knowledge and the Church's legitimating claims is explored later in this chapter. In the next chapter, how these colonial structures, which became part of the 'tide of history', legitimised the British Crown's assertions of sovereignty and ownership of Australia is explored. Before examining colonial structures, however, it is necessary to examine the English antecedents of Australian land-law.

PARAMOUNT LORDSHIP IN ENGLISH LAW

Australian land law is based on the assumption that the British Crown acquired radical title to all land in Australia upon settlement. The High Court confirmed the feudal base of Australia's land law in the Mabo decision.[79] The antecedents for the assumption are usually traced back to King William I's assertion of paramount lordship after the Norman Conquest.[80] As noted earlier, however, the idea of paramount lordship can be traced to earlier European feudal forms.[81] The Roman Church also played a significant role before William's victory through its influence in English secular administrative and legal affairs. The Church's authority to influence secular matters was derived from the Petrine mandate.

While the Church was re-establishing the division between secular and religious authority, England was embroiled in a succession crisis. The last Danish king died leaving no heir to the throne. Under the customary rules of succession, the Church

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[79] Brennan, McHugh and Mason, p. 33, Deane and Gaudron, p. 60; Dawson, p. 9, in *Mabo* (1992).
[80] See, for example, Castles, A. C. (1982) p. 2, where he suggests that Anglo-Saxon forms of land management were "refined and reinforced" after William to introduce the feudal system in England. See also Matthew, P. Hunter, R & Ingleby, R. (1995) p. 3
[81] Blackstone, W. (2001) Bk II, p. 37

and aristocracy chose Edward the Confessor.[82] Edward had lived his entire life in Normandy. On succeeding to the English throne, he made little change to existing law. He compiled Anglo-Saxon laws using his predecessors' collections, which became known as Edward the Confessor's laws. He surrounded himself with Norman advisers and administrators, gave Anglo-Saxon land to his countrymen, and appointed a Norman as Archbishop of Canterbury. His actions were unpopular among the Anglo-Saxons.[83]

The powerful Anglo-Saxon lord, Harold of Wessex, rallied support against the Norman King, which formed a potentially threatening opposition force against the Church. When Edward died, early in 1066, the Witenagemot[84] placed Harold on the throne. Pope Alexander II was concerned that the authority of the Church would weaken under Harold and excommunicated him for resisting Church authority. William, duke of Normandy, also made a claim on the English throne because he was Edward's second cousin. Pope Alexander sanctioned William's conquest of England as a kind of crusade or holy war.[85] Harold died when confronting the Normans at Hastings. The Duke of Normandy became William I, King of England. There is still debate about whether William acquired the English crown by conquest or inherited it through the rules of succession.[86] It is appears that William's acquisition of the throne and claim to all the land in England was a combination of both sets of rules.[87]

Conquest, as a mode of lawful acquisition of sovereignty at the time, was part of the customary law of nations developed earlier by imperial Rome. Sir Matthew Hale suggested that, ". . . it would seem that the common Consent of all Nations has tacitly submitted, that Acquisition by Right of Conquest, in Solemn War. . . should be

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[82] Edward's father, Ethelred, reigned in England between 979 and 1016. According to Lyon, B. (1960) p. 33, Edward was called the confessor because of his strong Christian beliefs.

[83] Lyon, B. (1960) p. 33.

[84] Lyon, B. (1960) p. 44. The Witenagemot was a council of Anglo-Saxon lords that was central to England's administration at the time.

[85] Erdmann, C. (1977) pp. 150-160. Although Urban II's call to crusade was not to happen for another thirty years, in 1099, (Brundage, J. (1964) p. 5) the Gregorian idea of holy war was centuries old.

[86] Lyon, B. (1960) pp. 34-35, argues that William had no legitimate claim to succession. His support came only from the Church.

[87] Although it may be disputed that the rules were not clearly defined at the time, they are defined for the purpose of contemporary debate. There is also evidence that there were rules established that guided decisions and actions such as the successions described above. The underlying consistency is found in the Petrine mandate. The Church's sponsorship of the Norman Conquest connects Williams paramount lordship with the Pope's mission.

allowed as one of the lawful Titles of acquiring Dominium over the Person, Places and Things so conquer'd."[88] Hale believed that rules of acquisition by conquest were necessary to provide stability after war but argued that these were complicated by a number of factors. The most significant factor for Hale was whether a war was just or unjust. The Pope sanctioned the conquest as a holy war against the Anglo-Saxon king providing William with support and legitimacy.

Hale found that the most difficult aspect of conquest as a mode of acquisition was ascertaining the precise moment when conquest was concluded. The moment of conclusion was important because, as Hale suggested, the conqueror's title is not secure while the conquered continue to make claims and military or legal force is necessary to hold it. The title of a conqueror is secure when either the conquered are entirely eliminated or through their total submission by a treaty, that concludes hostilities.[89] In the period after the conquest, there was no treaty between the Norman Duke and the English people. The lack of a treaty and King William's confirmation of Edward's laws suggests application of the rules of acquisition by succession. William's claim to the throne through succession provided legal justification for conquest. As a consequence, the two legal modes became indistinguishable.

The way that the Crown asserted its acquisition of territory did not necessarily require the support of a legally defined mode especially while it had military dominance. William was free to apply whichever mode of territorial acquisition he chose after he claimed victory. The legal mode was selected and modified to support his intentions as the new sovereign. The selected mode determined the resulting social formation.[90] William added military tenures to satisfy the demands of his invasion forces. The addition of military tenures in English land law made it resemble the feudal system of

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[88] Hale, M. (1971) p. 49. Sir Matthew Hale wrote in the seventeenth century as modern international law was emerging.

[89] Hale, M. (1971) pp. 49-54.

[90] As Blackstone, W. (2001) Bk II, p. 40, observed, English feudalism, as it is recognised today, was gradually established by Norman barons to suit their interest. Castles, A. C. (1982) p. 20, suggests that this occurred when the British Crown acquired sovereignty in Australia. He observed that "[t]he official steps which led to the British occupation of Australia made it almost inevitable that the principles of settled colonies became the foundation for the exercise of imperial sovereignty in this country."

land tenures,[91] akin to that of other European kingdoms. The extension of feudalism increased the Crown's ability to exercise its sovereign power and control over a hostile Anglo-Saxon population. As Brendan Edgeworth states, in English land law, ". . . sovereignty, radical title and absolute beneficial (allodial) title are coextensive."[92] In the absence of a treaty, absolute title is only secured with the exercise of absolute sovereign power making the assertion of paramount lordship vital.[93] William's assertion was, nonetheless, political rather than legal.

Harold's defeat was extensive with many Anglo-Saxon lords being killed in battle. This created the illusion of William's paramount lordship over all the lands in England because his invading forces had taken up much of Anglo-Saxon land left vacant by the effects of war. As Sir William Blackstone argued, the illusion "led many hasty writers into a strange historical mistake, and one which upon the slightest examination will be found to be most untrue."[94] William's assertion of paramount lordship over all the lands of England, because of conquest, is generally accepted as a legal fiction.[95]

Theoretically, paramount lordship, asserted after conquest, should have extinguished all pre-existing titles.[96] Instead, William commissioned the *Domesday Book,* a record of all pre-conquest land-holding relationships in England. The book's primary

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[91]Blacksone, W. (2001) Bk II, pp. 42, 71. The system of feudal tenures, in theory, is based on the notion that all land is held either mediately or immediately of the Crown. In return for payments of rents, the monarch was to ensure peace and security, and to rule justly. The Crown did not have absolute power and could not evict tenants without legal justification.

[92] Edgeworth, B. (1994) p. 415, refers to allodial title in this passage. In the context of his usage here, allodial title is the strongest of feudal titles because it can only be held by the king. He includes Megarry and Wade's definition as "land held independently by a subject" p. 399 and points out that some land in the United States is held in this way. According to Halsbury's Laws of England, (1974) Vol 39, p. 216. para 304, the pre-conquest, Anglo-Saxon land system, *bocland*, allowed allodial title. It was defined as "land owned by a subject and not held of a lord." Blackstone, W. (2001) p. 39, defined allodial title as "wholly independent and held of no superior at all." When applied to indigenous people's relation to the land before European presence, allodial title becomes the weakest form of land-holding. As examined in more detail later in this chapter, allodial title held by indigenous people is characterised as held of no superior because, it is claimed, there is no indigenous sovereignty.

[93] The absence of a treaty in Australia and the Crown's assertion of radical title indicates that there are strong links between William's assertions and the British Crown's acquisition of sovereignty. As explored further in the final chapter, the adoption of these feudal principles in Australia continues to support the Crown's exclusive sovereignty.

[94] Blackstone, W. (2001) Bk II, p. 40.

[95] Leading common law scholars, Maitland, F. W. (1957) p. 102 ; Blackstone, W. (2001) Bk II, p. 40; and Hale, M. (1971) p. 56; and contemporary commentators, McNeil, K. (1987) pp. 83-84 and Edgeworth, B. (1994) pp. 431-432; agree that William's claim to paramount lordship is a legal fiction.

[96] Edgeworth, B. (1994) p. 416.

purpose was to identify Edward the Confessor's possessions and lands, and the grants he made to enable the calculation of taxes and fees owed to the Crown.[97] As Kent McNeil observes, the book in itself provides evidence that the historical illusion of William's paramount lordship is unsustainable.[98] Other land holding in England, according to the book, remained unaffected, again suggesting that William inherited the throne rather than acquired it through conquest.[99] It also suggests that titles from pre-existing legal structures survive conquest.

Kent McNeil argued that the legal fiction of paramount lordship has created an unsustainable precedent in English law. Possession of land is based on occupancy, a rule applicable to the ruler and ruled alike. William could only claim the lands of those he succeeded because he could not show that he had the best title to other lands through occupancy.[100] Although McNeil's opinion may have a firm foundation in English law, the legal fiction of William's paramount lordship is an expression of sovereign power rather than a land tenure issue. In William's case, it supported his ability to exercise sovereign power and to reinstate Papal authority.

After William, Crown ownership has since been defined in the following terms: "Although in practice land is commonly, and correctly, described as owned by its various proprietors, English land law still retains its original basis, that all land in England is owned by the Crown. A small part is in the Crown's own occupation; the rest is occupied by tenants either directly or indirectly from the Crown."[101] This remains the foundations of Australian land law.

An interesting but neglected aspect of the extension of feudalism to include paramount lordship is that it became part of English customary law, not statute. Sir Matthew Hale theorised the distinction between custom and statute in English law by defining all law before 1189 as *leges non-scriptæ*.[102] Although this term suggests

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[97] Lyon, B. (1960) p. 5.
[98] McNeil, K. (1989) p. 84.
[99] Hale, M. (1971) pp. 61-62.
[100] McNeil, K. (1989) pp. 83-84.
[101] Megarry, R. E. & Wade, H. W. R. (1984) p.12.
[102] Hale, M. (1971) p. 3, 4, chose this date because it is when the statute roll was first kept. One of the first statutes on the roll was Magna Carta. The continuity of feudal fictions from unwritten to written law in England enables a conceptualisation, in the next chapter, of how relations between Aborigines and settlers were codified in Australia.

unwritten law, there were many compilations of law recorded during the Anglo-Saxon period. The term refers to the component of common law that was not created by legislation but laws that ". . . are grown into Use, and have acquired their binding Power and Force of laws by a long and immemorial Usage, and by the Strength of Custom and Reception in the Kingdom." Hale refers to them as 'before the time of memory' because there is no written evidence of their origins.[103] The Norman Conquest is notionally in the time before memory and has no legislative or written origins.

An understanding of the processes that convert convention into statute is important to a conceptualisation of Australia's legal development. The continuity of paramount lordship from unwritten to written forms in England, where it moved from convenient fiction to non-reviewable act of state, offers a theoretical perspective of how the fiction of *terra nullius* became the logic that underpinned Australian land law. That the feudal base of Australian land law rests on the legal fiction of paramount lordship, devised as a strategy of domination against a hostile Anglo-Saxon population, is explored in more detail in the next chapter. In addition, William's assertion of paramount lordship, which concealed the ambiguous nature of his claims to the throne, resonates in contemporary legal opinion regarding the British acquisition of sovereignty in Australia. Although it is insisted that Australia was acquired by settlement, the struggle between British and Aboriginal sovereign powers suggests conquest. Hale's argument about the nature of conquest has parallels with Australia and makes a contribution to the 'tide of history'.

CHURCH AND KING: THE FIRST COLONIAL POWERS

As secular power within the European kingdoms was becoming more centralised, monarchs claimed that their supreme authority over the populations in their territories was God-given and, accordingly, at least equal to Church claims. There was, not surprisingly, tension between the Roman Church and European monarchies but compromise was possible because of underlying mutual reliance. Monarchs still required the support of the Church to provide moral justification for their rule, especially in newly acquired territories. The Church relied on the military power of

[103] Hale, M. (1971) p. 17.

monarchs to pursue the Petrine mandate and to maintain its authority within the kingdoms.[104] The pursuit of the Petrine mandate in newly acquired territories included missionary activities that sought to change the native inhabitants. The underlying mutual reliance between the Church and the monarchs was enhanced by the modifying effects missionary work had on the character of the natives and, as a consequence, their natural-law rights as natives.

By the fifteenth century, Spain and Portugal had emerged as the two most powerful Christian kingdoms and had begun to expand their territorial claims beyond Europe. Portugal captured the Moorish Ceunta in North Africa. The motivation for conquest is not straightforward but it included the crusading impulse and economic reasons. Thornton suggests that the romance of discovery was also a contributing factor.[105] It has also been suggested that Christians sought the legendary kingdom of Prester John.[106] Explorers had failed to find the legendary country and it was believed that he resided at the horn of Africa. At the time, the Horn of Africa was a very difficult place for European explorers to reach. Prince Henry of Portugal, known as Henry the Navigator, became interested in learning about the Indies. He also sought the legendary country of Prester John.[107]

At this time, custom and mutual benefit governed the relations between kingdoms.[108] International law was not developed enough to regulate the competition introduced by secular expansionism.[109] The Pope, assuming the authority derived from the Petrine mandate, acted as an international arbitrator. He granted jurisdiction in the New World through donations in a series of bulls. The Portuguese Crown obtained exclusive rights to explore and trade in Africa from the Pope in a bull entitled

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[104] Lecler, J. (1952) p. 136.

[105] Boxer, C. R. (1969) pp. 19-29; Thornton, J. K. (1998) pp. 24-25. Brundage, J. (1964) p. 5, dates the last crusade at 1570.

[106] According to Beckingham, C. F. and Hamilton, B. (1996) pp. xi-xii, Pope Alexander IV received a letter from Prester John. In the letter, he told the Pope that he ruled a powerful and wealthy Christian Kingdom. The Pope was encouraged and hoped Prester John would support the Crusades. Since then, the idea of Prester John has "occupied a dominant place in the imagination of Western Europe. . . "

[107] Beckingham, C. F. (1996) p. 301.

[108] Oppenheim, (194) p. 67

[109] Modern international law did not begin to develop until after Francisco de Vitoria's lectures in the 1530s.

Romanus Pontifex.[110] The main condition the Pope applied to his donations of new lands to the kingdoms was the viability of converting the native inhabitants.[111]

Late in the fifteenth century, a controversy arose that tested relations between secular and Church authority. The Canary Islands, considered strategically important for defence and trade, were colonised by Portugal. Christian missionaries settled on the Islands and worked to convert the native inhabitants. Although the circumstances are vague, Portuguese sailors went on a murderous rampage and killed many natives, even those who had converted to Christianity. There were protests made by priests and scholars in Portugal. Pope Eugenius was outraged and banned all Portuguese people from the islands. The King of Portugal appealed to the Pope and asked him to reconsider his decision. The King suggested that other non-Christian countries might take advantage and claim the islands for themselves. He argued that because Portugal was a Christian kingdom it would be preferable to allow the Portuguese to continue their missionary works.[112]

The nature of Church and secular relations is visible through the controversy. The King of Portugal did not challenge the Pope's authority and appeared to accept the Pope's power to ban Portuguese sailors from the Canary Islands. This acceptance reflected the King's reliance on the Church's moral authority for territorial expansion and Papal donations to defeat rival claims. The King's avenue of appeal indicates well-developed legal structures within the Church. The Pope had legal advisers, experts in Church knowledge, to assist him to answer the appeal and make further laws. The Pope allowed the Portuguese to continue their colonial activities on the Canary Islands.[113] The interests and rights of the native inhabitants of the islands,

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[110] Williams, R. A. (1990) p. 72; Boxer, C. D. (1969) p. 21.

[111] Lecler, J. (1952) p. 135. Early Portuguese expansion relied on military domination and was justified by the Petrine mandate. The morality of Portuguese presence in North Africa and along the West Coast was sustained by the objective of saving souls. The Catholicism of the first colonial powers provides a link between crusade-era legal principles and the era of European discovery.

[112] Williams, R. (1990) pp. 67-71.

[113] Colonisation of the Canary Islands included satisfying the Petrine responsibility to change the natives and bring them to faith. Maintaining Portuguese rule ensured that the natives became Christians and resembled Europeans.

initially the Pope's primary concern, were overridden by European political, economic and theological concerns through legal processes.[114]

In the 1490s, Pope Alexander VI issued three bulls, entitled *Inter Caetra Divinai, Inter Caetra I* and *Inter Caetra II.* Similar to the *Romanus Pontifex* bulls, the Pope donated parts of the New World to the Spanish Crown. The Crown used the bulls to defend its colonial activities against criticism from within Spain, especially from the sermons of Friar Antonio de Montesino in Hispaniola.[115] The Spanish relied on the slave labour of the native inhabitants to extract the wealth of the New World. To avoid offending the Pope in light of Eugenius' reaction to the incident on the Canary Islands, the Spanish created the *Encomiendo* system.[116] Through this system, colonists were granted land to settle in the Indies by royal patent. The patent included ownership of the native inhabitants justified by missionary discourses that espoused Thomistic notions of achieving virtue.[117] As Robert Williams put it, to achieve "the Pope's Petrine responsibility to save the Indians, the Spanish Crown had to enslave them."[118]

Bartolome de las Casas and other Dominicans, lobbied for the abolition of the *Encomiendo* system.[119] Las Casas attempted to establish a separate farming community for Indians. With the King's support, poor Spaniards were encouraged to emigrate and act as mentors for Indians. It was hoped that by planting Spaniards among Indians, the Christian faith and farming skills would be absorbed by the native inhabitants thereby making them more like the Spanish. The colonies would form the basis of the ideal Christian community, furthering the Petrine mandate and replacing

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[114] In the history of the Yorta Yorta people's struggle to regain their land, there are several occasions where similar processes of negotiation between colonial authorities have incorporated Yorta Yorta claims for settler ends. This is explored in more detail in the final chapter.

[115] Hanke, L. (1949) p. 17.

[116] Williams, R. A. (1990) pp. 82-83. The Petrine responsibility to convert the natives is enhanced in the *Encomiendo* system to make them resemble Europeans in the way they work. Their enslavement, however, suggests that even as natives take on European characteristics they are still not completely European. This is a consistent feature of colonisation. As Cohen, F. S. (1942) p. 16 observed, the system instituted the notion of guardianship that later found expression in the United States in the Indian reservation system.

[117] Debo, A (1970) p. 21. This Thomistic notion underpinned the logic of assimilation processes in Australia, which became part of the 'tide of history'.

[118] As Williams, R. A. (1990) p. 84, observed, forced Christianisation was justified in the Pope's donation of territory to the Spanish Crown in 1493.

[119] Hanke, L. (1949) p. 83

the *Encomiendo* system.[120] Priests and scholars also questioned the Crown's claims to sovereignty in the New World and challenged the legitimacy of Papal donation. The first formal investigation regarding the basis of Spanish rule in America took place in 1503. The King, theologians and canonists continued to assume that Spanish presence in America was legitimised by Papal donation, a product of the Petrine mandate. The policy that Indians should serve Spaniards was maintained.[121]

Despite missionary discourses that natives were enslaved as part of the process of their uplift through proselytization, the indigenous population declined rapidly and criticism grew.[122] King Ferdinand realised that to maintain his claims to legitimate title in the New World he could no longer rely solely on Papal donation. To address these concerns, the King asked theologians and canonists for their opinions. In 1512, Juan Lopez de Palacios Rubis and Matias de Paz both referred to Pope Alexander's donation of 1493[123] and confirmed that Papal decree legitimised Spanish claims and activities in the New World. They argued that the King must require Indians to come to the faith.[124] The King convened a committee of theologians to examine the responses.[125] From their investigations, the committee created the Spanish charter of conquest called the *Requerimiento*.[126]

Although demarcation of jurisdictional boundaries between Spanish Crown and the Church was never clear-cut, the charter provides an example of how the Church and the King could combine their authority to make extraordinary claims and dominate indigenous sovereignty. The *Requerimiento* was a legal document explaining Spanish intentions and the legal and moral authority with regard to the indigenous peoples in newly discovered territories. Spanish conquistadors were required to read the charter to the native inhabitants before any hostilities could begin. It told the Indians that their possessions, including their lands, had been 'donated' to the Spanish Crown by

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[120] Hanke, L. (1949) pp. 54-55. This experiment failed completely but it provided an ideological model for future missions.
[121] Hanke, L. (1949) p. 28.
[122] Debo, A. (1970) p. 20.
[123] This was one of the *Inter Caetra* donations referred to earlier.
[124] Hanke, L. (1949) p. 29.
[125] According to Hanke, L. (1949) p. 30, there were several responses but the two mentioned are the only ones still in existence. They both make the same conclusion that is reflected in the committee's response.
[126] Hanke, L. (1949) p. 30. Hanke referred to the document as the Requirement.

the Pope in Rome.[127] Any failure on the Indians part to comply with this requirement would result in war and destruction.

The *Requerimiento* was an expression of the two-way loss described in the introduction of this thesis. It required that the natives mimic Europeans by coming to the faith, thereby losing their character as natives and the rights that status conferred. If they remained in the condition of savagery, their expropriation was justified. Again, priests and canon lawyers, especially from the Dominican order, and other critics challenged the *Requerimiento,* claiming that it was contrary to canon and natural law.[128] The Crown abandoned the Charter after about fifty years of use. During the fifty years, Spain had taken possession of large areas of South America and had killed or enslaved most of the indigenous inhabitants.[129]

Spanish success was not due to it committing its military might in the New World. Conquistadors were poorly resourced because Spain was involved in wars in Europe. The conquistadors suffered major defeats and Indians drove them away on several occasions. The invaders, however, brought smallpox and other diseases to the New World. The introduction of disease had a devastating effect on Indian populations, with the result that conquest and colonisation became much easier.[130] The devastation caused by introduced disease is a common feature of European expansion and assisted colonial enterprises by reducing indigenous peoples' capacity to defend their possessions.

After the *Requerimiento*, Royal directives instructed conquistadors and colonists to treat the Indigenous people and their possessions with respect. These instructions underlay the Papal decree *Sublimis Deus.*[131] According to Williams, it was in Spain's

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[127] Wright, R. (1992) pp. 65-66.
[128] According to Hanke, L (1949) p. 30, the Dominicans were initially satisfied with the document but became critical after its application.
[129] Williams, R. A. (1990) p.93.
[130] Wright, R. (1992) Wright argues that it is tempting to suggests that the spread of smallpox through Indian population may have been a deliberate act of biological warfare but doubts that the conquistadors would have had the necessary knowledge (p. 74). He notes that later hostilities between the English and the Cherokee Nation in 1752, and during the Pontiac war in 1763, that smallpox was deliberately used as a weapon of war. (pp. 104 and 136).
[131] *Sublimis Deus* was issued by Pope Paul III in 1537. In the bull, the Pope commanded colonists in the New World not to deprive Indians of their liberty and property, even if Indians remained outside

interest to maintain Church support by portraying Indians as having the capacity for reason. Colonial activity depended on Indian convertibility. Inquiries were held into Indian capacities to judge whether they were potential Christians. Colonists, on the other hand, responded by questioning the humanity of Indians and whether natural law applied to them. The effects of disease supported colonists' conclusions that Indians were backward and primitive. The crusade-era justification for dispossessing infidels for their salvation underwrote these colonial claims. The use of these descriptive strategies suggests that it was no longer sufficient to claim jurisdiction through Papal decree. Despite the directives, conquistadors and settlers embarked on murderous expeditions, a feature of settler colonialism that was to become indispensable.[132]

European expansion and contact with peoples outside Europe continued to present the Church and the kingdoms with novel ethical and political dilemmas, and military challenges. Controversies arose from colonial ventures especially questions regarding the morality of relieving newly discovered peoples of their property and liberty while the colonial monarchs grew rich. Spain and Portugal grew in strength with the wealth acquired from the Papal authorisation of exclusive trade and slavery in the New World.[133] This wealth enhanced renaissance-era technological advancement, which assisted their military campaigns in Europe. This advancement also saw the invention of the printing press that allowed broader access to the Bible. This, together with the growing dissatisfaction with the Church's interference in domestic secular affairs and its assertion of itself as international arbitrator, were factors that led to the Reformation.

The Reformation disrupted the unity of the Church that was central to its power. The Christian Kingdoms were beset with religious strife both within and between themselves.[134] The relationship between the Church and Protestant Kingdoms had again become reminiscent of the Church's relationship with pagan Rome. Violence,

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the Christian faith. (See Cohen, F. (1941) Chapter 8, Section 1). Non-belief was not considered grounds for just war.

[132] In Australia, this feature assisted settlement processes that progressively gave the Crown exclusive possession.

[133] Kelly, J. M. (1992) p. 163.

[134] Religious persecution later saw refugees from Europe settle in North America. See Quinn, D. B. (1974) p. 340.

persecution and division now returned to severely impinge upon the Pope's ability to exercise spiritual authority.[135]

Anti-Church sentiment acquired revolutionary force in Germany in 1517 when Martin Luther publicly denounced the practice of selling indulgences.[136] He directly challenged Papal authority and its claimed mediation between God and the souls of Christians. He believed that faith alone was all that was necessary. Simple faith became the foundation of Protestantism. Luther was widely supported in Germany by his colleagues within the Church and by the Prince. He espoused humanist discourses that gave a voice to incipient German nationalism. His support grew from disaffection with the increasing financial burdens place on his kingdom by the Church. Promises of reform over centuries had amounted to nothing and the time was ripe for rebellion.[137]

Lutheran ideas spread to England as reformists became more influential. In 1533, Eisermann, an early Lutheran jurist, published *On the Common Good* and dedicated it to King Henry. According to Witte, this "was the first detailed social contract theory of the Christian commonwealth to emerge in Evangelical Germany."[138] King Henry VIII of England remained a devout Catholic and persecuted reformists. It was not until the Pope refused to allow him to annul his marriage to Catherine of Aragon that he decided to act to strengthen his power. He made himself head of the Church of England and assumed spiritual authority in an attempt to remove Papal authority altogether. Henry's successor, Edward VI, admitted reformists ideas into the Church and Elisabeth I completed the process. Through violent suppression and persecution, Catholicism was reduced to hidden, private worship.[139] The British Empire emerged after the Reformation from a complex interplay of anti-Catholicism, persecution and violence, and justificatory discourses for secular assertions of authority both within and beyond England.[140]

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[135] Lecler, J. (1952) p. 130.
[136] Indulgences referred to the divine forgiveness of sins and, for reformists, their selling represented an intolerable corruption of Christian doctrine.
[137] Witte, P. (2002) p. 153.
[138] Witte, P. (2002) p. 153. Eisermann dedicated the publication to King Henry VIII of England.
[139] Gelder, H. A. Enno Van (1961) p. 328.
[140] Armitage, D. (2000) p. 65.

The nexus between Reformation and Renaissance was strong. Similar to the Church's strategy in the eleventh to thirteenth centuries to establish its independence from secular authority, English Scholars studied Aristotle and Saint Thomas to assert independence from Rome.[141] Christian ideology remained a major part of these formulations. The English Crown's usurpation of Papal authority absorbed the Petrine mandate in subtle ways. According to the scriptures, God commanded all humans to go forth and multiply, and subdue the earth. This command was limited and 'to go forth' was restricted to lands considered vacant under the doctrine of *vacuum domicilium*.[142] Where England planted settlements[143] in occupied territories, it developed discourses that legally defined occupancy[144] to justify its colonial activities. The notion of *terra nullius* grew from this divine commandment to settle in vacant places and legal manipulation to include the absence of ownership.[145]

Despite reformist arguments that the Roman Church was false and the Pope was the anti-Christ, the colonial aspirations of European kingdoms were foremost in secular ambitions of independence from Church authority. As Joseph Lecler put it:

> "The Renaissance did not in fact tend only towards the liberation and exaltation of the individual; it also did much to free from all moral and religious constraint the person of the Prince and the sovereignty of the State."[146]

In summary, the Church pursued its mandated responsibilities and expressed its claims to spiritual and moral authority through the monarchs of Spain and Portugal. The monarchs accepted the Pope's authority over their territorial acquisitions to protect them from rival claims. This symbiotic relationship produced colonial-legal structures such as the *Encomiendo* system, the *Requerimiento* and Las Casas' social experiments. The underlying logic of these structures was derived from the Petrine

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[141] Armitage, D. (2000) p. 71.
[142] *Vacuum domicilium* refers to land that is uninhabited.
[143] Plantation at this time had two meanings. In the context above, it refers to colonies of settlers. The other usage of plantation is in relation to agriculture.
[144] Occupancy in feudalism refers to a physical relationship to the land.
[145] Armitage, D. (2000) p. 97. The *Terra nullius* was specifically constructed for territorial acquisition. It was derived from Roman law and became part of international law. It entered common law early in the British colonial era and is evident in North America. Its significance in Australia is discussed in detail in chapter two.
[146] Lecler, J. (1952) p. 143.

mandate and its assumption that Christian-European people should explore the world and spread Christianity.

The native inhabitants of European-conquered colonies where considered barbarous savages, a legacy of the Gregorian quest to realise the Petrine mandate and crusade-era logic. With a missionary responsibility came the duty to bring non-Christian people to the faith, by force if necessary. This required the infusion of Spanish culture into Indian society. Indians were thereby modified, which effectively disqualified their claims to their possessions. In other words, as Indians came to resemble Europeans, their claims as Indians became less valid. Where Indians resisted modification and remained as non-Christian primitives, the Spanish Crown justified their expropriation.

The Pope played the role of arbitrator between Portugal and Spain as disputes arose regarding the sovereign rights over certain territories and trade rights. The need for this judicial role indicates the requirement of sovereign power for exclusive control over its territory. It formed the underlying logic that justified colonists' murderous campaigns against native inhabitants. The Renaissance and Reformation disrupted the Pope's authority within other emerging European kingdoms. As will be seen, the Pope's creation of a duopoly in expansion became the focus of jurists and scholars across Europe. Modern international law emerged from the anti-Church expansion ambitions of these other kingdoms. The rejection of Papal donation as a system to regulate relations between nations allowed colonial empires to develop their colonial legal structures.

THE DEVELOPMENT OF COLONIAL LEGAL STRUCTURES

The Spanish Dominican Francisco de Vitoria is considered the founding father of modern international law.[147] In his lectures in the 1530s, he attempted to address the emerging issues regarding the legitimacy of European colonial expansion using natural-law principles rather than Papal decrees. To resolve questions regarding the legal status and rights of native inhabitants, he examined Indian personality and capacities. He refuted generalisations of them as slaves and barbarians. He argued

[147] Anghie, A. (1999) p. 89.

that Indians had the faculty of reason, which made them human and subject to natural law.[148] It also made them potential Christians and raised the possibility that Indians could become like Europeans. Convertibility of the native inhabitants enhanced Spain's claims under Papal donation. To remain consistent, Vitoria suggested that Indians had natural-law rights to their possessions. By using humanity as a common denominator and natural law as a universalising discourse, he made Indians comprehensible to European juridical order. As Peter Fitzpatrick observed,

> ". . . this comprehension of "otherness" was still charged by that occidental fiat of encompassing universality that rendered or could render everything commensurable and containable in its terms."[149]

Indians of the New World had natural-law claims to their property through Vitoria's elevation of natural law. In spite of first appearances, though, Vitoria was not advocating Indians' property rights. Vitoria compared Indians and their social institutions with Spanish custom and culture. He implied that only the Spanish could exercise sovereignty in the New World because they had achieved cultural perfection. Indians still only had the potential to be perfect.[150] He emphasised that the Indian way of life was lacking in comparison and was itself a violation of natural law. As such, his representations justified Indian dispossession. Spanish exemplification of perfection entitled the Crown to take possession of Indian property.[151] The act of taking possession included a right, and a perceived duty, for the Crown to impose strategies to achieve perfection of the Indians. Like other Dominicans of his time, he proposed that Spanish colonial activity was the path to Indian uplift. Influenced by Thomism,[152] he argued that the way to perfection and the acquisition of virtue was through labour, Christianity and the discipline of Spanish law. For Indians to achieve perfection they had to come to resemble Europeans.

The universality of natural law only imposed obligations on Indians to follow the faith and allow the Spanish to travel, trade and preach on their lands.[153] Reminiscent of crusade-era concepts of justifiable war and *Sublimus Deus*, Vitoria refuted the idea

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[148] Scott, J. B. (1934) pp. 112-113; Vitoria, F. de (1535) p. xi, paragraph 330-301.
[149] Fitzpatrick, P. (1999) p. 42.
[150] Anghie, A (1999) pp. 94-5.
[151] Fitzpatrick, P. (1999) p. 50.
[152] Scott, J. B. (1934) pp. 112-113.
[153] Anghie, A. (1999) p. 94; Vitoria, F. de (1535) p. xxxvi, paragraph 385.

that non-belief and resistance to conversion were reasons to wage war and dispossess infidels.[154] He replaced non-belief with the notion that violation of natural law was just cause for war. Any refusal, on the part of the Indians, to meet these imposed obligations rendered them vulnerable to military action. He justified Spanish conquest as defending Spanish natural-law rights to travel and trade.[155]

By recognising Indian rights and responsibilities, Vitoria justified dispossession of Indians and the application of European processes to change them. His refutation of Indians as slaves offered an alternative interpretation but maintained the logic of colonisation that underpinned the *Encomiendo* system and the *Requerimiento*. His recognition of Indian rights brought the idea that those rights remained until Indians resembled Europeans. The foundation of those rights disappears with modification. The lectures were a prototype for the extension of secular European juridical order[156] to the New World. They were influential in England and useful to its imperial aspirations mainly because they disputed Papal authority. His extension of natural law from the land to the sea was an important component of emerging English power. Vitoria argued that all products of the sea were *res nullius* and became private property with possession.[157] These ideas had a strong influence on Richard Hakluyt.[158] He proposed that God scattered the world's resources and that trade would relieve shortages in one place with the surpluses of another. Trade was part of God's plan and a requirement under Thomistic eternal law. Hakluyt advocated

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[154] Vitoria, F. de (1535) p. viii.

[155] Fitzpatrick, P. (1999) p. 50.

[156] This is not to suggest that there was an identifiable European juridical order or international legal system at the time. The order resembled the Roman *Ius Gentium* as Borkowski, A. (1994) p. 79 describes it, that is, the domestic laws nations have in common rather that an overarching international system.

[157] Vitoria evoked the Roman law principles within Thomism giving international law a Roman flavour. *Res nullius* means a thing belonging to no-one and the first person to possess it acquires lawful ownership. Ownership only applies to persons with international personality, that is, from a sovereign nation. Oppenheim, L. (1948) p. 113, developed his definition of international personality from Vitoria's lectures. In his compilation of modern international law, he defined a society with international personality as a group of people that live in a community within a territorial boundary. He prescribed that the group must have a sovereign, representative government that is independent of any other earthly authority. Other sovereign states must also recognise the sovereignty of the independent state. The only restrictions on the sovereign are the will of God and natural law. Vitoria disqualified Indians in this regard.

[158] According to Armitage, D. (2000) pp. 70-72, Hakluyt was considered by many historians and theorists of the British Empire as "the ideological progenitor of the Empire." Hakluyt was influenced by Aristotle, St Thomas, Protestantism and was involved with the Cloth-workers' Company eager to expand its markets into the New World.

colonisation to facilitate trade with the Indians. He argued that colonisation would provide an outlet for English surplus population and production.[159]

At this time, English law had defined only two methods for acquiring new territorial possessions. One was succession, where the English monarch could acquire territory through royal marriage into other European royal families. It was relatively uncommon compared with the other way, which was through conquest. The necessity to allow for any other type of acquisition had not yet arisen making the rules of conquest applicable regardless of how the acquisition was made.[160] Calvin's case of 1608 was the leading authority in England regarding overseas possessions for many decades. The case restated the Norman feudal principle that the Crown exercised prerogative power over all its territories. It provided authority for the extensive exercise of the Royal prerogative outside England. The judges in the case maintained that conquest was the primary method of acquiring territory in Europe and extended these principles to the new colonies. Sir Francis Bacon, who served as Calvin's counsel, suggested that Roman law and natural law provided another method of acquisition through the principles of occupancy. He argued that the law should treat settlers who occupy uninhabited territories differently to those who settle in conquered territories.[161]

Under the doctrine of conquest, the Crown retained indigenous law to the extent that it was not repugnant to English law.[162] The Crown could change or abolish existing law through legislation. Bacon argued that, in settled colonies. there was no existing indigenous law and that English law should accompany settlers wherever they may travel. He limited the application of English law and argued that it should only apply to the extent that it suited the circumstances of the new colony. Any new laws made in England after settlement could not apply in the colonies unless the law specifically included the colony or the colonial authorities chose to adopt them.[163] The judges dismissed Bacon's suggestions and retained the notion that all overseas territories

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[159] Armitage, D. (2000) pp. 70-75.
[160] Castles, A. C. (1982) p. 9. As discussed earlier, the modes of acquisition were made irrelevant by William's need to assert absolute sovereign power when he acquired the English Crown..
[161] Castles, A. C. (1982) p. 8.
[162] This feature of pre-colonial English law was retained by the High Court in Mabo and gained prominence in the Yorta Yorta decision.
[163] Castles, A. C. (1982) pp. 7-8.

were acquired through conquest. The territories were included under the Crown's paramount lordship. As Sir William Blackstone noted, the word conquest continued to signify no more than acquisition.[164]

Vitoria's challenge to Papal authority provided English theorists with support for English assertions of rights to travel the seas and to trade wherever and with whomever it chose. The Englishman Samuel Purchas was strongly influenced by Hakluyt and he referred to Vitoria's work as support for his own denunciation of Papal grants and advocated for the principle of *mare liberum*[165] in the world's waterways. At the same time, the Crown asserted dominion over the seas surrounding England to secure its borders against the threat of foreign invasion and the violation of fishing rights, especially from the Dutch at the time. The Crown reserved exclusive ownership of the products of the sea. By doing so, the Crown advocated the doctrine of *mare clausum*.[166] The apparent contradiction of advocating both *mare liberum* and *mare clausum* enabled the emerging British Empire to protect its borders while denying other European powers the same defence in the New World where Spain and Portugal continued to claim exclusive trade rights under Papal donation. As Armitage suggested, the contradiction was an expression of English pretensions to sovereign domination of the oceans.[167]

Following Vitoria's challenge to Papal donation, the Dutch jurist Hugo Grotius also relied on interpretations of natural law to reject Portuguese and Spanish claims in the New World. The publication of *The Freedom of the Seas* (part of a larger work) was also a response to English imperial aspirations.[168] He denied that any European monarch could claim sovereignty in the New World because sovereignty already existed in the native inhabitants.[169] In a manner similar to Vitoria, Grotius then

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[164] Blackstone, W. (2001) p. 40.

[165] *Mare liberum* is the Roman law term expressing freedom of the seas. It was based on the principle that no one can possess the seas and products of the sea can only be owned through possession. See Armitage, D. (2000) p. 107.

[166] *Mare clausum* is the doctrine of closed seas, that is, under the sovereignty of a European power. See Armitage, D. (2000) p. 108.

[167] Armitage, D. (2000) p. 109.

[168] Armitage, D. (2000) pp. 109-111

[169] Grotius, H. (1972) p. 11. It is notable that Grotius advocated native rights and recognised their sovereignty to support Protestant Holland's claims against Catholic Portugal's assertions of exclusive trade rights. A similar strategy was discussed earlier, in relation to the dispute between the Church and

qualified native sovereignty by arguing that all humans have natural-law rights to trade and travel. These rights came directly from God and not through the Pope. He contended that no one had the authority to determine who may travel and where. This included the native inhabitants of the New World as much as the kings of Portugal and Spain, and the Pope. To refuse passage without good reason was to violate natural law, which was cause for just war.

He rejected the idea that discovery gave Portuguese traders exclusive rights to trade in the East Indies. To claim exclusive trading rights, the Portuguese were required not only to find these lands, but also to claim ownership and take possession.[170] He insisted that the Portuguese Crown had not taken possession so they only had the right to trade alongside other European nations.[171] King Philip III of Spain attempted to maintain the monopoly for Spanish traders in 1606. He referred to the 1493 Papal donation as justification. Grotius refuted Spanish claims by evoking feudal principles. He argued that, for the Pope to donate the land, he was required to possess it. To possess it, he needed to occupy it. The Pope did not occupy any territory in the New World and had no authority to donate it to anyone.

Grotius extended his argument to consider the spiritual nature of the Pope's authority. He argued that property was a human creation governed by human law and not divine law. He then concluded that spiritual authority could not confer property in land.[172] Grotius relied on the separation of Church and secular power to reject the Pope's authority. Grotius's rejection of Papal authority began a process of transferring the authority of the Petrine mandate, which conferred rights to non-Christian possessions, to the kingdoms.[173] Jurists that followed continued the process.

Portugal in the Canary Islands. In the final chapter, a similar strategy emerges again in the history of the Yorta Yorta people's claims to their land.

[170] Grotius, H. (1972) pp. 22-26, demonstrates in his refutation of Portuguese claims, the feudal base of his propositions.

[171] Grotius, H. (1972) pp. 11-14.

[172] Grotius, H. (1972) p. 16.

[173] The secularisation of the Petrine mandate shifted responsibility for the modification of native inhabitants of European colonies from the Church to secular authorities. With this responsibility came the justification to dispossess the natives that remained in a primitive state and to reduce the rights of those that began to resemble Europeans.

In 1682, the Swiss jurist Samuel Pufendorf also rejected Papal donation and argued that possession in land was only possible through feudal conceptions of occupancy. He based his argument on the idea that only the physical seizure of a thing, with the intention of keeping it, conferred rights of possession. He postulated that there were two categories of acquiring ownership, original and derivative. The original modes included, first, discovery[174] and occupation of uninhabited territory by European nations, and, second, *usucapion*,[175] derived from the Roman doctrine that recognised pre-existing ownership of territory. The application of *usucapion* acknowledges acquisition where there is no record or knowledge of how the property was originally acquired. It refers to such possessions as from 'time immemorial' and relies solely on occupancy as proof of acquisition. Derivative modes included purchase, conquest and cession of property.[176]

The arguments and propositions made by Grotius and Pufendorf, and their successors, extended European feudal forms into international relations.[177] Pufendorf developed a system for modes of acquisition. The logic that underpinned international-law categories of territorial acquisition precluded any overlap. In relations between European nations, the categories functioned to reduce the potential for conflict and maintain order. European colonial aspirations, however, required a different logic. In relations between European nations and the native inhabitants of the New World, discrete categories became dysfunctional because they had the potential to impede European expansion by recognising Indian rights. The logic of colonialism complicated the category of discovery, the mode most used for European territorial expansion, by including Vitorian examinations of Indian personality and social organization.

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[174] With reference to Grotius and Pufendorf, Oppenheim, L. (1948) p. 43 defined discovery as the first time a thing is seized by physical means with the intention of keeping it. According to Grotius, H. (1972) p. 21, a thing must be *res nullius* in order to be discovered. The lands of the East Indies were not *res nullius* because sovereign peoples, with their own laws, inhabited them.

[175] Pufendorf, S. (1995) p. 66, describes *usucapion* as the acquisition of a thing in good faith and possession for a long time in peace and without interruption. According to Oppenheim, L (1948) p. 543, Grotius rejected this mode of acquisition. Oppenheim defines the mode as recognition of the fact of possession. He stated, "the question, at what time and in what circumstances such a condition of things arises, is not one of law but one of fact." As discussed later, Oppenheim's logic is reflected in Australian law, especially the Native Title Act, 1993, and is clearly evident in the Yorta Yorta decision.

[176] Pufendorf, S. (1995) pp. 63-67.

[177] Blackstone, W. (2001) Bk II, pp. 8, 37 included Grotius and Pufendorf in his discussion of occupancy in feudal systems. He asserted that feudalism was part of the law of nations. This is clearly visible in Australian law, especially after the Mabo decision. How the Crown's radical title remains intimately linked to its assertion of sovereignty in Australia is explored in the next chapter.

From the above discussion regarding the early formulations of modern international law, it can be concluded that it was not designed to protect native inhabitants but to regulate relations between European powers. Vitoria's examination of Indian personality and conclusions of inferiority were consistent with crusade-era representation of non-Christian people in many respects. The Petrine mandate and its assumed responsibilities made conversion paramount to Vitoria's reasoning. In this way, Vitoria confirmed the natives' two-way loss that had been articulated in the *Requerimiento*. English scholars were influenced by Vitoria's lectures, especially his ideas about property in relation to the sea. Freedom to travel and trade were important to English aspirations to empire.

Grotius's direct attack on Spanish and Portuguese assertions in his publication the *Freedom of the Seas* indirectly attacked English claims to closed seas around the island kingdom. Grotius refuted the Pope's authority to grant exclusive trade rights to Portugal and Spain by donation. He implied that the Pope's authority should be dispersed among secular authorities under feudal principles of occupation and possession. Pufendorf's construction of international-law modes of territorial acquisition refined Grotius's feudal proposition. Paramount lordship was vested in monarch of discovering kingdoms rather that in the Pope.

Modern international law was constructed on anti-Church sentiment and its main purpose was to provide legitimacy for European expansion in the New World. The combination of the constructions of Indian personality as inferior and the modes of acquisition produce a legal abstraction of the notion of habitation. Only European Christians could inhabit territory in a legal sense. Newly discovered territories, whether inhabited by native or not, were considered *terra nullius*.

DISCOVERY IN NORTH AMERICA

The European discovery of North America began while English law regarding its colonial acquisitions was beginning to develop. Modern secular international law was establishing its dominance over Papal donation and there was a growing number of religious refugees migrating from Europe. It was assumed that discovery and

settlement were legitimate modes of territorial acquisition even if the territory was occupied. The legal status of native inhabitants had been established as something less than the status of Europeans. The extensive use of pre-existing legal and social constructions in North America and their subsequent use in Australia illustrate how these antecedent elements contributed to the 'tide of history'.

English social-contract theorist John Locke was influential in the American settlements.[178] He made several theoretical assertions about Indians and the legal status of their relationship to the land by expanding on Vitoria's representations of native personality. Locke described the differences between European and Indian cultures. He cast Indians as the exemplar of man in his natural state and Europeans as the height of civilisation. According to Locke, echoing Spanish colonial logic, European possession and control of Indian land were necessary to assist Indian uplift to civilisation.[179] He generally argued that success in violent confrontation did not confer ownership of land.[180] The only way to obtain title in land was through the application of labour.[181] Nevertheless, he accepted that the process of civilising natural man might require force or coercion. Reminiscent of Thomism, he argued that the civilising effects of industry would discourage Indians from their disorderly wandering and they would settle and become farmers. [182]

Although similar to Vitoria's representation of Indians as imperfect, Locke emphasised land use as the marker of social progress. He contrasted European possession of land with his perception of Indian land use, a distinction that is later reflected in conceptions of native title. He asserted that Indians did not know God's commandment to subdue the earth,[183] a Protestant adaptation of the Petrine mandate,

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[178] Arneil, B. (1996) p. 18.
[179] In Locke's theory, the colonial duty to change natives to make them resemble Europeans remains consistent. He also retains Vitorian ideas regarding natives' rights to their possessions and European rights to dispossess and modify.
[180] Locke, J. (1968) Book II, 182, 184; Arneil, B. (1996) p. 197.
[181] Locke, J. (1698) Book II, 34, 35.
[182] Arneil, B. (1996) p. 171.
[183] Locke, J. (1698) Book II 34, 35.

and left the land in its natural state. That many Indian tribes did in fact cultivate the soil failed to enter Locke's postulations.[184]

Later, Emerich de Vattel[185] considered the legal status of Indians in retrospect and asserted that their tribal organization was best described as independent families rather than sovereign nations. He stated that "[w]hen several independent families are settled in a country they have the free ownership of their individual possessions, without the rights of sovereignty over the whole, since they do not form a political society" [186] Vattel's description of Indians' legal status relied on representing them as being at an earlier stage of social progress. He proposed that free and independent families, like the Indians, were yet to come together to form a state where they "acquire as a body sovereignty over the entire territory they inhabit."[187] Similarly, English-law theorist William Blackstone argued that Europeans had already come together and formed states, making them more socially advanced. He believed that feudalism was part of the process that created civilised states and developed as a defensive strategy after the fall of the Roman Empire.[188]

Land, as a possession of Indian families, was assumed to be held in common without the hierarchical structures associated with feudalism. As Blackstone argued, before feudalism land holding was "perfectly *allodial*".[189] Indian acquisition of their territory from time immemorial, that is, with no written origins, was proven by occupancy.[190] While recognition of sovereignty in the European juridical order offered protection through the rules of war and territorial acquisition, the denial of

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[184] As discussed in the final chapter, Locke's ideas about property in land underpinned Justice Olney's construction of Yorta Yorta people's ancestors and the recognisability of their tradition and custom in common law.

[185] Emerich de Vattel was a Swiss jurist who was influential in England. He discussed Indian legal status and his book, *Law of Nations* (published in 1758), was often cited in Australian jurisprudence. See Castles, A. C. (1982) p. 16; Bennett, J. M. & Castles, A. C. (1979) p. 250; Reynolds, H. (1987) p. 17.

[186] Vattel, E. de (1995) p. 142.

[187] Vattel, E. de (1995) p. 84.

[188] Edgeworth, B. (1994) p. 399.

[189] Blackstone, W. (2001) p.39. (Allodialism is described earlier at footnote 80.)

[190] See Grotius, H. (1972) p. 11 regarding Indian law and sovereignty in relation to trade, and Vattel, E. de (1995) p. 38 & 85. See also Blackstone, W. (2001) p. 39; Edgeworth, B. (1994) p. 399. Indian land holding was also characterised as allodial by the United States Attorney General in 1821 and Supreme Court in *Holden v Joy*, 1872 (See Cohen, F. (1941) p. 293). The tribal identity that allodialism supported offered some protection for Indians later through treaty agreements with the United States but was often undermined by state authorities. (See Cohen, (1960) pp. 258-259)

Indian sovereignty denied that protection. Recognition of a form of Indian ownership of their possessions, however, allowed trade between Indians and Europeans, an important aspect of early European colonisation in North America. The fur trade with Indians, the potential of mineral and agricultural wealth, and an outlet for European manufacturing made North America important to England. Trade relations made treaty making with Indians an important feature of early colonialism.[191]

The prevailing international-law principles restricted Indians to the land that they used as defined by European standards.[192] European states could claim any land deemed vacant, through the application of Lockean notions of property, as *terra nullius*.[193] Indian claims against colonial assertions could be silenced through military action legitimated by colonial interpretations of justifiable war.[194] England established their first permanent settlement in Jamestown in the early 1600s. The Crown annexed the American settlements under its jurisdiction and transplanted English law.[195] The Crown's assertion of paramount lordship over settlers' land was unpopular in North America.

Although transplantation of English law was controversially practiced in early North American settlements, [196] the legal status of the colonies was not settled. England was still debating the legal status of settlers in new colonies. In the case of *Craw v Ramsay* in 1670 reference was made to Bacon's ideas in Calvin's case. In 1693, a submission to the House of Lords that British settlers in unoccupied lands be treated differently to those in conquered lands was rejected. The English law conception of territorial acquisition as annexation was retained.[197]

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[191] Treaty-making was not a feature of colonialism in Australia. The lack of trade relations with Aborigines negated the need for treaties. See the discussion in chapter two regarding Captain Cook's early attempts to establish relations with Aborigines.

[192] Vattel (1995) p. 38. This included the feudal principle, that underpinned later conceptions of native title, that the Crown owned the land and the Indian were permitted to occupied it. (See Cohen, F. S. (1960) p. 237.)

[193] Vattel, E. de (1995) p. 85. The term *terra nullius* was not used by Vattel but was implied through his argument that Indian "occupancy. . . can not be held as a real and lawful taking of possession" p. 85.

[194] See previous discussions regarding Pope Urban's crusade-era propositions on just war, Vitoria's natural-law interpretations and Grotius on the rights to travel, trade and sojourn.

[195] Castles, A. C. (1982) p. 1.

[196] Arneil, B. (1996) p. 190; Alvord, C. 91917) vol II, p. 201.

[197] Castles, A. C. (1982) p. 7-9.

After more than a century of legal debate and appeals from the colonies[198], the Privy Council made three determinations that declared the legal status of colonies in the Memorandum of 1722. The first determination related to settlements in uninhabited territory. It confirmed that because English law was the birthright of every English subject, wherever they went they took the laws of England with them. It declared that once English subjects settled in an uninhabited land, new legislation in England did not bind them unless their colony was specifically mentioned.[199] The law of the colony could then develop to suit its unique circumstances. This part of the Memorandum was specifically addressed to the legal status of colonies and settlers. It did not refer to native inhabitants and their law. Logically, if a colony was established in uninhabited territory, there should be no prior indigenous law to recognise. At this stage of English law's development, it was possible for a territory to be considered legally uninhabited even with the presence of native inhabitants.[200] The second and third determinations restate the rules of acquisition by conquest.[201] The Memorandum allowed a new legal system to develop in the colonies with the support of English law. Special laws could now govern the relationship between Indians and settlers, a source of colonies' unique circumstances.

The possibility of colonial law encouraged colonists to continue land purchases and other trade with Indians in the understanding that Indians owned the land. The acknowledgement of allodial Indian possession, as defined by Blackstone and later by Vattel, also allowed a space for Indian alliances with rival European powers outside the settlements. There were hostilities between British colonists and Indians over trade and land dealings. This and the growing fears among Indian tribes on the frontiers of continuing English advancement into their territory (through coercion, deception and outright confiscation of their lands) brought Indians into the continuing conflict between Britain and France.[202] The French and Indian War that started in 1754 was a struggle over sovereignty and trade rights in North America and became

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[198] See Jensen, M (1967) p. 108.
[199] See Bennett, J. M. & Castles, A. C. (1979) p. 247; Blackstone (2001) Bk 1, p.70.
[200] Armitage, D. (2000) p. 87.
[201] Castles, A. C. (1982) pp. 10-13. See the earlier discussion regarding the English notion of acquisition.
[202] Alvord, C. W. (1917) vol I, p. 116, suggested that the Indians preferred to deal with the French.

part of the Seven Years War, a wider conflict in Europe.[203] The British military became dominant in America and Europe, and hostilities ceased with the Treaty of Paris in 1763.[204]

Shortly after the treaty, King George III issued the Royal Proclamation of 1763. The proclamation nullified rival claims, both European and Indigenous, to territory and sovereignty. The Crown asserted exclusive sovereignty and, to make it secure, claimed absolute title to the land. Anticipating the Crown's reasoning, Vattel had suggested, in 1758, that "[s]overeignty, or the right of supreme jurisdiction, by which a Nation regulates and controls at will whatever goes on in the territory" requires paramount lordship over all its territory. He rhetorically asks, "[h]ow could it govern itself after its own policy if the lands it inhabits were not fully and absolutely at its disposal?"[205] After its experience before 1763, the Crown avoided losing a significant portion of its power base by not allowing Indian tribes to retain their land independently. The Proclamation was designed to discourage settlers from negotiating directly with the Indians within the British Crown's jurisdiction. A significant aspect of the Proclamation was that it signified the completion of international law's role in British-held North America. The Crown's compliance with international-law rules about acquiring new territory was reflected in the Treaty of Paris. After that, the rights of native inhabitants were no longer protected by the Crown's need to observed international conventions.[206]

The Proclamation created four colonial governments and set their geographic limits. It also set the limits to Indian Territory by reserving "all the Land and Territories not included within the Limits of Our said Three New Governments or . . . Territory granted to the Hudson Bay Company. . . under our Sovereignty, Protection, and Dominion, for the use of the . . . Indians". This included all territory "lying Westward

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[203] The Seven years War in Europe began in 1756. It involved most European powers and was the largest conflict involving more countries than in any other previous war.

[204] Williams, R. A. (1990) p. 233.

[205] Vattel, E. de (1995) pp. 84 & 139 respectively. According to Albert de Lapradelle, in his introduction to Vattel's *Law of Nations*, Vattel became very influential in the British North American colonies after Benjamin Franklin read his book. His influence grew after the War of Independence and, by 1780, his works were standard texts in US universities.

[206] The Crown assumed similar jurisdiction in Australia and acknowledge international conventions in relations with other European states. As potential for rival European claims diminished, the Crown's observance of international law, especially regarding Aborigines, also diminished. This is an expression of the need for sovereign exclusivity.

of the Sources of the Rivers" that fall into the Atlantic Ocean.[207] While settlers came under the doctrine of settlement and were the subjects of the British Crown, Indians were subject to the doctrine of conquest with a clear geographical boundary separating the two legal doctrines. While colonies governed themselves and developed colonial legal structures under British sovereignty, British authorities governed Indians and restricted their exercise of sovereign power to make and enforce laws. The Proclamation constructed Indian Territory in North America as lacking sovereignty and introduced British sovereignty to fill the void.[208]

The Proclamation transformed Indians' allodial independence and replaced it with aboriginal title. While it protected the Indians' use of the land, at the Kings' pleasure, it did not confer legal ownership. Aboriginal title in British North America amounted to permissive occupancy.[209] The refusal to consider that Indian title may be accommodated within existing forms of land tenure - for example fee simple or fee tail[210] - is an expression of the sovereign power to exclude and include. It brings Indians, and their law and territory, within colonial jurisdiction while excluding them from the benefits of English law. Indians were theoretically British subjects[211] but were often treated as members of foreign nations. As subjects of the Crown, Indians' occupation from time immemorial should have given them legal title amounting to fee simple and not merely permission to occupy the land.[212] A significant aspect of this change was the control the Crown imposed on the alienation of Indian land. As a function of its radical title, only the Crown could acquire land from Indians. This power, known as pre-emption, allowed the Crown to exercise control over the progress of colonisation and the power of land speculators.[213]

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[207] The Royal Proclamation of 1763, p. 3. That the Crown had forbidden settlement west of the Appalachian Mountains suggests that its claim to sovereignty extended into what was defined as Indian territory. See Jensen, M (1967) p. xviii.

[208] Similar legal boundaries were constructed in Australia but were recognised less formally as the frontier. The separation of Aborigines and settlers is discussed in more detail in the next chapter.

[209] The assertion of sovereignty and the construction of native title in North America have strong parallels in Australia, especially the High Court's construction of Australian native title.

[210] Fee simple is the tenure of a heritable estate in land forever and without restriction to any particular class of heirs. Fee tail is similar but restricts heritability to a particular class of heirs.

[211] Cohen, F. (1941) p. 152.

[212] See McNeil, K. (1987) pp. 80-85, 201-205.

[213] See the Marshall decisions discussed below. The Australian construction of native title, examined in the next chapter, strongly resembles the Indian title expressed in the Proclamation and later in decisions made by the judiciary in the United States.

As the Crown asserted its authority over the colonies in North America, Lockean notions of the limitations of sovereign power grew in popularity.[214] Locke extended the Protestant concept of faith, where individuals converse directly with God without interference from the clergy. He argued that trade with Indians in goods and land did not require Crown control. He rejected monarchical rule and its hereditary base and subscribed to the democratic idea that the people chose a leader to care for society. As all people are equal, the leader cannot be an overlord of landed estates. He criticised the Royal prerogative and insisted that a legal system, based on natural law, is declared by the people and binds everyone, including the elected leader.[215]

Colonists continued to acknowledge Indian allodial ownership of the land. Reminiscent of Vitoria's reasoning, land speculators emphasised Indians' natural-law rights. They also emphasised the Crown's treaties with Indians as evidence that the Crown recognised Indian sovereignty. It was also more profitable to trade directly with the Indians than receive feudal grants encumbered by rents.[216] While English-law theorists considered the feudal system based on the Crown's fiction of universal occupation to be in the national interest,[217] colonists such as Thomas Jefferson saw it as oppressive. He denied British dominion in North America and advocated Lockean ideals of labour and property.[218] The retention of feudal tenures in America, through the Royal Proclamation of 1763, stifled the development of colonial law, especially in relations with Indians, and its capacity to diverge from English law. English law did not serve the needs of the colonies as far as colonists were concerned. They made a distinction between land ownership and territorial sovereignty.[219] To protect its exclusive sovereignty, the Crown continued to reject such a distinction and maintained its claims regarding the disposition of Indian lands.[220]

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[214] See Arneil, B (1996) for a detailed discussion of the extent of Locke's influence in North America.
[215] Locke, J. (1698) Book II 136. See also Alvord, C. W. (1917) vol I, p. 201, regarding the revolutionary discourses of Indian sovereignty.
[216] Williams, R. A, (1990) p. 280; Alvord, C. W. (1917) vol II, p. 201.
[217] Blackstone, W. (2001) p. 41.
[218] Arneil, B. (1996) p. 190. Alvord, C. W. (1917) vol II, pp. 214-215.
[219] Arneil, B (1996) p. 83; Castles, A. C. (1982) p. 4. In England after 1688 revolution, the Crown's prerogative power was curbed in England but not in the colonies.
[220] Williams, R. A. (1990) p. 287. The distinction between land ownership and sovereignty enabled the recognition of native title in Australia.

Not surprisingly, colonists adopted Locke's ideas, which acquired revolutionary force.[221] The Crown's attempts to maintain authority by voiding individual land purchases from Indians and the imposition of more taxes contributed to the tensions that culminated in the Revolutionary War.[222] The Revolutionary War suspended the operation of English law in the American colonies. Upon the victory of revolutionary forces, United States colonial authorities reanimated English law to the extent that it suited colonial circumstances. The victory was seen in Europe and the North American colonies as a triumph for Lockean ideals of equality and the rights of man over absolute monarchy. Those rights in a settler-colonial state included unimpeded settlement.[223] Indians were exposed to an unfettered exercise of sovereign power with colonial objectives of increasing settler land holding at the expense of Indians. The exercise of sovereign power and the establishment of colonial law were controlled by the colonists themselves.[224] Despite revolutionary assertions of Indian equality and territorial rights, the United States retained the mode of acquisition of territorial sovereignty claimed by the British Crown in the Royal Proclamation of 1763. It also retained the conceptualisation of aboriginal title as permissive occupancy despite the practice of making treaty agreements with Indians.[225]

Treaties, by definition, can only be concluded by independent sovereign nations.[226] It is clear, however, that United States authorities, as successors to the Proclamation, did not consider Indian Nations as independent and sovereign. This is apparent in George Washington's justification of the United States' claim to Indian land through the rules of conquest. The Indian Nations, he asserted, lost their sovereignty because of their military loss in the French and Indian War. The United States inherited the British

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[221] Locke's ideas were strongly influenced by the arguments advanced by Protestant reformers. A factor that led to the Reformation, the Church's imposition of economic burdens, has parallels in North America. Colonists rebelled against the Crown's imposition of taxes and fees.

[222] Alvord, C. W. (1917) vol II, pp. 214-215. There was a similar practice of voiding or annulment of purchases in Australia, see the discussion in the next chapter about Batman's treaty in the district of port Phillip.

[223] Jensen, M. (1967) p. xviii.

[224] Reynolds, H. (1996) p. 21 discusses this phenomenon in relation to Australian Aborigines. Agamben, G. (1998) p. 36 argued that Indians where extremely vulnerable during the constitution of colonial legal structures.

[225] Cohen, F. S. (1941) p. 292.

[226] See Oppenheim, L (1948) p. 27.

Crown's gain after the Revolutionary War.[227] Together with the international law definition of sovereignty, which excludes non-European nations, the elevation of Indian Nations as sovereign for treaty-making purposes was politically motivated.[228] Indian sovereignty was only acknowledged to the extent that it legitimated United States' territorial foundations after the revolution.[229]

An example of the politicisation of Indian Nations' capacity to exercise sovereign power is found in one of the first treaties,[230] made by the United States with the Delaware Indians in 1788. Congress made several legislative acts to satisfy the conditions of the treaty. In enacting this legislation, the Congress of the United States articulated the main sources of federal authority thereby strengthening federal power in response to state jurisdictional claims. Federal authority in Indian affairs entailed the power to go to war, make treaties, govern territories,[231] and spend money.[232]

The United States asserted itself as sovereign over the states and Indian Nations As Indian resistance weakened, the president used treaties as an exercise of power. Philip J. Prygoski argued that "[p]residential power *over* Indian tribes is centered on the ability to enter into treaties. . . "[233] Treaty-making for the Indians, on the other hand, entailed loss of territory and subjection to an imposed law.[234] The diminution of Indian Nations in this way strengthened United States' assertions of exclusive sovereignty. Later treaty making in the United States also attempted to destroy communal tribal existence through negotiating individual entitlements within the agreements. Indian resistance caused many treaties to fail in this regard. The failure

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[227] Cohen, F. (1941) Chapter 3, Section 4 Part C. George Washington's assertion, that the United States acquired Indian lands through conquest, is also reflected in the placement of Indian affairs in the War Department.

[228] Early treaties reflected respect for Indian military power and their rights to the soil. As the United States subjugated Indian Nations, treaties were used for internal domination and land acquisition. See Cohen, F. S. (1941) chapter 3, section 4.

[229] Fouberg, E. H. (2000) p. 3.

[230] There were earlier treaties made between Indians and the British Crown. Theoretically, the United States inherited these as a result of the revolutionary war.

[231] 'Territories' here refers to Indian lands and not the existing states.

[232] This summary of the United States' first Indian laws comes from Cohen, F. S. (1941) pp. 68-69. . The demarcation of state and federal jurisdiction was a continuing source of conflict in the fledgling United States. Federal Indian law began with placing Indian affairs within federal jurisdiction. The Cherokee cases discussed below illustrate state resistance.

[233] Prygoski, P. J. (1995) p. 1. (Emphasis in original)

[234] Cohen, F. S. (1941) p. 216.

saw the establishment of the allotment system that broke Indian tribal lands down into individual allotments.

The allotment system in the United States represented a secular strategy for the modification of Indians. By breaking up their tribal lands into individual allotments, legislators sought to make Indians imitate European methods of land use. As Indians became more like Europeans under the system, they lost their native rights to their tribal territories. The vast areas of Indian Territory that became available for settlement measured the success of the system in settler-colonial terms.[235]

The use of treaties was rejected in Australia through the application of the doctrine of *terra nullius* and the fact that the British Crown did not declare war against the Aborigines or trade with them. Nevertheless, the underlying colonial logic was similar only the legal instruments applied were different. The requirement of settler colonies for land and the necessity of settlement to validate sovereign assertions are shared features. Aborigines also lost their land and were subjected to an imposed legal system. As argued in the next chapter, the use of *terra nullius* rather than treaties represents a perfection of colonial legal responses to indigenous territorial rights.

The legitimacy of United States' assertions of exclusivity and the denial of Indian exercise of sovereign power was tested and upheld by Chief Justice Marshall of the Supreme Court in1823 in the case of *Johnson v McIntosh*.[236] A feature of the decision is that it declared that the United States acquired territorial sovereignty under the doctrine of discovery.[237] The judge's opinion reflects a peculiar interpretation of the doctrine, which illustrates how Pufendorf's discrete modes of acquisition are affected by the interaction with native inhabitants. Marshall's discussion of the principles of discovery began with the removal of Indian presence from any consideration. It

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[235] Cohen, F. (1941) p. 273. In Australia, the allotment system was not official policy and was discouraged. Aboriginal property rights had already been denied through the doctrine of *terra nullius*. See, for example, Olney in *Yorta Yorta, 1998* at 42. It briefly describes an attempt to introduce an allotment system at Cummeragunja. Even though the Yorta Yorta people were successful in working their allotments, the lots were resumed and granted to white settlers.

[236] *Johnson v McIntosh* extracts reprinted in Cohen, F. S. (1941) pp. 292, 293. The High Court of Australia relied on this case as precedent in the Mabo decision.

[237] See Cohen, F. (1941) p. 291-293 for excerpts from the Marshall decisions regarding the Cherokee Nations and McNeil. K. (1989) p. 252

legitimated British presence as against other European nations. The United States possessed the absolute, or radical, title to Indian lands as the successor to British rule.[238] The case clearly showed that the acquisition of territorial sovereignty relating to Indian Territory, asserted in the Proclamation of 1763, remained in force in 1823.[239]

Once absolute territorial sovereignty was determined as residing in the United States, the judge drew Indians back into consideration. He negated Indians' capacity for legal possession of the land by following Vattel and Locke in their interpretations of natural law and the nature of possession and sovereignty. He concluded that the gifts of European civilisation and Christianity were ample compensation for any loss incurred by Indians. He described Indian rights to land as 'aboriginal title' as opposed to legal ownership. Marshall represented the Indians of incapable of alienating land primarily because they did not own it and as lacking the qualities of the 'civilised inhabitants' of the settlements.[240] In other words, while Indians remained in a primitive state they could be dispossessed. When they receive the gifts of civilisation, that is, they become more like Europeans, their rights to territory were lost. Although Indians had come to resemble Europeans, they remained less than Europeans.

Chief Justice Marshall confirmed that Indians could sell their rights of occupancy to the United States government and, under the doctrine of pre-emption, to the United States alone. In legal terms, such a sale extinguished aboriginal title. If the Indians refused to sell, the United States government could compel them to, using military force. Conquest also extinguished aboriginal title.[241] Marshall concluded that the United States' actions were legitimate because of its absolute ownership of the land.[242] The arrangements were cast in terms of protecting the Indians from unscrupulous land speculators.[243] United States' right of pre-emption had the effect

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[238] McNeil, K. (1989) p. 259; Williams, R. A. (1990) p. 313.
[239] Williams, R. A. (1990) p. 314, suggests that despite revolutionary rejection of feudal principles, the Marshall decisions re-affirm them.
[240] *Johnson v McIntosh* extracts reprinted in Cohen, F. S. (1941) pp. 292, 293.
[241] See Williams, R. A. (1990) p. 315; Cohen, F. S. (1941) p. 272, on the role of treaties in extinguishment; McNeil, K. (1989) p. 259 on extinguishment by acts of Congress.
[242] *Johnson v McIntosh* extracts reprinted in Cohen, F. S. (1941) pp. 292, 293, Mc Neil, K. (1989) pp. 252, 253
[243] Cohen, F. S. (194) p.

of maintaining control over the states and how settlement progressed by preventing Indians from negotiating with anyone but the US government.[244] Pre-emption protected the United States' exclusive sovereignty.

In 1827, the Cherokee Nation wrote a constitution and declared itself an independent nation with sovereignty over its territory. Geographically, Cherokee territory was within the State of Georgia. The State reacted by enacting laws that would make the state's laws effective in Cherokee territory and made Cherokee law and their constitution null and void. This action by the State of Georgia challenged federal jurisdiction by contravening existing Federal Indian Law[245] and treaties between the United States and the Cherokee Nation.[246] The Cherokee Nation appealed to the Supreme Court and asked for an injunction against the Georgian laws. Their counsel argued that the Cherokee Nation was sovereign and foreign and that the State of Georgia had no jurisdiction on their territory.[247]

In his decision in 1831, Chief Justice Marshall avoided making a politically sensitive decision by claiming that the Supreme Court had no jurisdiction to grant the injunction.[248] He denied that Indian nations could be considered foreign states and described the Cherokee Nation's relationship to the United States as something that "resembles that of a ward and his guardian." He went on to state that "[t]hey look to our government for protection, rely upon its kindness and its power; appeal to it for relief to their wants, and address the President as their *great father*." He described their status in United States legal order as a 'domestic dependent nation'.[249] This decision is continuous with the logic of aboriginal title expressed in the Proclamation

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[244] Cohen, F. S. (1941) pp. 69, 70; McNeil, K. (1989) p.221, 223, argues that this was consolidated in the Proclamation of 1763.
[245] See Cohen, F.S. (1941) p, 68-69. Burke, J. C. (1996) p. 145.
[246] Burke, J. C. (1996) p. 139. It is also not insignificant that gold had been recently discovered on Cherokee land and Indians were 'encouraged' to leave the State, fore shadowing the imminent passing of the federal *Removal Law*.
[247] Burke, J. C. (1996) p. 159.
[248] Burke, J. C. (1996) p. 140. The president expressed his opinion that the Cherokees had no right to independence and he had no right to interfere with Georgia's laws. If Marshall found in favour of the Cherokees Nation he would be in opposition to the popular president.
[249] *Cherokee Nation v State of Georgia 1831* p. 3.

of 1763. Indians had no sovereignty but were permitted to occupy their land at the president's pleasure.[250]

After the commencement of the Georgian laws, the State of Georgia imprisoned two missionaries for being on Cherokee territory without the State's permission. In a put-up case, the missionaries appealed to the federal Supreme Court. In the case of *Worcester v Georgia*, Chief Justice Marshall upheld the Cherokee Nation's rights to govern itself as a 'domestic dependent nation'. The Supreme Court ordered the release of the missionaries. With the tacit support of the President, the State of Georgia chose to ignore the Court.[251]

While the Supreme Court made its decision according to Federal Indian law, the United States Constitution and treaties with the Cherokee nation, President Jackson, a strong supporter of states' rights, was able to ignore the court. He maintained the United States' exclusive sovereign power and supported the State of Georgia's unconstitutional laws that led to the arrest of the two missionaries. He withdrew military support that was supposedly protecting the Indian tribes, leaving them exposed to State and settler violence.[252] The prior enactment of the *Removal Act*[253] by Congress not only denied the existence of Cherokee sovereignty; it also denied their rights as humans.

The Court acknowledged that the United States' claims might be contrary to Indians' natural rights. The Cherokee Nation's assertion of sovereignty was met with an extreme and violent response that required the President to place himself above the law and the Cherokee Nation outside it. The Court justified the United States' violation of natural law by concluding that its actions were in keeping with the

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[250] McNeil, K. (1989) p. 246, argues that the definition of the relationship between Indian Nations and Congress enabled treaty-making but excluded Indians from the protection of English land-law. In Australia, native title is based on North American precedent. This is discussed in more detail in the next chapter.

[251] Burke, J. C. (1996) pp. 136, 160, 161.

[252] Burke, J. C. (1996) p. 156.

[253] Cohen, F. S. (1941) p, 72. This Act expressed the policy of exchanging Indian lands for federal land west of the Mississippi River. It also describes extinguishment by abandonment, which is a feature of the Yorta Yorta decision.

expectations of settlers. As such, it was asserted, these relations with Indian Nations must be considered the law of the land and unchallengeable.[254]

The President was only able to ignore the law because he followed the conventions that ordered his society and were legitimate according to colonial law. The most important considerations at the time were gold discoveries[255] and agricultural development[256] in Indian Territories and not the rights of Indians. The Supreme Court also had to comply with sovereign rule and could not enforce its decision to free the missionaries. It made the exercise of the president's power a non-reviewable act of state. Most importantly, it provided the legal and moral basis of United States' dominion, leaving Indians in the precarious position of being including in the United States juridical order while being excluded from the protection of US laws.[257]

The discovery and settlement of North America became a salient feature of Brennan's 'tide of history'. Ideological and theological discourses and increasingly elaborate legal structures were available for the European colonisation of North America. Locke extended Vitoria's characterisation of natives as inferior through anti-feudal propositions regarding the source of property in land. Vattel later combined Indian status with feudal principles to deny Indian sovereignty and ownership of their land. In feudalism and in propositions outside it, Indians remained inferior and incapable of possessing property. It made little difference to Indians whether their rights were denied by a monarchy or a democracy.

Federal Indian law retained the idea that Indians were inferior, giving crusade and early discovery-era notions of non-Christian status effect in the new democracy. In the Marshall decisions, Indians' legal status was framed within the notions of wardship and incompetence. Trade and Indian military power were the main purposes of early treaties rather than recognition of Indian sovereignty. Treaty-making later became an instrument of dispossession and domination. The shift is evident in early Federal Indian law as the terms of treaties were included in the emerging colonial order.

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[254] See Cohen, F.S. (1941) p. 292.
[255] Burke, J.C (1996) p. 153.
[256] Wolfe, P. (2002)
[257] McNeil, K. (1989) p. 246.

New legal instruments and forms of sovereign power emerged from colonial development in North America. The concept of native title emerged from notions of allodialism and the 1763 Proclamation as they developed through treaty-making processes, special laws and the idea of domestic dependency. Indians' legal status as inferior and the illegitimate action to maintain it relied on the prerogative powers of the President and the non-reviewability of acts of state.

In Australia, the exercise of the sovereign's prerogative power to violate Aboriginal rights began with the processes of settlement and the assumption of *terra nullius* and continues to the present day with the *Native Title Act*. The social formation of colonial America has strong parallels with that in Australia. The connection between the two settler-colonial states is expressed in the Mabo decision in the Court's reliance on North American legal precedent. Although the legal responses vary in relation to the legal status of Indians and treaty-making processes, the construction of colonial law in the two states share the European history of legal development. The Australian constructions of common-law aboriginal title and the legal status of Aborigines are derived from the development of American colonial law.

THE 'TIDE OF HISTORY'

From this brief sketch of the European history of expansionism, the components of the 'tide of history' that washed away the Yorta Yorta people's legal rights to their ancestral land emerge. The representations of native personality and social organization as primitive and barbaric form the basis upon which the 'tide of history' was generated. The representations informed the discursive frameworks that supported the idea of just war during the crusades, the Norman Conquest, and expansion into the New World. These representations were part of the logic that inspired and authorised early missionaries to travel into England and Africa and the first missions in Spanish-held colonies.

The legal status of indigenous people was produced by these representations of their personality and social organization. Their difference to the Christian-European standard was interpreted as inferiority in religious, humanist and natural-law

ideologies. The native inhabitants of colonies were obliged to observe European law but were not offered its protection as social entities or individuals. Indigenous people were not considered capable of exercising sovereign power and their social structure was represented as family groups and tribes rather than independent kingdoms or nations. Their relationship with the land was considered one of use rather than ownership. European colonists conceptualised natives' rights to the land as a form of allodial title.

The construction of native inhabitants and infidels as inferior to European- Christians brought with it a perception of a duty and entitlement to make modifications to natives' ways of life. Within Vitoria's, and later Grotius' formulations, modification of native personality also modified their rights as native inhabitants. Within this logic, as natives received the gifts of civilisation, their economic reliance on the land reduced along with their rights. The proselytization of infidels brought them into the Christian commonwealth. The civilisation of natives modified their land use to mimic that of European practices of enclosure and cultivation. Native resistance to modification brought conflict and the justification for expropriation. Resistance also contributed to the development of colonial legal structures.

The 1722 Memorandum allowed the development of colonial legal orders independently of the British legislature. The emergence of new legal orders within colonies demonstrated the development processes that brought aspects of colonial convention into statutory forms while maintaining the unwritten order. It gave colonial authorities extraordinary powers to manage its indigenous populations. It made special laws, like those made by congress that regulated trade and land dealing, and created institutions such as Las Casas prototype missions.

The doctrine of *terra nullius* was forming within the discourses that produced the characterisations of non-European people as incapable of legal possession and the requirements of international-law modes to territorial acquisition. International-law rules, the product of the rejection of Papal donation dictated the type of occupation that was to be considered as settlement, which included the establishment of legal institutions. *Terra nullius* supported claims of discovery. The authority to assert that a territory was *terra nullius* was derived from the Petrine mandate, which justified

dispossession. Its application was a form of domination of one sovereign power over another in pursuit of the one sovereign's exclusive possession.

Within the representation of native inhabitants as incapable of legal possession of their land emerged the idea of native title. Native title evolved from the Proclamation of 1763. It allowed Indians to use their ancestral lands while the legal owner- that is, the Crown- had no better use for them. The concept of continuous connection was still embryonic in the doctrine of *usucapion*. The idea of Indians' allodial title developed from their perceived relationship to the land as economic rather than political. Native title is constructed as a personal right to use and enjoyment and not a legal right of ownership.

The idea that European monarchs had sovereign rights outside their territorial borders was derived from the Petrine mandate. The ideology of the mandate justified crusades and holy wars, then discovery and expansion. Its logic underpinned assertions of legitimacy for European presence and subsequent annexation of colonised territories to sovereign empires. The mandate's authority was incorporated into modern international law through a process of secularisation empowered by ancient Roman jurisprudential and Greek philosophical interpretations of natural law. From there, discourses that justified colonial activities flourished and informed British colonisation of North America, then the creation of the United States.

The idea that an act of state is not reviewable is derived from the mandate and supported by the effects of disease and military domination. Non-reviewability is derived from the idea that victory in battle was an act of God and not reviewable in a human court. The sovereign struggles for exclusive possession, not just over territory but also the bodies and souls of discovered people began with the tensions between secular and Church authorities culminating in the absorption of the Petrine mandate into international law. The struggles between indigenous people and European invaders produced the concepts of settlement and conquest, the practice of treaty-making and the construction of other legal instruments such as the *Encomiendo*, the *Requerimiento* and systems such as allotment. Although indigenous people's rights and legal status were subordinated, their presence in settler colonial state undermined European sovereign power because of its requirement of exclusive possession.

2. AUSTRALIA

In the late seventeenth century and into the eighteenth, there was intense competition between European states to explore, chart and take possession of the great southern continent. In England, there were hopes that this new land would resemble Africa and South America in its mineral wealth.[258] The promise of vast lands and wealth motivated navigators. After many decades of exploration, the British Crown claimed and settled most of Australia in the late eighteenth century and throughout the nineteenth century. The discovery and settlement of Australia transported much more than just European people. They brought their history embedded in social institutions, legal principles, philosophy, technology and weaponry with them. It could be said that the first fleet sailed on the tide of history that washed up on Australia's shores in 1788.

European colonial ideology was well developed by the time European explorers first sighted Australia. With many newly discovered territories being inhabited when discovered, methods of constructing the legal status of these inhabitants had become more comprehensive and sophisticated. The Royal Proclamation of 1763 was only seven years old when Captain Cook landed the Endeavour on the east coast of Australia. The Proclamation gave legal expression to British imperial ideology of the time. Through the Proclamation, the Crown asserted paramount lordship and sovereignty over North America.[259] Any rival European or Indian claims were swept aside after the British victory in the Seven Years War.

After its experience in North America, the British Crown was careful not to allow rival European claims to complicate settlement of its new acquisition in Australia and its relations with the indigenous people.[260] The accepted characterisation of native inhabitants as inferior to Europeans and the idea that European monarchs could rightfully expand their territorial borders were drawn together in the Australian concept of *terra nullius*.

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[258] Banks, J. (1963) p. 93.
[259] *The Royal Proclamation* (1763) p. 1&3. The Crown claimed absolute ownership and sovereignty over the colonies and Indian territories.
[260] Rowley, C. D. (1970) p. 10.

TERRA NULLIUS

The Roman-law doctrine of *res nullius* (a thing belonging to nobody), became a strong undercurrent within the tide of European of history', that accompanied European people to Australia. In Australia, the doctrine became known as *terra nullius* (a land belonging to nobody).[261] Early explorers characterised Australian native inhabitants as being incapable of legal possession of the land that they lived on. British actions, starting with their simple physical presence on Australian soil, depended on the doctrine for justification and legitimation.

The application of *terra nullius* in Australia has been strongly criticised and was rejected in law by the High Court of Australia over two hundred years later.[262] Before its rejection, Australian historian Henry Reynolds characterised the application of *terra nullius* as a convenient error of law and fact. He argued that, at the end of the eighteenth century, international law and common law could not sanction the application of the doctrine in Australia because it was already inhabited. Tim Rowse supported Henry Reynolds' argument that the claim of discovery was erroneous and regarded *terra nullius* as a "profound error" because it "hardened into legal doctrine." He implies that this hardening occurred after settlement. [263]

Although the assumption of *terra nullius* may not have acquired the status of law until expressed in a judicial decision,[264] it should be remembered that *terra nullius* is a doctrine. Doctrines do not rely on legislation or judicial decisions for their existence. As sets of beliefs that provide the philosophical base for political action and legal decision-making,[265] they are prior to formal legislation. Doctrines also have an internal logic that may defy common-sense views such as those held by Reynolds. As

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[261] As discussed in the previous section, *terra nullius* grew from Protestant theology and the scriptural commandment to subdue the earth, go forth, and multiply. See Armitage, D. (2000) p. 97 and Locke (1698) Book II, 32&35.

[262] High Court Of Australia (1992) *Mabo and others v State of Queensland,* (This case is discussed often in this chapter and is referred to as *Mabo*.)

[263] Rowse, T. (1993) p. 245.

[264] Some commentators suggest that the doctrine was not expressed in Australian law until the Privy Council's decision in *Cooper v Stuart* in 1889. See, for example, Reynolds, H. (1996) p. xi. Others suggest that it was expressed earlier in the New South Wales Supreme Court's reasoning in *McDonald v Levy,* 1833, see, for example, McNeil, K. (1989) p. 121.

[265] The legal status of Aborigines at settlement and the operation of the doctrine of *terra nullius* are important in the analysis of the Yorta Yorta decision. The ideological underpinnings of settlement in their country enhance an understanding of the literature that Justice Olney relied upon to make his conclusions.

noted earlier, *terra nullius* was constructed within the Norman fiction of paramount lordship, the Protestant imperative to go forth and subdue the earth, and representations of natives as barbarous and primitive. The doctrine's scope gave it flexibility.

The doctrine was first applied to Aboriginal people by William Dampier after his voyage in 1688. He described the native inhabitants as

> ". . .the most miserable people in the world . . . [t]heir only food is a small sort of fish . . . for the earth affords them no food at all. There is no herb, root, pulse nor any sort of grain for them to eat that we saw; nor any sort of bird or beast that they can catch, having no instruments wherewithal to do so. I did not perceive that they did worship anything. . ."[266]

At the time of his voyage to Australia, modern international law was emerging. As Anthony Anghie has argued, Vitoria's representations of South American Indians as inferior with no legal rights to their possessions was influential.[267] In the above passage, Dampier prepared the ground for the justification and legitimation of colonisation in Australia.[268] His representation removes the possibility of Aboriginal ownership of land in European terms because of their primitive state and lack of cultivation.[269]

Cultivation and primitiveness are not legal concepts.[270] They are philosophical propositions with genealogies that are traceable through Lockean social-contract theory and Protestant theology, back to Scholasticism, the proposals of Pope Gregory I, and beyond. In contract theory, primitiveness is a stage of human evolutionary progress that comes before European-style civilisation and the concept of property.[271]

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[266] Dampier, W. (1981) pp. 120-123. This passage is cited in Moorehead, A. (1987) pp. 121-123. Dampier's impressions influenced Cook and Banks and the cultural misconceptions that produced them continue to be evident in the judges' reasoning in the Yorta Yorta case.

[267] Anghie, A. (1999) p. 103.

[268] Australia was known by many names at the time, Terra Incognita, Terra Australis, the Great Southern Continent and New Holland. To avoid confusion, particularly with the Great Southern Continent, which also referred to Antarctica, I will use Australia.

[269] Later representations of Aborigines reflect Dampier's impressions. As will been seen later in this chapter, these representations formed part of the strategies that supported the validity of *terra nullius* and assimilation policies.

[270] As Patrick Wolfe (2000) p. 143, observes, these terms constitute part of colonising ideology rather than legal ideology. The judiciary and legislature borrow the terms which results in groups similar to the Meriam obtaining land rights while others, such as the Yorta Yorta have been unsuccessful.

[271] Blackstone, (2001) p.7; Pufendorf, (1995) p. 62.

The dichotomy of primitive and civilised entered into natural-law interpretations to disqualify native peoples' claims to ownership of the land. The interpretation of cultivation as the source of land ownership disqualified other types of land use, especially nomadic forms, from providing native inhabitants with property rights.[272]

The inclusion of these concepts into early colonial perspectives on Australia flowed from previous constructions that justified European entitlement to colonise elsewhere. The Portuguese represented native Africans as primitive during their conquest and the development of the slave trade in East Africa.[273] The Spanish adopted Portuguese justificatory conceptions when claiming possession of Indian wealth in South America.[274] The British considered North American Indians an inferior class of humans, particularly after they had been subdued in war.[275] Colonial powers denied native inhabitants' property in the soil after taking possession of their territory and in the processes of installing European legal structures.

Rowley suggested that, after the experience gained in North America and Britain, British authorities were aware of the advantages of a clean slate in law.[276] McNeil observes that England's history of colonial experience might account for it not recognising the pre-existing rights in Australia that were acknowledged in other colonial situations.[277] It could be concluded from these observations that *terra nullius* was used to avoid the legally complex relations with natives experienced in other colonies. The application of the doctrine suggests a refinement in colonial techniques. Rowley interpreted *terra nullius* regarding land ownership as a legal device of administrative convenience.[278] By vesting ownership of all land initially in the Crown, *terra nullius* provided policy makers with a *tabula rasa* in land law. Edgeworth observes that, theoretically, the complete control of land grants made by

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[272] According to McNeil, K. (1989) p. 202 , nomadism and the lack of cultivation did not necessarily disqualify ownership in feudalism. Accordingly, Locke's use of the concepts not only deny native inhabitants' capacity for legal possession but also rejects feudalism.
[273] Benton, L (2002) p. 56.
[274] Anghie, A. (1999) p. 102.
[275] This continued after the change in sovereignty to the United States. See Cohen, F. (1941) p. 152, especially the discussion on Indian rights and liberties as wards.
[276] Rowley, C. D. (1970) p. 24.
[277] McNeil, K. (1987) p. 1. For example, in the United States Indians were initially considered proprietors of their land. The difference between the US and Australia is how *terra nullius* was applied.
[278] Rowley, C. D. (1970) p. 24.

the Crown made it possible to trace all titles back to their original grant.[279] The conceptualisation of land law in Australia as a *tabula rasa* suggests a legal vacuum, which, in turn, supports *terra nullius*.[280]

The idea that Australia was a *terra nullius* was built on cultural misconceptions, notions of social hierarchy, and military and economic imperatives. The Crown combined sovereignty and paramount lordship to defend its acquisition from rival claims and avoid the costly wars that resulted from alliances between the native inhabitants and rival European powers experienced in North America. It provided colonial administration with a legal *tabula rasa* where a land management system could be constructed within a new legal order.

DISCOVERY

The Crown's claim of discovery in Australia is controversial. The judiciary and the legislature insist that Australia was settled under the doctrine of discovery. Many scholars and lawyers argue[281] that conquest is a better description. The following examination of the Crown's claims to acquisition by settlement is not intended to argue which international-law doctrine was most appropriate to Australian circumstances. As noted earlier in relation to the Norman Conquest, the application of legal rules to acquire sovereignty were of secondary concern. Instead, it explores the consequences of the Crown's claims and the effects they had on the Mabo decision, the construction of the *Native Title Act* and Justice Olney's reasoning in the Yorta Yorta decision.

As the discussion above suggests, native rights to the soil in Australia were discounted before the Endeavour left England. The Admiralty instructed Cook to, "with the consent of the natives take possession of convenient situations of the

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[279] Edgeworth, B. (1994) p. 408. This is not possible in the United Kingdom, which also demonstrates the fictitious nature of William's paramount lordship after the Norman Conquest.

[280] *Terra nullius* allowed the Crown to grant titles, which complicated the belated recognition of Aboriginal land rights. Later in this chapter, the complexity that produced the *Native Title Act* and its extensive validation of grants is explored.

[281] These arguments are considered in more detail below.

country" for the Crown.[282] These instructions could only be given with the confidence that the native inhabitants would offer little resistance to British presence. The Admiralty appeared to base its assumptions regarding the native inhabitants on William Dampier's descriptions.[283] The instructions did not include the possibility of native ownership of the soil. They did not refer to the purchase of land. For the Crown to take possession usually led to it acquiring paramount lordship and installing the feudal system of tenures.[284] The word 'consent' in the passage cited above suggests negotiation with, and respect for, the native inhabitants. A closer reading, however, suggests dispossession and conquest. Alex Castles argues that the phrase 'with the consent of the natives' implies conquest in English law because the presence of natives precludes settlement after the 1722 Memorandum.[285]

Further instructions were to offer natives gifts to secure their friendship and establish trade relations. Cook was initially unable to cultivate any sort of relationship with the native inhabitants, least of all trade relations. This set Aborigines apart from the civilised world according to Hakluyt's ideas regarding trade. While trade relations with Indians in North America affected colonial legal structures and acknowledged Indian rights to some extent, Aborigines offered no economic value to colonial ventures. Cook described Aborigines' behaviour to be like that of beasts. He recorded his first impressions of the natives as cowardly and miserable.[286] Restating Dampier's impressions, he and his officers made assumptions regarding the native inhabitants after observing that they obtained their sustenance from the sea. They thought that the natives were few in number, in comparison with New Zealand and Tahiti, and inhabited the coastal regions only.[287] Cook claimed that there was no evidence of European-style cultivation and assumed that the natives would not survive inland without the sea as a resource.[288]

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[282] Bennett & Castles (1979) p. 254. It is significant that these were additional instructions. Cook was instructed to keep them secret until after he was at sea. His command of the Endeavour, rather that Joseph Banks, suggests that the scientific purposes of the voyage were intended to obscure the Admiralty's military intentions in Australia.
[283] Banks, J. (1962) p. 50, refers to Dampier's impressions in his journal.
[284] McNeil, K. (1989) p. 80; Blackstone, W. Sir (2001) p. 42.
[285] Castles, A. C. (1982) p. 21.
[286] Cook, J. (1968) pp. 52-53.
[287] Cook, J. (1968) pp. 248, 250.
[288] Cook, J. (1968) p. 320. Cook's first impressions contributed to the assumption that Australia was *terra nullius*. In the 1880s Edward Curr made a similar assessment of the Yorta Yorta people's

Cook and Banks became aware that Aborigines had strong conceptions of property and ownership while shipwrecked on the Great Barrier Reef for almost two months. They spent time with the Aborigines while the Endeavour was being repaired and were surprised at how little these people resembled the natives Dampier described.[289] Cook began to reconsider his opinion of the character of indigenous social structures.[290] While sailing along the east coast, he noticed campfires that seemed to follow the Endeavour.[291] What he perceived as the natives' social network impressed him. Although Cook was gaining more respect for Aborigines and their culture, he still felt that it was legitimate to shoot at Aborigines to resolve a dispute over the ownership of a turtle.[292]

From his instructions, Cook satisfied his duty to the Crown and claimed the eastern half of the continent under the doctrine of discovery.[293] These events suggest that ascertaining the character of the natives[294] was part of the Endeavour's military mission to claim the new land against other European rivals. The low estimation of Aborigines' military capabilities and the limited possibilities of other European nations making alliances with Aborigines made the use of North American treaty-making processes irrelevant.

Instead of claiming Australia in accordance with English law or international-law rules regarding inhabited territories, the Crown exercised its extensive prerogative powers for overseas possessions.[295] McNeil suggests that colonial assertions were symptomatic of ad hoc solutions to pressing problems and the inadequacy of advice and instructions from London. This resulted in a "pot pouri of irreconcilable

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ancestors. Justice Olney accepted Curr's impressions as being a true account of Yorta Yorta tradition. In the final chapter, this link between *terra nullius* and the Yorta Yorta case is explored.

[289] Cook, J. (1968) p. 286; Banks, J. (1962) p. 96.

[290] Cook, J. (1968) p. 286.

[291] Cook, J. (1968) p. 238.

[292] Cook, J. (1968) pp. 289- 290; Banks, J. (1962) pp. 95-97. The conception of legitimacy that enabled Cook's actions is derived from the Petrine mandate adapted by Protestantism. As Australia was settled and legal institutions were established, the legitimacy of European presence and action was assumed and maintained through the non-revival principle proposed in the Mabo decision. This is discussed in more detail later in this chapter.

[293] Cook, J. (1968) p. 325 (historical notes.)

[294] Aborigines were described by Cook, J. (1968) p. 319-320. as "not warlike" but "Timorous and inoffensive."

[295] These powers were established after the Norman Conquest and confirmed in Calvin's Case in 1608. See Castles, A. C. (1982) p. 7.

approaches."[296] Nevertheless, legal doctrine based on philosophical and political discourses to legitimise British presence on Australian soil in a manner similar to its assertions in North America were selected.[297] Although Indians posed a greater military threat than Aborigines, it is possible to gain an insight into how Aborigines were situated in English law by comparing Indian status in pre-revolutionary North America. Indians' natural-law rights to the soil were recognised as a form of allodial land-holding that precluded Indian sovereignty.[298]

The land for colonies was acquired by purchase or treaties but was treated as uninhabited for the formation of legal structures. Indian law did not become part of American colonial law. This is evident in the transplantation of common law in accordance with the 1722 Memorandum declaration regarding settlement.[299] This application of the doctrine of *terra nullius*[300] in North America allowed English-law governance of the colonies. The English colonies were concentrated mainly along the east coast. The geographical space around the settlements provided a place for Indian alliances with rival European powers. Along with other contributing factors discussed early, this ultimately led to the French and Indian War.[301]

The space for alliances with rival European powers was closed in the colony of New South Wales through the Crown's claim to the entire continent and the universal application of the doctrine of *terra nullius*. The closure of this space negated the need for treaty agreements because Aboriginal military capabilities were not considered a threat. The British Crown never formally declared war on Aborigines. The presence of the native inhabitants was treated in a similar way to North America. It resulted in the application of the doctrine of settlement for settlers and some components of the doctrine of conquest for Aborigines. The Crown had discretion on how it treated

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[296] McNeil, K. (1987) p. 2.

[297] As discussed earlier, Locke's ideas about property were influential in North America, as were Vattel's ideas about Indian society not attaining the status of sovereign nations. Similar logic underpinned Australian settlement and is evident in the Yorta Yorta decision.

[298] Vattel, E. de (1995) pp. 38 & 85; Blackstone, W. (2001) p. 39; Edgeworth, B. (1994) p. 399. Indian land-holding was also characterised as allodial by the United States Attorney General and Supreme Court. See Cohen, F. (1941) p. 293.

[299] As noted earlier, the Memorandum declared that English law was the right of every Englishman and he took it with him wherever he went.

[300] Vattel, E. de (1995) p. 85. Vattel did not use the term *terra nullius* in relation to North America but implied it in his argument that Indian ". . . occupancy. . . can not be held as a real and lawful taking of possession. . . "

[301] The French and Indian War became part of a wider conflict in Europe.

native rights conferred by the international law principle of conquest.[302] It chose to ignore Aboriginal common-law rights to the land they occupied leaving Aborigines with no legal rights at all except those granted by the sovereign.

The British cannot claim to have been the first European discoverers of Australia in fact, but they can claim discovery in law. The Dutch had already found it and named it New Holland. The British Admiralty acknowledged in 1768 that the southern continent had been discovered previously, though not fully explored.[303] Cook justified the claim against the Dutch by asserting that the east coast had not been discovered by any other European nation.[304] Bearing in mind that the doctrine of discovery is only relevant to European nations,[305] the British can claim to be the first Europeans with the intention to possess the newly found territory. Consequently, under international law at the time, the British were the legal discoverers of the east coast Australia.[306]

The validity of the Crown's assertion of acquisition by discovery has been challenged ever since. That Australia was not uninhabited is the most contentious aspect of the British claim. Reynolds asserted that discovery was an inappropriate choice as the founding mode of acquisition. He argued that international law rules at the time disqualified British claims because Australia was inhabited. He cited Hugo Grotius' assertion that it is impossible to discover land that is already occupied to support his argument.[307] While exposing the factual invalidity of the Crown's claims of discovery, Reynolds did not appear to consider that Grotius' postulations on discovery and the rights of natives were addressing the politics of his time. Grotius sought to reject the Roman Church's universalism and English aspiration to empire. His ideas were not for the benefit of the natives.[308]

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[302] Dawson in *Mabo*, p. 94, referring to Privy Council decision in *Vajesingji Joravarsingji v Secretary of State for Indian (1924).*

[303] Admiralty's instructions to Cook, reprinted in Bennett, J.M & Castles, A. C. 9179 p. 253.

[304] Historical notes in Cook, J. (1968) p. 325.

[305] Reynolds, H. (1987) pp. 9-10; Oppenheim (1948) p. 113.

[306] Reynolds, H. (1987) p.27.

[307] Reynolds, H. (1987) p. 9. Reynolds contributed to the discourses that led to the rejection of *terra nullius.* Analysis of the High Court's constructs that replaced the doctrine (discussed in more detail below) requires closer scrutiny of the logic of Grotius' ideas.

[308] See earlier discussion on the emergence of modern international law.

As noted earlier, Grotius evoked native rights to deny Portuguese and Spanish claims to territory justified by papal donation.[309] He described native societies as governed by their own law. He then followed Vitoria's representations of Indians as human and subject to the rights and obligations of natural law. After the establishment of European authority in the New World, natives' rights were denied but their obligations to natural law were maintained.[310] Grotius advanced Vitoria's ideas of European rights to travel, trade and sojourn in foreign lands and native refusal to acknowledge these rights were cast as violations of natural law. These violations were cause for justifiable war[311] making discovery and conquest intimate to the point of being indistinguishable.[312] In Australia, the fact that Aborigines occupied the land did not limit the British Crown's assertions. The acquisition of territory in English law also makes the modes indistinguishable as part of the exercise of the Crown's prerogative power.[313]

A further challenge to the validity of the Crown's acquisition of territorial sovereignty comes from international law's natural-law interpretations.[314] According to Vattel's formulation of natural-law rights, discovery restricted discoverers' claims to the territory that they used. Cook claimed a vast area that was yet to be explored, mainly to prevent French explorers from making a claim.[315] Claiming more than can be occupied was, according to Vattel, contrary to natural law.[316] Although the British claim to Australia is weak in this regard, the French did not make rival claims to areas not even sighted by the British,[317] suggesting respect for British military power. The

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[309] Grotius, H. (1972) pp. 11-21.
[310] Anghie, A. (1999) p. 100.
[311] The notion of just war can be traced to early Christian Church assertions in the fifth century of its rights to pursue the Petrine mandate.
[312] In the previous chapter it was noted that the blurring if these modes of acquisition supported the feudal fiction of William the Conqueror's paramount lordship over England. A similar strategy is evident in the Crown's assertions in Australia. The High Court did not distinguish between the modes when it rejected *terra nullius* and retained settlement. The retention of settlement affected Justice Olney's approach in the Yorta Yorta case.
[313] See the earlier discussion of the Norman Conquest
[314] Reynolds, H. (1987) p. 11.
[315] As Castles, A. C. (1982) observed, in practice, Cook's claim was no guarantee of French acquiescence.
[316] Vattel, E. de (1995) p. 85. It also created gaps between the assertion of sovereignty and actual settlement. Although gaps were not significant at the time of sovereignty, it produced a space in the Yorta Yorta claim for an extraordinary exercise of judicial discretion. See the discussion in the final chapter.
[317] According to Vattel, E. de (1995) p. 84, after giving sufficient signs of its intention to possess a territory, a nation cannot be deprived of it. See also Reynolds, H. (1987) p. 11. Castles, A. C. (1982)

lack of rival claims also suggests respect for international law. Cook expressed the same respect for international law conventions when he did not claim the west of the continent at this time and retained the name New Holland. It also implies agreement that, under international law, the new colony was considered legally uninhabited and that the British Crown had every right to claim it. Following McNeil's argument that possession is based on occupancy, however, where there was no settlement, the Crown could not claim possession.[318]

The discovery of the western half of the continent was made in the early 1800s during the Napoleonic Wars. Rivalry between France and England was intense but observation of international law conventions continued. French navigator Nicolas Baudin reached the western coast of Australia before the Englishman Matthew Flinders.[319] Baudin's poor health and subsequent death, together with political rivalry in France, left the English to claim the entire continent after the Dutch had not consummated their discovery.[320]

According to international jurists, discovery does not confer rights of possession. They insisted that possession cannot be made with the eyes alone.[321] Once a new land is found, the discoverer must first show an intention to possess it. The territory remains available to any other European state if these intentions are not expressed.[322] In Australia, with only a little knowledge of Aboriginal society that was constructed on preconceived ideas and limited observations, British naval officers and scientists categorised Aborigines as living in a state of nature with no law, culture or government. The officers on the Endeavour initially dismissed the native inhabitants as primitive and cowardly.[323] Through European eyes, Aboriginal technology was backward and they lacked modern weaponry. It was assumed that they would pose little threat to the military might of the British Empire. Australia was constructed as a

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p. 26, observed that Britain had recently defeated the French in North America, reducing the possibility of French claims.

[318] McNeil, K. (1987) p. 83-84. McNeil's argument is important to the Yorta Yorta claim discussed in the final chapter.

[319] Flinders, M. (1966) p. 201.

[320] The Navigators (2002) ABC.

[321] For example, see Grotius, H. (1972) pp. 11&25; Pufendorf (1995) pp. 63-66; Vattel, E. de (1995) p. 84; Oppenheim, L. (1948) p. 506.

[322] The most relevant example of discovery that was not consummated is the Dutch discovery of New Holland, later possessed by the British.

[323] Banks, J. (1962) p. 59.

vast legal wasteland with no sovereign entity. This construction was to enter into Brennan's notion of the 'tide of history'. These assumptions regarding the lack of Aboriginal sovereignty are consistent with British representations of Indians in North America as expressed in the Royal Proclamation of 1763.

Captain Cook performed ceremonies of discovery, made charts and maps, named geographical features, and left physical evidence such as marks on trees, to demonstrate British intentions.[324] This gave the British Crown what was termed an 'inchoate' title.[325] The next part of the process to claim exclusive possession under international law requires the discoverer to occupy and settle the territory.[326] To fulfil these requirements, the Crown planted a colony in 1788 and called it New South Wales. The Crown asserted sovereignty and began to establish colonial-legal institutions.

SETTLEMENT

As the British proceeded to settle in New South Wales and competition from rival European states receded, the Crown confirmed its title and acquisition of sovereignty by establishing colonial legal structures. The Proclamations that established colonies represent the moments when the Crown acquired sovereignty across Australia. In keeping with the 1722 Memorandum, legal jurisdiction in the colonies was held by colonial administration from the moment that this act of state was concluded.[327]

The formation of law in the colonies required English law to be suspended then reanimated to the extent that it suited colonial circumstances. The English feudal system was not re-animated in its entirety but the Crown's paramount lordship over

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[324] Bennett, J. M. & Castles, A. C. (1979) p. 255.
[325] Reynolds, H. (1996) p. 88; Castles, A.C. (1982) p. 20.
[326] Settlement includes the physical presence of settlers and the introduction of political and legal structures. See Grotius, H. (1972) p. 11; Vattel, E. de (1995) p. 85.
[327] Blackstone, W (2001) Bk I p. 79. According to Castles, A. C. (1982) pp. 11, 23-24, it was at that moment that any Aboriginal claims to legal jurisdiction were immediately extinguished. Recognition of extinguishment would be absurd under the doctrine of *terra nullius* but after the doctrine's rejection became crucial to native title determinations. The moment of the Crown's acquisition of sovereignty in the Yorta Yorta case was complicated by the gap between the claim and act of settlement. This is discussed in detail in the final chapter.

territory was maintained. The Crown asserted radical title to all the land.[328] Settler occupancy of part of the land was authorised by the Crown through grants of titles.[329] Similar to William the Conqueror's assertions in 1066, the Crown's assertions in Australia rest on the feudal fiction of the Crown's universal occupancy. Similar to North America after the Proclamation of 1763, the Crown absorbed Aboriginal allodial title over land not yet granted.

While colonial administration reanimated much of English law for settler society, colonial law diverged significantly regarding relations between Aborigines and settlers.[330] Suspension of the law[331] did not mean that law governing relations between Aborigines and settlers was absent during the period between settlement and the first laws relating to Aborigines.[332] Similar to the United States, there was a colonial legal order that was driven by settler need and not constructed on English law.[333] Settler society had its own system of norms, informed by jurists such as Vattel.[334] The system was legitimised through informal consent among settler populations rather than from the colonial or British legislature. Colonial law[335] was *leges non-scriptæ* regarding relations with Aborigines during settlement. The two main objects of colonial *leges non-scriptæ* were the removal of Aborigines from land

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[328] In Australia, colonists made similar protests against the Crown's assertions of radical title to those made in North America. See Bennett, J. M. & Castles, A. C. (1979) pp. 263-264. The protests in Australia did not acquire revolutionary force although the Crown's radical title is still questioned. See Reynolds, H. (1987) p. 38. The Crown's assertions remain undisturbed and are confirmed by Brennan (p. 2) and Dawson (p. 6) in the Mabo decision.

[329] Megarry, R. E. & Wade, H. W. R. (1984) p. 12.

[330] As discussed in the previous chapter, the Proclamation of 1763 provided a geographical expression of the application of the rules of settlement for settlers and the rules of conquest for Indians. The idea of frontier performs a similar function in Australia. (It is accepted that the idea of frontier is artificial, see Wolfe, P. (1999) pp. 165,168; Jebb, M. A. & Haebich, A. (1994) p. 20.) The conditions that made this possible rely on the notion that Australia was legally unoccupied but inhabited. This allowed Justices Deane and Gaudron (p. 57) to argue in the Mabo case that a state was entitled to claim sovereignty through settlement, even if it was inhabited and the processes of settlement included negotiation and hostility with the native inhabitants. See also Brennan, F. (1993) p. 86 and Oppenheim, L. (1948) pp. 506-514.

[331] A strong indication that English law was suspended is found in the reanimation of traditional title after the rejection of *terra nullius*.

[332] Aborigines, as a distinct group, did not formally enter colonial law until the Victorian *Aborigines Protection Act, 1869*.

[333] Reynolds, H. (1987) p. 4, suggests that English laws was corrupted by relations between Aborigines and settlers.

[334] Vattel's was very influential in Australia in the nineteenth century. See Bennett, J. M. & Castles, A.C. (1979) p. 250, and Reynolds, H. (1996) p. 52. Castles, A. C. (1982) p. 537, argued that Aboriginal legal status at this time was a product of colonial administration rather than legislation. As such, Aborigines status was constructed by "religious, philanthropic and humanitarian ideas and idealism."

[335] This term was discussed earlier in relation to the development of Indian law in North America.

desired by settlers and the severance of any relationship between Aborigines and the land.[336] The colonial legislature played a passive role at this stage and supported unwritten colonial law by not enacting legislation to regulate settler relations with Aborigines.[337] Similar to the legal form adopted in North America, Australian colonial law had two faces.

Reynolds described Aborigines' legal position as being trapped in a legal no-man's land subject to a power as extreme as any other conceivable situation, "at the mercy of the Leviathan untrammelled by law or morality."[338] The Crown and settlers were no longer constrained by the territorial and juridical boundaries of English law. As Ian Hunter argued "[t]he negation of native customs and rights during colonisation . . . flows from the stark and unavoidable fact that legal, moral and political systems come into play only after the shell of the new state has been imposed."[339] The British Crown's acquisition of sovereignty was not a simple act of state to claim and settle Australia but is a continuing act of domination against the Indigenous inhabitants.[340]

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[336] It is difficult to ascertain if these effects were the achievement of a conscious intention. It is likely that the idea of continuous connection and the doctrine of *usucapion*, and its conferral of rights to land, was known to colonists. Reynolds, (1996a) p. 22 citing G. I. Bennett, argued that the idea of title existing through long occupation, even without proof of acquisition, was as ancient as the idea of property. Bennett also observed that continuous use and occupation was the sole source of title in unwritten systems of law, which was a fundamental part of all systems of law. With the influence of the international jurists, particularly Vattel, it is possible that some colonists were aware of the international law requirement for Aborigines to maintain continuous connection to retain their legal rights to land. Nevertheless, it is also possible that such knowledge was not widely available in the colonies. Peter Read (1984) p. 54 observed that colonial intervention in New South Wales forced some Aborigines to maintain their continuous, physical connection with their land.

[337] Although no legislation was enacted, in 1816 Governor Macquarie issued a proclamation to allow settlers to drive Aborigines away from settlements by force of arms if necessary. See Reynolds, H. (1987a) p. 39.

[338] Reynolds, H (1996) p. 21. The Leviathan of Hobbesian theory describes absolute sovereign power. See also Lecler, J. S. J. (1952) p. 147; Weinreb, L. (1987) p. 68-76; Armitage, D (2000) p. 122-123. The order of law that provides ideas of sovereignty and settlement with substance became indistinguishable from the violence of nature that accompanies hostility. In the absence of the reflective qualities of law, human emotions of fear and revenge governed the regimes of punishment in both societies. The clearest examples of this violence were reprisal attacks on Aborigines when they violated unwritten colonial law.

[339] Hunter, I. (1994) p. 102.

[340] As discussed in more detail below, this proposition is not accepted in Australian law. Nevertheless, as Wolfe, P. (1999) p. 3, has argued, "invasion is a structure not an event." It has had profound implications for the Yorta Yorta people, discussed in the final chapter.

European settlement forced Aborigines to change their way of life as it encroached further into their territory.[341] The practical difficulties that settlement imposed are a physical manifestation of deeper colonial ideology and indicate Aborigines' status in the colonial legal order. Aborigines had little choice: either enter missions and reserves or take settlers' stock and supplies to survive.[342] In other words, Aborigines' faced a choice between remaining in their primitive state, where their expropriation could be justified, or entering mission, where modification processes would be applied. Either way, they lost.

Taking settlers' stock resulted in Aborigines becoming violators of colonial law and provided settlers with justification, within colonial norms, to mount reprisal attacks.[343] Within the logic of the Crown's paramount lordship and the doctrine of *terra nullius*, the presence of Aborigines on their own land was treated as a violation of settler law. Settlers did not treat Aboriginal theft of their resources as property offences, as would be the case under English law. They were treated as an attack on settlers' lives. Settlers replaced English penalties of imprisonment or fines with the death penalty not only for the perpetrator but also, in some cases, the whole of the perpetrator's clan. [344]

In 1835, Henry Melville discussed the status of Aborigines in written colonial law. A Tasmanian Aboriginal man, Black Jack, was accused of murder and faced the death penalty under English law. Melville had doubts about whether English law applied. He argued that,

> "[t]he reader can imagine the awful situation in which the legitimate prisoner of war, "Black Jack", was placed. . . On one side was the learned Attorney-General, pressing, as in duty bound, the conviction of the offenders against laws brought by the invaders to the country, and on the bench sat a judge to administer impartially these laws, which Black Jack [could not] comprehend"

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[341] The modification of Aborigines, that affected their ability to maintain traditional laws and customs, is a feature of the doctrine of continuous connection and the 'tide of history' in the Yorta Yorta decision.

[342] Read, P. (1984) p. 46-47, describes the experiences of the Wiradjuri people and how protection laws exacerbated this predicament.

[343] Rowley, C. D. (1970) p. 26; Reynolds, H. (1987a) pp. 46-53

[344] Reynolds, H. (1987a) pp.32-39, 46-53; Rowley, C. D. (1970) p. 30.

With little knowledge of English and no legal representation, Black Jack was called to speak on his own defence regarding an act that he considered retaliation for settler violations of Aboriginal law and not a crime. [345] The observance of his own law brought him into conflict with the invaders' law. The inclusion of Black Jack in colonial legal institutions required him to modify his behaviour and mimic settler practices.

The awful situation that Black Jack found himself in was that he was both violator of colonial law and enemy of the state. This is a product of the blurring of settlement and conquest as legitimacy for acquisition. Melville's discussion implied that Aboriginal tribes were sovereign and that conquest of their sovereignty was yet to be concluded. He recognised that Aborigines had rival claims. That Black Jack was subject to colonial law suggests settlement. Black Jack's situation was exacerbated by his inability to give evidence. Legal authorities in London were reluctant to admit Aboriginal evidence claiming that, as non-Christians, Aborigines could not be sworn in. In 1839, the New South Wales legislature passed an act that allowed Aboriginal testimony to be heard in court but only to the extent that it corroborated other testimony.[346]

The construction of Aborigines as violators of colonial law is reminiscent of Vitoria's postulations regarding the character of natives in the New World.[347] According to Felix Cohen, the legal status of Native Americans after the Declaration of Independence was based on the idea that Indians were human but inferior. United States administration, while espousing equality for settler society, accommodated its objective of removing Indians from the land within the interpretations of wardship and legal incompetence.[348] To extend Vitoria's reasoning to Australia raises the proposition that colonial administration acknowledged Aboriginal inclusion as human to enable them to be violators of colonial law. Aboriginal status as inferior human

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[345] Melville, H. (1959) pp. 37-39. Henry Melville was the editor of the *Colonial Times* in Hobart between 1831 and 1838.
[346] Castles, A. C. (1982) p. 533; Cannon, M (1993) p. 253. This was mainly to support colonial authorities in their attempts to control lawlessness between Aborigines and settlers. Murderers on both sides were avoiding punishment because Aborigines were unable to give evidence. Admissibility of Aboriginal evidence remains contentious in the Yorta Yorta decision.
[347] Anghie, A. (1999) pp. 94-98.
[348] Cohen, F. S. (1941) p. 152.

beings, first alluded to by Dampier, was produced by the discourses that sustained *terra nullius*, including the Crown's assertions of paramount lordship and sovereignty. The British Crown asserted sovereignty in the colonies over several decades.

In English law, municipal (or local) courts administer colonial law and not English law. While the Privy Council could review municipal court decisions, Crown assertions were considered acts of state and not appealable in municipal courts.[349] Non-reviewability of an act of state is derived from the ancient idea that the battlefield is the highest court. The victor in battle wins through divine providence, which cannot be challenged in a human court.[350] Theoretically, in English law, this only applies to municipal courts but in practice, there is no international review structure, except the battlefield, available for indigenous people because they lack international legal personality.[351] In international law, an act of state can only be made within the state's own territory. In foreign European territory, such an act was considered an act of war.[352] The act of state that asserted British sovereignty in Australia was not regarded as an act of war.[353] This is only legally possible if Australia was assumed to be *terra nullius* at the time. [354]

The continued acceptance of non-reviewability in the Australian judiciary has stifled examination of the relationship between Crown and Aboriginal sovereignty. The Crown's prerogative power is discussed in legal commentaries regarding the legitimacy of the act of acquiring sovereignty but Aboriginal sovereignty and its possible survival is neglected in this regard. Its is assumed to have been extinguished at the moment that the Crown acquired sovereignty. This is, in itself, an expression of *terra nullius*. Aboriginal commentators continue to challenge European concepts of

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[349] McNeil, K. (1987) observed that ". . . the King could not be impleaded in his own courts without his consent." p. 94 Reynolds, H. (1987) p. 4; Brennan, F. (1993) p. 86; Gregory, M. (1992) p. 158.
[350] Hale, M. (1971) pp. 55-56.
[351] Oppenheim, L. (1948) p. 113. As Rowse, T. (1993) p.247, suggests, for the Aborigines to challenge Crown sovereignty required military power.
[352] Oppenheim, L. (1948) p. 506.
[353] Castles, A. C. (1982) p. 31. This was confirmed by the High Court in the Mabo decision.
[354] This was acknowledged by Melville, H. (1959) pp. 47-48, in 1835. He referred to Grotius and Vattel to question English sovereignty in Australia. He concluded that it could only be legitimate if Aborigines had no law. He stated "it is wholly out of the argument to refer to their state, and that they are little better than "ferae naturae". . . that they have no laws."

sovereignty[355] and maintain that Aboriginal legal jurisdiction has survived British settlement. Aboriginal activist Michael Mansell asserts that Aborigines "are in fact a nation of people and we ought to stand up and acknowledge it."[356]

From the moment the Crown acquired sovereignty in each colony, it also asserted that it acquired radical title to every inch of land, above and below the surface. Settlers gained various titles to the surface of the land from Governors who were authorised to make land grants on behalf of the Crown.[357] According to Blackstone, the assertion of radical title was essential to the feudal system of tenures.[358] As Brendan Edgeworth observed, radical title was one of the few aspects of English feudalism to be retained in colonial law.[359]

Australia historians and English-law scholars dispute the validity of the Crown's claims to radical title in Australia. Reminiscent of North American revolutionary arguments, Reynolds claims that acquisition of radical title and sovereignty were two components of settlement that are not necessarily co-extensive.[360] Kent McNeil also asserts that the link between the two components perpetuated the feudal fiction of William the Conqueror's paramount lordship. [361] In Australia, radical title provided the Crown with absolute power over all land dispositions. This reflects Vattel's proposition that the Crown's power to rule the land must include ownership of it.[362]

The selection of some English-law principles and the rejection of others were made possible in Australian colonies under the doctrine of *terra nullius*. After the 1722 Memorandum, establishment of law in Australia as a settled colony required these

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[355] Aboriginal lawyer, Pearson, N. (1993) p. 15, argues that Aborigines were a sovereign people before settlement, but not sovereign by European definitions.
[356] Mansell, M. (1989) p. 5. According to the proposition of English-law theorist, Mathew Hale, (1971) pp. 49-51, Mansell's claim represents continuing conquest between Aborigines and settlers in Australia.
[357] Castles, A. C (1982) p. 23. This was part of King George's instructions to Governor Phillip in 1787.
[358] Blackstone, W. (2001) p. 213.
[359] Edgeworth, B (1994) p. 410.
[360] Reynolds, H. (1996) pp. 1-15.
[361] McNeil, K (1989) p. 109. The point Reynolds and McNeil make is consistent with anti-feudal sentiment in revolutionary North America. It is also fundamental to the High Court of Australia's rejection of *terra nullius* suggesting that combining sovereignty with radical title was a necessary part of maintaining *terra nullius*.
[362] The feudal base of the Crown's radical title enabled the legislature to construct Aboriginal land rights in a way that protected its sovereignty after the rejection of *terra nullius*. See more detailed discussion below.

selective processes and the representation of the territory as a legal void. As McNeil observed, "not only could apparently unlawful acts of the sovereign create new law but it seems the constitutional status of the colony could shift to suit the interests of the colonisers."[363]

To summarise, the processes of discovery and settlement[364] created a new legal order in Australia. Colonial society was reliant on the Crown's authority for peace and order but independent regarding the legal treatment of Aborigines. The suspension then re-animation of English law left Aborigines included only as violators as colonial administration attempted to control the violence in the new settlements. The non-reviewability of the Crown's act of state was established through the violence of frontier confrontation and the link between sovereignty and paramount lordship. Aboriginal law was extinguished by ignorance and cultural misconception. Aboriginal communities were forced to adapt to the devastating effects of invasion on their populations and economy as settlement progressed and the 'tide of history' washed over the Crown's new acquisition.[365]

EXCLUSIVE POSSESSION

For the Crown to consummate its acquisition of Australia, it had to establish exclusivity. While Aborigines remained on the land, the Crown did not have exclusive possession. Precisely how colonial law was to accommodate the presence of Aborigines was complex simply because, unlike rival European nations, they were still there and had nowhere else to go. Rowley framed this problem as two questions for colonial administration. First, how to extend and secure the Crown's possessions, and then, what role the conquered should play in the new nation. [366] Within Rowley's questions is the assumption that Aborigines had rights as native inhabitants but had no right to stand in the way of the Crown's exclusive possession. The threat posed by

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[363] McNeil, K. (1989) p. 246.

[364] As discussed earlier, if the Crown had followed Roman strategy and decided that it had acquired Australia by conquest, its legal base would have incorporated indigenous law giving it a different character.

[365] Similar to Innocent IV's proposition that the mere fact of the Petrine mandate modified infidels' rights to their possessions, British presence forced Aborigines to adapt to their new circumstances. As will been seen in the final chapter, this became modification that extinguished the Yorta Yorta people's native-title rights.

[366] Rowley, C. D. (1970) p. 21.

Aboriginal presence was addressed over time by administrative constructions of Aboriginal status and modification strategies.[367] The Crown's claim to exclusivity was reflected in founding Proclamations and early judicial decisions.

In the 1829 Proclamation of Western Australia, Lieutenant-Governor Stirling clearly established the Crown's authority by restating that the laws of the United Kingdom, as far as applicable, prevailed in the new colony. The Proclamation set Aborigines outside and against settler society as a foreign force similar to European rivals. Sterling declared that,

> ". . . the safety of the territory from invasion and from the attack of hostile native tribes may require the establishment of a militia force."[368]

Reminiscent of early Church expansionism and then Portuguese and Spanish colonialism, the inclusion of natives as foreign demonstrates that they are considered to have no right to interfere with settlement. Both natives and foreigners are considered as enemies of the state. The establishment of British exclusivity in Western Australia denies rival foreign states access to the new territory under international conventions. The native inhabitants already had access but their legal rights were subject to the exercise of sovereign power legitimised under the doctrine of *terra nullius*. Aborigines' inclusion in the Proclamation as foreign but domestic sets Aborigines in relation to colonial law by excluding them from settler society from the outset.

A judicial decision regarding the legal status of Aborigines was made in the case *Rex v Murrell* in 1836. The case examined the question of whether Aborigines were subject to colonial law or Aboriginal law. Justice Burton decided that Aborigines had no law so they must be subject to colonial law. He concluded,

> "[t]hat although it might be granted that on the first taking possession of the colony, the aborigines were entitled to be recognised as free and independent, yet they were not in such a position with regard to strength as

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[367] As noted earlier, Castles, A. C. (1982) p. 537, argues that administrative processes and not law constructed Aboriginal legal status. These constructions remain and are evident in the *Native Title Act* and the Yorta Yorta decision.

[368] See Bennett, J. M. & Castles, A. C. (1979) p. 257.

> to be considered free and independent tribes. They had no sovereignty."[369]

In this decision, Justice Burton expressed the doctrine of *terra nullius*.

He referred to Aboriginal independence and freedom by alluding to allodialism as described by Vattel and Blackstone.[370] In their construction of indigenous society, there is no sovereign interest in land, meaning that, in European jurisprudence, there is no nation or state. Burton's decision effectively upheld the doctrine of discovery and demonstrated its effects in Australian law. Aborigines were constructed in the Murrell case as having no sovereign power and could only be treated as individuals by the colonial juridical order. By not recognising Aboriginal social structure, Aboriginality was atomised into individual identities,[371] a strategy used in other settler-colonial situations demonstrated in the later United States allotment system.

While Indian claims in North America were initially recognised through treaty-making processes,[372] in Australia treaty-making was strenuously opposed. In 1835, John Batman made a treaty agreement with Aborigines in Port Phillip. With the anti-slavery bill having been passed two years earlier in England, Batman appealed to humanitarian sentiment when he applied to the Governor for recognition of the treaty. Batman's motives were unlikely to have been guided by concern about Aborigines' rights. The treaty was exploitative in European terms. It exchanged 600,000 acres of land for £200 worth of trinkets. Batman was also not known for his humanitarian values. It was well known that he had shot several Aborigines.[373]

Batman's treaty challenged the Crown's assertions of exclusivity by recognising Aboriginal ownership, however politically motivated. Governor Bourke annulled the treaty and denied the existence of Aboriginal law and sovereignty.[374] The annulment defeated rival Aboriginal claims by dismissing their legitimacy to make them,

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[369] See Bennett, J. M. & Castles, A. C. (1979) p. 262.
[370] See earlier discussion on allodial title. To recap, a weak form of allodial title was attributed to non-European people as a consequence of their lack of sovereignty.
[371] Rowley, C. D. (1970) p. 55. Individualising Aborigines made them comprehendible to, and more lime, Europeans.
[372] Rowley, C. D. (1970) p. 11; Reynolds, H. (1996) p. 13.
[373] Christie, M. (1979) pp. 25-26.
[374] Christie, M. (1979) p. 28.

strengthening the Crown's claims of exclusive possession.[375] Sovereign power was equally expressed in the rejection of treaty-making in Australia as it was in the processes developed in the United States that embraced treaty-making. In a similar strategy employed in the United States' treaty-making process, the Governor's actions protected the Crown's power inscribed in radical title. The universal application of the doctrine of *terra nullius* did not allow natives' property rights to formally enter colonial law as they had in United States' treaties.

The Crown's claim to absolute ownership of the land and everything on it[376] allowed Aborigines to be separated from their land. The justification for legal separation is based on the natural-law principle of possessing only what can be used.[377] Vattel extended the principle of possessing only what can be used to include women.[378] He argued that,

> "A Nation can not maintain its continuous existence except by the procreation of children. A nation of men is therefore justified in procuring women, who are absolutely necessary to its preservation; and if its neighbours have more than are needed and refuse to give up any, the Nation may use force to obtain them"[379]

As extraordinary as Vattel's argument seems, and never officially encouraged,[380] his interpretation provides an insight into European ways of thinking about native women at the time. Women in general were considered chattels of men at the time Vattel wrote his *Law of Nations*. A significant aspect of taking possession of Australia and the epitome of the relations of settlement were expressed in sexual interaction

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[375] The absence of treaty-making in Australia denies continuing conquest. The non-reviewability of the Crown's acquisition of sovereignty allows the denial to continue. It also limits the inclusion of violence as a factor that contributed to the modification of the Yorta Yorta people's tradition. See more detailed discussion in the final chapter.

[376] See Pufendorf, S. (1995) p. 63-64, for a description of what the acquisition of the land entails for a sovereign entity.

[377] Vattel, E. de (1995) p. 85, argued that Indians should be confined to the land that they used but did not advocate dispossession. See also Reynolds, H. (1996) p. 53.

[378] Justice Olney's analysis of the Yorta Yorta people's ancestors did not acknowledge the character of sexual relations between Aboriginal women and European men. He considered the products of these relations to be proof of a loss of connection to the native inhabitants of 1788. This is discussed in more detail in the next chapter.

[379] Vattel, E. de (1995) p.150.

[380] Jebb, M. A. & Haebich, A. (1994) p. 33-36; Huggins, J & Blake, T. (1994) p. 49.

between settler men and Aboriginal women.[381] In 1836, the settler population consisted of 186 men and 38 women in the district of Port Philip. The gender imbalance threatened the stability of settler society. Settlers used indigenous women to redress the imbalance and satisfy their desires for sexual and domestic services. [382].

Vattel qualified his interpretation and proposed that men should only acquire women if they were surplus to the requirements of the women's society.[383] Although census data did not include Aborigines at this time,[384] Grimshaw et al suggest that the sexual interaction with Europeans created a gender imbalance in Aboriginal society. Some Aboriginal women became infertile after contracting sexually transmitted diseases resulting in less healthy women than men in Aboriginal communities.[385] The taking of settler women by Aboriginal men, however, attracted passionate and violent reactions from settler society.[386] Settlers disregarded the natural-law rights of Aboriginal society, which was consistent with the discourses that perpetuated *terra nullius*. Aboriginal society was denied these rights because it was characterised as merely a collection of families and individuals with no society to maintain. Sexual interaction between Aboriginal women and settler men was primarily an exercise of colonial power.

This exercise of power represents an ambiguous aspect of settler-colonialism. If its main objective was to clear Aborigines from the land desired by settlers, the restriction of Aboriginal society's capacity to reproduce itself has obvious advantages. On the hand, it increased Aboriginal populations with the children produce by this interaction usually remaining with their Aboriginal mother and her community. This appears to be in direct conflict with settler-colonial objectives.[387] Bearing in mind Vattel's postulations, sexual interaction ultimately increased the settler population

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[381] The following discussion regarding Indigenous and non-Indigenous sexual interaction is a theoretical overview. It is not intended to deny genuine consensual relations between Europeans and Aborigines or the complicity of Aboriginal men in non-consensual relations.
[382] Grimshaw, P., Lake, M., McGrath, A. & Quartly, M. (1994) p. 87.
[383] Vattel, E. de (1995) p. 150
[384] Watts, R. (2003) pp. 46-47, argues that although Aborigines did not appear in official census data, they were counted. This enabled settler authorities to devise defensive strategies and, later, policy to regulate Aborigines lives.
[385] Grimshaw, P., Lake, M., McGrath, A. & Quartly, M. (1994) p.25
[386] Huggin, J & Blake, T (1994) p. 50.
[387] As Wolfe, P. (1999) p. 181 described, ". . . the chronic negator of the logic of elimination had been the white man's libido."

through assimilation practices and legal definitions of Aboriginality within racial and cultural boundaries.[388] At the same time, it reduced (and continues to reduce) indigenous claims to land through its modifying effects on Aborigine society.[389]

While the removal of Aborigines from the land and the legal reduction of Indigenous populations have obvious benefits for settler society, protection of Aborigines served settler purposes in other ways. In the Proclamation of 1836 that established the colony of South Australia, Governor Hindmarsh included Aborigines as subjects of the Crown and requested settler assistance to protect them. Within logic that was similar to that of Spanish missionary discourse, that native inhabitants have rights but are inferior, the Governor stated:

> "I trust therefore, with confidence to the exercise of moderation and forebearance by all classes, in their intercourse with the native inhabitants, and that they will omit no opportunity of assisting me to fulfil His Majesty's most gracious and benevolent intentions towards them, by promoting their advancement in civilisation, and ultimately, under the blessing of Divine Providence, their conversion to the Christian faith." [390]

Aborigines were considered British subjects much as American Indian Nations were considered sovereign within the idea of domestic dependency. Indians were subject to the rules governing sovereign states, especially those regarding justifiable war, but were not offered the respect and protection of their independence afforded to

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[388] As Rowley, C. D. (1970) p. 20, observes, racial definitions changed with changes in colonial policy. In relation to the Northern Territory's protection laws that included the concepts of 'native' and 'ward' he stated that "the greater the effort towards assimilation, the more rigidly defined the differences in status become." The first definition of 'Aboriginal person' is found in the *Aborigines Protection Act* 1869 (Vic). See also Wolfe, P. (1999) p. 29.

[389] An important part of the failure of the Yorta Yorta claim was the judge's conclusions regarding their known ancestors. Of the known ancestors, Justice Olney considered only two to have proven connections to the claimed land. It is note worthy that these two ancestors were the only two described by Olney as 'full-bloods'. The philosophical and political underpinnings of the judge's decision is discussed in the next chapter.

[390] See Bennett, J. M. & Castles, A. C. (1979) p. 258.

European states.[391] Aborigines were subject to colonial law, without its protection, both in relation to their rights to the soil and their personal security.[392]

Exclusive possession was consolidated as settlement expanded. Settler demand for labour and land increased exponentially. In 1838, there were 211,042 sheep in Melbourne and 99,904 in Geelong. [393] Settlers and their flocks destroyed native animals and plants, the economic base of Aboriginal society, in their wake. Settlers arrived in a constant flow and the hunger for land to graze sheep grew. Governors granted land, claimed by the Crown, to settlers and squatters laid claim to more. As Aboriginal resistance reduced, along with their means of subsistence, they were encouraged onto reserves and missions with promises of food and shelter.[394]

The processes of establishing legal institutions and occupying the Crown's acquisition through settlement gradually brought more territory under the exclusive possession of the Crown. But the Crown's exclusive possession remained incomplete because of the continued presence of Aborigines. Aboriginal legal status within the Australian legal order was initially as enemies of the state subjected to colonial convention in the form of violent reprisal. Then, as settlement progressed, there was a limited acceptance of Aborigines as subjects of the Crown to be protected, as violators of colonial law, and as providers of domestic services and menial labour.

AUSTRALIAN LAW

The legal status of Aborigines, indicated in the above examples, was characterised by representations of them as British subjects but also as enemies of the state. This reflected the indistinct mode of acquisition and, in part, the disparity between British idealism about the equality of man and colonial expediency. [395] The British House of

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[391] In the Cherokee cases, Chief Justice Marshall upheld Indian claims to sovereignty in *Worcester v Georgia* but the State of Georgia legislated to make Cherokee legal jurisdiction in their territory null and void. See the discussion in the previous chapter.

[392] As Rowley (1970) p. 54, observed, "[o]n the one hand the Aborigines were British subject; at the same time they had been dealt with on occasion 'avowedly upon the principle of enforcing belligerent rights against a public enemy." (citing the House of Commons Select Committee of Aborigines, 1837)

[393] Cannon, M (1984) p. 449.

[394] Rowse, T. (1998) p. 18.

[395] Castles, A. C. (1982) p.525, suggest that directives from London were often ignored because colonists believed that colonial authorities misunderstood Australian conditions. This is similar to colonial attitudes in early Spanish colonies.

Commons established the Select Committee on Aborigines to examine the best ways of protecting and civilising the indigenous people whom Britain had colonised. In 1837, it recommended missionaries, protectors, reserves, education for the young, and special laws for Aborigines until they were assimilated.[396] The Committee confirmed Britain's legitimacy in foreign lands. Its focus was on removing indigenous ways of being. The Report demonstrated similar logic to that of Las Casas' for his social experiments in Spanish-held American colonies, based on the Petrine mandate. The Report articulated the colonial duty to change the native inhabitants of British colonies. It became a significant feature of the 'tide of history' because it underpinned modification practices in Australia and it provided the framework for Australia's protection laws.

An 1857 census found only 1769 Aborigines left in Victoria, a result of disease and conflict, and the difficulties of conducting surveys in colonial Victoria.[397] According to the Court, the census information was used by a Victorian Select Committee which, in 1858, was charged with the responsibility to find " . . . the best means to alleviating their absolute wants."[398] The two committees' reports and settler demands for protection[399] produced the first colonial legislation regarding Aborigines.

The Victorian *Aboriginal Protection Act* of 1869[400] was the first comprehensive Act[401] in Australia that sought to legitimise and regulate relations between settlers and Aborigines. It followed the Select Committee's recommendations. It is an exemplary example of the capacity of colonial law to diverge from English law. At the time of the Act, democratic reforms were introduced in England and colonial Australia. While settlers enjoyed more freedom through greater limits on the Crown's paramount lordship and exercise of prerogative power, the Act substantially reduced Aboriginal freedoms. The Act is significant because it authorised colonial administrative intervention into every aspect of Aboriginal life.[402]

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[396] Rowley, C. D. (1970) p. 20.
[397] These difficulties are discussed in more detail in the next chapter.
[398] Cited by Olney in *Yorta Yorta* (1998) at 36.
[399] See Read, P. (1984) p. 48.
[400] This act had a profound effect on the Yorta Yorta people's ancestors. It was instrumental in modifying Yorta Yorta custom and tradition and contributed to the 'tide of history'.
[401] Attwood, B. (1989) p. 84; Rowley, C. D. (1972) p. 5.
[402] Attwood, B. (1989) pp. 28, 29, 50. Missions were a central feature of the application of the Act. Missionaries relied on it to strengthen their authority over Aboriginal people to assist their mission to

The shift from unwritten colonial law to written Australian law marks the progression of the settler-colonial project from physical confrontation to administrative management.[403] To use Ian Hunter's words, it imposed the "shell of the new state", through which it addressed Aboriginal human rights as proposed by the Select Committee. The Act effectively established a mechanism of surveillance that monitored and controlled Aborigine's lives and their relations with settlers. Tim Rowse suggests, in his examination of rationing and a similar Act in the Northern Territory, that such progressions reflect Foucault's observations of the emergence of modern governance and the new focus of sovereign power from the body to the soul of its population.[404] .

Rowse suggested that rationing and its institutional counterpart, missions, were techniques applied to improve life for Aborigines and provided an avenue to gain knowledge about them.[405] Notwithstanding the utility of biopolitics to explain the shift from violence to rations, rationing and its legislative counterparts were primarily for the betterment of settler life. The act of providing subsistence, as Rowse observed, protected settler life and disrupted Aboriginal ways of being.[406] Together with missions and reserves, rationing contributed to settler-colonial removal practices developed in colonial relations then later rendered in written form in Protection legislation.

In addition to Rowse's observations, the shift from custom to statute and the function of writing law, particularly as it relates to the intersection of two different cultures, should be considered.[407] Historically, law shifted to statutory forms as an expression of the successful modification of excesses and abuses of power made possible within customary juridical orders. For example, the twelve tables were written in Ancient

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Christianise and civilise the Aborigines. Their role in Australia was reminiscent of Las Casas in Spanish held America.

[403] Rowley, C. D. (1972) p. 5, argued that most legislation relating to Aborigines was enacted "after the frontier had passed on".

[404] Rowse, T. (1998) pp. 6-7.

[405] Rowse, T. (1998) pp. 5-6.

[406] Rowse, T. (1998) p. 17.

[407] The shift from unwritten to written law is an important feature of the Yorta Yorta decision. The function of the Mabo decision in constructing the *Native Title Act*, through which the Yorta Yorta claim was made, and the philosophical underpinnings of the value placed on Aboriginal law in comparison with Australian law.

Rome to control the abuses of legal power by the Emperor and his officials.[408] Similarly, English statutory-law began with Magna Carta after King John's use of his prerogative powers was restricted.[409] Canon law took a statutory form to curb the excesses of priests and their military lords that threatened Church authority.[410]

These legislative responses were confined within the boundaries of their respective societies. In settler-colonial states, colonial administrations enlarged and enhanced the function of legislative acts to accommodate the unique sets of problems posed by the intersection of settlers and indigenous populations, especially after military conquest.[411] The Crown's response in North America was the Proclamation of 1763 after the French and Indian War. It set legal boundaries around settler society and extended it jurisdiction into Indian territory.[412] In Australia, colonial legislation regarding the relations between Aborigines and settlers was also enacted after Aborigines were subdued. Rowley notes that the Victorian Act was produced after the decline of 'full bloods' and an increase in 'half castes'.[413] The legislature attempted to curb the excesses of frontier relations that were no longer necessary, and somewhat embarrassing to Australian colonial authorities.[414]

For the legislature to remain a symbol of justice, it could not allow settler responses, which were often morally repugnant or contrary to English law, to enter Australian written law. As the Aboriginal population dramatically declined in Victoria,[415] the priority moved from clearing the land to managing the problems created by dispossession, such as fringe camps and reserves.[416] The shift in priority should not be understood as a change in colonial objectives. The Crown continued to pursue

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[408] Maine, H. (1924) p.12.
[409] Hale, M. (1971) p. 12.
[410] Tierney, B. (1964) p. 150.
[411] According to Anghie, A (1999) p. 40, it was these sets of legal difficulties that the Spanish jurist Vitoria attempted to address in the sixteenth century, which led him to construct the character of indigenous people as inferior to Europeans.
[412] See the discussion on the1763 Proclamation in the previous chapter.
[413] Rowley, C. D. (1970) p. 353.
[414] Castles, A. C. (1982) p. 541.
[415] Watts, R. (2003) p. 40-41, 46, argued that census of Aborigines in Port Philip was an important process of settlement and suggests that colonial authorities were aware of population declines.
[416] Read, P. (1984) p. 46.

avenues to obtain exclusive possession. Accordingly, it continued the established relations between settlers and Aborigines in many respects.[417]

To trace the continuities between unwritten colonial law and written Australian law, it is instructive to consider the aspects of relations that the Victorian *Aboriginal Protection Act* did not specifically address. The Act did not refer to Aborigines as subjects of the Crown or any other authority. It assumed that Aborigines were a collection of individuals and families, supporting the assumption that Aborigines had no sovereignty. This assumption was clearly stated by Burton in Murrell case in 1836. It did not refer to Aboriginal collectives or social structures in Aboriginal terms, only as residents of reserves. It dissolved Aboriginal tribal structures and imposed a colonial reconstitution of political boundaries, that is, it superimposed the State of Victoria over tribal boundaries.[418] The Act did not refer to Aboriginal law and offered no protection under Australian law. Most notably, it provided no legal mechanism for Aborigines to appeal against the application of the Act. Who was to be counted as Aboriginal was entirely left to judicial discretion, precluding Aboriginal evidence.[419]

It continued to deny Aboriginal ownership of the soil by not referring to it. The Act's silence legitimated the established practice of removing Aborigines from the land used by settlers. To include Aboriginal rights in this regard would be absurd within the Act's paternalistic terms supported by the doctrine of *terra nullius*. The concept of common law aboriginal title is not only missing from the Act but, as Australian law diverged from English law, could have no place within it. Common-law aboriginal title remained in suspension. The possibility of Aborigines owning land under colonial land management practices was rendered unthinkable. Taken together these features of Aboriginal-settler relations rest on the premise that Aborigines had no law and no pre-existing rights to their land. In other words, the Act assumed the doctrine of *terra nullius* in what it excluded. The Act legitimised settler customary-law in the things it includes.

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[417] Wolfe, P. (1999) p. 169.
[418] Watts, R. (2003) p, 46.
[419] Judicial discretion to categorise people is retained in the *Native Title Act* and confirmed in the Yorta Yorta decisions.

The very existence of the Act suggests that the legislature assumed that it was entitled to complete control over the Aboriginal population.[420] This assumption is fundamental to colonisation and, as will be seen, the Act's purpose was to support the modification of the native inhabitants. Legislators sought to make the natives resemble Europeans by removing them from their tribal lands and restricting their traditional practices. In section 2 (I) it authorised the Governor to make regulations to prescribe where Aborigines could live, thereby restricting their movements.[421] This part of the Act enhanced the sovereign power to exclude Aborigines from settler society. In some cases, it forced Aborigines to remain on their traditional lands.[422] In other cases, it removed them from it in 'rounding-up' operations performed by inspectors from the Board for the Protection of Aborigines.[423] In both cases, it continued the disruption of Aboriginal social structures that unwritten colonial law created. It threw together Aborigines from different countries into one location, which exacerbated pre-existing tribal rivalry.[424]

A definition of 'Aboriginal person' was deemed necessary to clarify who was to be protected, or otherwise, under the provisions of the Act.[425] The Act defined who was an 'Aboriginal person' in the following terms. "Every aboriginal native of Australia and every half-caste or child of a half-caste, such half-caste or child habitually associating and living with aboriginals, shall be deemed to be an aboriginal within the meaning of this Act." Section 8 authorised any judge, presiding over actions in relation to the Act, to use his discretion to classify Aborigines. Colonial administration removed Aborigines' capacity to exercise the fundamental sovereign power to decide who was included and excluded from its society by confirming the Crown's own power in this regard.

The cultural basis of the definition[426] was, in practice, reduced to its racial components, which exposes some basic aspects of colonial ideology. It works to

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[420] The authority to make this assertion is derived from the Petrine mandate and, as discussed at footnote 109, immediately modified the rights of Aborigines subject to the Act.
[421] Christie, M. (1979) pp. 178,191.
[422] Read, P. (1984) p. 54
[423] Christie, M. (1979) p. 205
[424] Cannon, M. (1993) pp. 29-30, describes an inter-tribal massacre with guns.
[425] Rowley, C. D. (1970) p. 341.
[426] Attwood, B. (1987) p. 84.

increase non-indigenous populations by legally disqualifying any person outside its definition from being an Aborigine.[427] The modifying strategies were then focussed on those it deemed to be natives. Racial terms provided control of the definition, which could be manipulated to colonial advantage.[428] The definition was refined in 1886 to exclude 'half-castes' from the provisions of the Act and its subsequent regulations.[429] It was at this time that assimilation was becoming dominant in government policy. As Rowley suggests, "the greater the effort toward assimilation, the more rigidly defined differences in status become."[430] In 1910, the definition was amended again to include half-castes as fringe-camp populations grew and settlers demanded government intervention.[431] Fringe camps also demonstrated that the Crown was yet to establish exclusive possession.

The Act controlled Aboriginal access to economic life. It provided for the education of Aboriginal children, designating responsibility to the governor. Education was not meant to be tribal but European to prepare Aboriginal children for life in settler society, albeit on the lowest rungs. It was designed to make Aboriginal children like Europeans.[432] The capacity for Aborigines to trade, even among themselves, was restricted by the introduction in the Act of trade licenses in section 6.[433] Aboriginal labour was granted by the Crown via the Governor's certification of ". . . aboriginals who may be willing to earn a living by their own exertions." These exertions had to support settler society,[434] which also addressed the labour shortage in Victoria. It did

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[427] Rowley, C. D. (1970) p. 341; Wolfe, P. (1999) p. 175.

[428] Rowley, C. D. (1970) pp. 341-342, suggested that race was the simplest definition but left those being defined inarticulate. It was also inaccurate because Aborigines were often categorised by the colour of their skin and not their genealogy.

[429] The 1886 Act split Aborigines into two groups, defined by race. As Wolfe, P. (1999) pp. 174-175, argued, the amendment was the centrepiece of assimilation policy. It produced a category that neither Aboriginal nor European. As I will argue, the logic beneath the Act and its amendments persists into the Yorta Yorta decisions.

[430] Rowley, C. D. (1970) p. 20.

[431] A similar process is evident in other colonial jurisdictions. See Read, P. (1984) p. 54, on how the New South Wales *Aborigines Protection Act,* 1909 was amended in 1918 to tighten the definition of 'Aborigine' to satisfy settler demands.

[432] The obligation on colonial authorities to educate indigenous children was transformed into a strategy of child removal. As Cato, N (1974) described, Daniel Matthews enthusiastically removed young women from the Echuca area, where Yorta Yorta ancestors resided, to Healesville for education in domestic duties. This strategy was also applied in the United States at the time. See Cohen, F. S. (1941) pp. 241-242 and Wilkinson, C. (1987) p. 19.

[433] A similar structure on a larger scale was devised in the United States, see Cohen, F. S. (1941) pp. 69-70

[434] The restriction on where Aborigines worked ensured that modification processes produced natives that resembled Europeans.

not allow economic activity in Aboriginal terms. Economics are solely within European frameworks of contract and certification. In section 2 (II) the Act authorised the Governor or his representative to make contracts with settlers regarding Aboriginal labour. Section 2 (III) provides that Aboriginal earnings be withheld and used to maintain reserves.

In the United States, a similar strategy was applied. In Federal Indian Law, according to Felix Cohen, Indians were considered incompetent to manage their own financial affairs.[435] Incompetency was primarily used as an instrument to control alienation of Indian land. In Australia, Aborigines had no right in colonial law to alienate land because they could not own it in colonial terms. Control of Aboriginal resources and their inability to enter into contracts ensured that they could not become property owners. The total control of Aboriginal economic life prescribed in the Act maintained settler dominance of Aboriginal people for decades. Other colonial authorities enacted similar legislation with many Acts remaining in force well into the twentieth century. The modifying effects of these legislative measures on the observance of Aboriginal customs and laws became part of the 'tide of history'. Christie argued that "[v]iewed in the harshest light, the 1886 Act could be construed as an attempt at legal genocide. Certainly it was aimed at removing Aborigines as a distinct and observable group with its own culture and way of life."[436] It was aimed at making Aborigines mimic Europeans.

The 1869 Act marks the time when Aborigines were controlled by written law rather that colonial conventions. It was designed to disrupt the already devastated Aboriginal communities. It imposed legal obligations but gave no legal rights. It was the first legislative expression of *terra nullius* because it denied Aboriginal law and the land rights it conferred. It provided the first legal definition of 'Aborigine' that set the standard up to, and including the *Native Title Act*. The Act's power to modify Aborigines became a salient feature of the 'tide of history' that washed away Yorta Yorta people's land rights.

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[435] Cohen, F. S. (1941) p. 169.
[436] Christie, M. (1979) p. 205.

The laws that governed Aborigines were increasingly challenged throughout the twentieth century. Aborigines formed lobby groups and took industrial action, historians and anthropologists revised conventional Australian history and representations of Aboriginal culture, and English-law theorists reviewed the feudal system of tenures. The products of new approaches to historical research wrote Aboriginal agency, settler violence and dispossession into Australian history. While it impacted on the way Aborigines were perceived in non-Indigenous society[437] and encouraged more sympathetic responses from government to Aboriginal issues, its positive effect on law was that it made new approaches to dealing with historical materials available to the judiciary.[438]

While previously judges and conventional historians approached their inquiries by starting with an event and working forward in time, the work of revisionist historians reversed the approach.[439] As Reynolds described, when he observed present relations between Aborigines and non-Aborigines, his curiosity to understand how these relations were established led him to work back through time.[440] The discipline of anthropology also developed and changed. Some anthropologists rethought ethnography and moved away from traditional methods that focussed on Aborigines in isolation. They began to consider Aborigines in relation to their interaction with the broader community and to recognise their diversity.[441] The characterisation of Aboriginal society shifted from primitive and barbarous to an example of an ancient and sophisticated society with strong conceptions of law, property and justice. These combined challenged the founding assumptions of the Australian State, the doctrine of *terra nullius*.

THE REJECTION OF TERRA NULLIUS

In 1992, the High Court of Australia declared that "[t]he common law of Australia does not embrace the enlarged notion of *terra nullius* or persist in characterising the

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[437] Broome, R. (1996) p. 54.
[438] As noted in the previous chapter, Church authorities adopted a similar strategy when they sought to change Christian doctrine or needed to justify themselves in other ways.
[439] Attwood, B. (1996) p. xvi. The distinction between these two approaches became significant in the Yorta Yorta decisions.
[440] Reynolds, H. (1999) p. 89. Reynolds is considered to be a leading revisionist historian.
[441] Cowlishaw, G. (1992) p. 27.

indigenous inhabitants as people too low in the scale of social organization to be acknowledged as possessing rights and interests in land." The Court found that ". . . the Meriam people are entitled, as against the whole world, to possession, occupation, use and enjoyment of the lands of the Murray Islands." [442] The Mabo decision rejected the long-standing assumption that Australia had no settled law before the British assertion of sovereignty.[443]

The decision was made in the glow of political and judicial awareness of Australia's history of "unutterable shame"[444] and willingness to change the relations between Indigenous people and the settler state.[445] The High Court re-established itself as the place where the law of Australia is declared in the face of increasing legislative recognition of Aboriginal land rights in the states and the reliance on the disciplines of anthropology and history for authority.[446] The Mabo decision has been hailed as a triumph of the moral authority of Australian law.[447] It was believed to have the potential to disrupt the basic assumptions of Australian land law and cause a constitutional crisis of legitimacy.[448] It was hoped that the rejection of *terra nullius* was the beginning of the process to provide social justice to Aborigines through the recognition and protection of their property rights.[449]

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[442]Brennan in *Mabo* (1992) p. 2. This statement also extends the rejection of *terra nullius* to the mainland. By 'persist' the judges refer to previous authorities such as *Re Rhodesia,* and the House of Commons' Select Committee on Aborigines, that sustained Dampier's and Cook's representation of Aborigines (see p. 26-27). Justice Olney reinvigorated Dampier's representations of Aboriginal people in his Yorta Yorta judgement.

[443] It should be noted from the beginning of this discussion that the High Court rejected the applicability of a legal doctrine and did not repeal any law or overturn any judicial decision. The Court rejected the use of *terra nullius* as a set of beliefs for future legal decision-making processes.

[444] Deane and Gaudron in *Mabo*, p. 79.

[445] Keating, P. (1993) p. 4.

[446] Brennan in *Mabo* (1992) pp. 18-9. In the decades preceding the Mabo decision, land rights legislation had been enacted in the states and for the North Territory. The Mabo case gave the High Court an opportunity to re-establish control of Australia's land law. Between the Woodward Commission's Report in the 1970s and the Mabo decision in 1992, some Aboriginal communities enjoyed success in regaining some of their traditional lands. Made through state and federal legislation, small areas around missions and reserves were returned to Aborigines. The Yorta Yorta community legally regained some areas of land around Cummeragunja through the New South Wales *Aboriginal Land Rights Act,* 1983. The *Aboriginal Land Rights (Northern Territory) Act* 1975 was the most comprehensive federal legislation and provided Aboriginal communities with titles to their lands. The *Aboriginal Land Rights Act* also laid the ideological and administrative foundations for the *Native Title Act,* 1993,especially regarding the doctrine of continuous connection and the interaction between law and anthropology. See Keon-Cohen, B. (2001) p. 235.

[447] Latimer, P. (1993) p. 884-5; Bartlett, R. (1993a) p. 58.

[448] Wolfe, P. (1999) p. 204; Bartlett, R. (1993a) p.58-59.

[449] Reynolds, H. (1999) p. 203.

After the Mabo judgement rejected *terra nullius*, Reynolds maintained his characterisation of the doctrine as construed within British claims to radical title and sovereignty. He argued that the High Court examined the Crown's assertions regarding property ownership, which brought native title but left its claims to sovereignty intact.[450] Reynolds suggested that the introduction of native title recognised Aboriginal property rights but as Patrick Wolfe suggests,[451] native title, as a colonial legal concept, is a symptom of colonialism and not its cure. That native title is a product of settler colonialism is supported by its role in the Proclamation of 1763.

Some Aboriginal commentators criticised the decision and argue that property rights without recognition of sovereignty will afford no social justice.[452] Other non-Indigenous commentators argue that despite the rejection of *terra nullius*, Aborigines are still trapped in Australia's colonial legacy.[453] These analyses focus on issues of morality and social justice, and the decision's potential to disrupt colonialism in Australia. To extend these observations, the structures of Australian law based on *terra nullius* and the extent that the doctrine's rejection disrupted the fundamental relations between Indigenous people and the Australian state in relation to land are now considered.[454]

All the judges relied on United States precedent, especially Chief Justice Marshall's decision in *Johnson v McIntosh*, to advance their opinions and construct Australia's version of native title.[455] To summarise the decision, Marshall confirmed that the United States acquired sovereignty over Britain's North American possessions as successor after the revolutionary war. Following Vitoria and Locke, he characterised Indians as not having the civilised qualities of European settlers that were necessary to confer ownership of the soil. He also confirmed that Indians could not alienate land because they did not own it. He suggested that the civilising effects of European

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[450] Reynolds, H. (1996) p. 15.
[451] Wolfe, P. (2000) p. 143.
[452] Mansell, M. (1992) p. 6. That the Crown's claims were not disturbed is emphasised by the High Court in the Yorta Yorta case.
[453] Hughes, I & Pitty, R. (1994) p. 14.
[454] Before proceeding with a discussion about how the High Court maintained the international law basis of the Crown's claim to sovereignty, it is instructive to recall the foundations of international law. As discussed earlier, the initial purpose of modern international law was, after rejection of Church authority, to regulate relations between European states and not relations within colonies.
[455] Nettheim, G (1994) p. 54.

presence was amble compensation for any loss Indians may have suffered. The High Court's use of Marshall's opinions in its construction of native title draws American precedent into Australia's 'tide of history'.

Until the Mabo case, Australian courts claimed that they could not review acts of state, which included the Crown's acquisition of sovereignty and radical title.[456] The exercise of the Crown's prerogative power is not reviewable anywhere without the Crown's consent.[457] Upon first settlement, in accordance with the 1722 Memorandum, legal jurisdiction within the colony was vested in colonial authorities, subject only to the prerogative powers of the Crown. The Crown was able to review colonial law, a most notable example being the case of *Cooper v* Stuart in 1889.[458] The High Court proceeded in the Mabo case by separating the Crown's claim to sovereignty as legal jurisdiction and radical title as proprietorship of the land.[459] The separation of the two parts of acquisition made the Crown's acquisition of sovereignty an act of state and placed the Crown's acquisition of property in land within the colonial jurisdiction.[460] The Crown's right to colonise is not challenged by the Mabo decision. The High Court's justification rests on the non-reviewability of the act of state that acquired sovereignty.[461] The High Court decided that the application of *terra nullius* was not an act of the British state but of Australian law origin.[462]

The rejection of *terra nullius* acknowledged Aboriginal law, an essential element of the definition of 'inhabited' in international law and English law. In both systems, inhabited territory can only be acquired through conquest or cession. The Crown's acquisition of sovereignty in Australia was theoretically an act of war.[463] Within the

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[456] A prominent decision in this regard was in *Milirrpum v Nabalco* in 1971. In this case, Justice Blackburn acknowledged Aboriginal law and the injustice of dispossession but maintained that the non-reviewability of the Crown's acquisition of sovereignty prevented him from acknowledging Aboriginal land rights.

[457] McNeil, K. (1987) p. 94

[458] This case is usually considered as the place where the doctrine of *terra nullius* formally entered colonial law. The High Court's adherence to the founding assumptions of colonial law enable the rejection of the doctrine but maintain the structures that enabled its entry into Australian law.

[459] Justice Toohey in *Mabo*, p. 147. Rowse, T. (1993) p. 233.

[460] Rowse, T. (1993) p. 233; Brennan in *Mabo*, p. 31. The Crown's radical title was left undisturbed but native title was added to Australia's land management system.

[461] As the previous discussions suggest, legitimacy for non-reviewability can be traced to the Petrine mandate, which was adapted by Protestantism where it entered British imperialism. The High Court in the Yorta Yorta claim rests its case on the non-reviewability of an act of state.

[462] Brennan in *Mabo* (1992)p. 20; Rowse, T. (1993) p. 233.

[463] See earlier discussion on discovery and settlement.

international law rules of conquest, the subjugating state can only annex territory once conquest has been concluded by treaty or the cessation of hostilities. No annexation can occur during hostilities.[464] In Australia, there has been no legally recognised treaty with Indigenous people. There are several reasons why a treaty was never concluded in Australia. Earlier comparisons with treaty-making in North America suggest that the state of Aboriginal military technology and their early reluctance to trade were contributing factors. Hostilities have continued through the continuous claims to pre-existing rights by Indigenous people. Rather than acknowledging that the Australian settler-state remains in a theoretical state of war with Indigenous people, the High Court insists on the fiction that Australia was acquired through settlement.[465]

This is, in part, due to the circumstance of the Meriam people. They were subjected to a franchise colonialism where their value to settler society was in their potential as a labour force. The remoteness of the Murray Islands made their land less attractive for settlement than mainland Australia, where settler colonialism was dominant. The object of settler colonialism is the land itself.[466] The Meriam people experienced limited disruption to their traditional customs and laws. Toohey concluded that settlement was the most appropriate mode of acquisition and believed that the Meriam had no objections.[467]

The validity of the Crown's claim to the discovery of an inhabited territory[468] remains unchallenged by the High Court. The doctrines used to justify acquisition under *terra nullius*, settlement and conquest, are not defined by the Court and remain indistinguishable. This strategy was employed by William the Conqueror to support his assertions of sovereignty in England. At settlement, as now, there was no

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[464] Oppenheim (1948) pp. 517-525.
[465] Brennan in *Mabo* (1992) p. 15; Toohey in *Mabo*, p. 141. The Court's insistence on settlement, while providing the necessary components that define conquest through the rejection of *terra nullius*, are derived from the logic that characterised the two faces of acquisition during early settlement. As discussed earlier, this logic was sustained by *terra nullius*. The Court's insistence on settlement also reflects the importance of the doctrine to the Crown's still incomplete exclusive possession.
[466] Wolfe, P. (1999) p. 202.
[467] Toohey in *Mabo* (1992) p. 141; Brennan in *Mabo* (1992) p. 14. The retention of settlement by the High Court suggests that Aborigines continue to be considered inferior and that their presence, despite the rejection of *terra nullius*, counts for very little in legal terms. This is illustrated in the Yorta Yorta case discussed in the final chapter.
[468] Reynolds, H. (1996) p. 9.

international forum to test the Crown's claims (except the consent of other European nations) because Aborigines were characterised as having no international legal personality. The Mabo decision retains that characterisation.

Instead of denying the existence of Aboriginal law before settlement, the High Court declared that the act of acquiring sovereignty extinguished Aboriginal law at the moment of settlement. Ironically, that the rejection of *terra nullius* requires its reinstatement at the time of sovereignty allows the High Court to maintain the discovery-era claims that Australia was settled because it was legally uninhabited.[469] This is indicated in High Court Justices Brennan, Mason and McHugh's statement that the "Imperial Crown acquired sovereignty over the Murray Islands on 1 August 1879 and the laws of Queensland (including common law) became the law of the Murray Islands on that day."[470]

All the judges agreed that Australian land law is based on English feudalism regarding the Crown's acquisition of radical title. The assertion of radical title has always been intimately linked to the acquisition of sovereignty in English feudalism since at least the Norman Conquest.[471] This intimacy was again illustrated in the 1763 proclamation where the Crown claimed radical title to assist its assertion of sovereignty in North America.[472] High Court judges, Brennan and Toohey, emphasised Blackstone's views regarding the legal fiction of the Crown's radical title and McNeil's argument that to sustain that fiction, native title must be recognised.[473] Justice Toohey stated that "if the fiction that all land was originally owned by the Crown is applied . . . it cannot operate without also according fictitious grants to the Indigenous occupiers." It was within this logic that Justice Toohey concluded that the Meriam people were in possession of their land and that native title existed.[474]

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[469] Once the Crown acquired sovereignty, according to Deane and Gaudron, p. 59 and Toohey in *Mabo* (1992) p. 142. Aboriginal sovereignty ceased to exist.
[470] McHugh, Brennan and Mason in *Mabo* (1992) p. 2.
[471] McNeil, K. (1989) pp. 80-81; Vattel, E, de (1995) pp. 84, 139.
[472] In chapter one, I argued that William asserted paramount lordship to support his claim to the throne. A similar strategy is evident in the Royal Proclamation of 1763, discussed in chapter two.
[473] Brennan in *Mabo* (1992) p. 33; Toohey in *Mabo* (1992) p. 166.
[474] Toohey in *Mabo* (1992) p. 166.

Justice Toohey identified two types of native title, traditional and common-law aboriginal title.[475] Traditional title relies solely on pre-settlement Aboriginal presence and confers an allodial title, (title that is outside the Crown's jurisdiction and where radical title does not apply.) Justice Toohey argued, with reference to McNeil, that traditional title could be recognised in feudal terms as an estate in fee simple.[476] Common-law aboriginal title is based on possession and has no existence outside common law. Indigenous peoples' possessory rights arise immediately upon the Crown's acquisition of sovereignty. The title is held of the Crown who retains radical title. The possessory title amounts to an estate in fee simple unless modified by the Crown. To prove title, Indigenous people must prove occupation by their ancestor at the time of sovereignty.[477]

While the two types of native title share the pre-requisite conditions of occupancy and connection with ancestors at the time of sovereignty, they are different in other ways. As noted earlier, traditional title is not technically part of common law, while common-law aboriginal title cannot exist outside it. The source of Aboriginal rights impacts on the sovereign's power to extinguish those rights. In traditional title, the legislature may extinguish Aboriginal land rights with a "clear" and "plain" intention to do so[478], if such extinguishment does not violate any other laws.[479] Common-law aboriginal title confers a personal right and its extinguishment is complicated by limits placed on the Crown by its responsibilities to its subjects embedded in feudal principles.[480]

Justice Toohey believed that the Meriam people's claim could be interpreted as either.[481] With reference to McNeil, Deane and Gaudron concluded that native title in Australia exists within the rights conferred by pre-existing native law and custom. They suggest that traditional native title sits well within the general principles of

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[475] In the final chapter, I argue that in the Yorta Yorta case, the High Court's Chief Justice Gleeson, and Justices Gummow and Hayne blur the distinction between these two types of native title to support their theoretical formulations of the source of native title.
[476] Toohey in *Mabo* (1992) p. 139.
[477] Toohey in *Mabo* (1992) p. 161. This is the essence of the doctrine of continuous connection.
[478] Toohey in *Mabo* (1992) p. 150.
[479] The most significant law in this regard is the *Racial Discrimination Act, 1975,* see Brennan in *Mabo*, p. 46; Toohey in *Mabo*, p. 150, suggests that consent of title-holders is also necessary.
[480] McNeil, K. (1989) p. 174.
[481] Toohey in *Mabo* (1992) p. 162.

Australian law and "accords with its fundamental notions of justice". They insist that native title is not part of common law.[482] Brennan concluded that "[n]ative title has its origins and is given its content by the traditional laws acknowledged and the traditional customs observed by the indigenous inhabitants."[483]

It is clear that the judges in the Mabo case, except Dawson, understood Aboriginal land rights as traditional native title as describe by Toohey. The selection of traditional title accords with Australian laws 'fundamental notions of justice' by excluding the source of native title from Australian law, consistent with pre-existing exclusion practices.[484] Traditional title also retains the Crown's prerogative to remove Aborigines to satisfy settler demands. It confirms colonial conceptions of Aboriginal rights through constructing native title as recognised and protected rather than as a form of land tenure. The possibility of Aborigines owning the land continues to be denied. It allows for the extinguishment of native title where its exercise is inconsistent with settler-colonial use providing an avenue for the validation of Crown grants.[485] This maintains the structures of *terra nullius* linked to the Crown's acquisition of sovereignty.

The Court's construction is consistent with native title in North America after the Proclamation of 1763 and amounts to permissive occupancy.[486] The privileging of settler interest is visible in the Court's selection processes. Justice Toohey's opinion that either form of native title amounts to the legal right of an estate in fee simple is not included. According to Bartlett, the "[a]pplication of the principle to indigenous inhabitants would suggest their rights extend to subsurface resources of the land".[487] To extend native title to these resources would disrupt the Crown's pursuit of exclusive possession. How its definition of native title was rendered in legislative form is discussed below in relation the Native Title Act and its amendments.

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[482] Deane and Gaudron in *Mabo* (1992) p. 61.
[483] Brennan in *Mabo* (1992) p. 42. This statement formed the basis of the definition of native title in the *Native Title Act.*
[484] See the earlier discussion regarding the Victorian *Aborigines Protection Act* of 1869.
[485] Cooray, L. J. M. (1994) p. 86. The inconsistency principle was embryonic in Vitoria's formulations of the rights of native inhabitants. The principle formed the base of the respondents' submissions in the Yorta Yorta claim.
[486] Deane and Gaudron in *Mabo* (1992) p. 67, reject the idea that permissive occupancy describes Australian native title.
[487] Bartlett, R, (1993) p. xii.

From the above discussion, it can be concluded that the rejection of *terra nullius* has had a minimal effect on the foundations of Australia's land law. The *tabula rasa* in land law that was created through the application of the doctrine of *terra nullius*[488] and the supporting structures that developed Australia's system of land management is maintained. The Mabo decision has strengthened the feudal principles that connect radical title with sovereignty. From this perspective, it is difficult to conceive of the decision as a sea change in Australian law even though it introduced native title as a national legal response to land rights claims. Native title is, at best, an attachment to existing structures erected on the rejected doctrine. The introduction of native title complements, rather than disrupts, Australia's feudal roots.

The Court's introduction of native title contained the concept of continuous connection,[489] already expressed in the *Aboriginal Land Rights (Northern Territory) Act*, to govern the legal space where native title resides. The Court's conception of the Murray Islanders' possession of rights and interests in land, that is, native title, borrows from the international law doctrine of *usucapion*.[490] *Usucapion* is possession of land from 'time immemorial'. The High Court has adopted Oppenheim's interpretation of this mode of acquisition as ". . . an undisturbed continuous possession [that] can under certain conditions produce a title for the possessor, if the possession has lasted for some length of time"[491] After the Crown's acquisition of sovereignty, Aboriginal law ceased to function effectively ending 'time immemorial'.[492]

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[488] See Rowley, C. D. (1970) p. 24.

[489] The concept of continuous connection played a significant role in the Yorta Yorta case, discussed in the final chapter.

[490] Oppenheim's discussion of *usucapion* includes the notions of time immemorial and continuous connection in the context of recognising the rights of the members of the family of nations and not native inhabitants of colonial states. The language adopted by the High Court, however, can only be referring to this mode of land acquisition. See Oppenheim, L. (1948) pp. 525-544 and Brennan in *Mabo*, p. 43.

[491] Oppenheim, L. (1948) p. 256. The length of time is not specified.

[492] Hale, M. (1971) p. 3, 4, describes time immemorial as time out of mind, or beyond memory when written records were not kept. In Australian legal history, time within memory begins with the assertion of sovereignty and radical title.

According to Justice Toohey, continuous connection is proven by occupancy and determined through proof of ancestral occupation at the time of settlement.[493] He described the meaning of occupancy in common law and argued that simply being present on the land was insufficient. Occupancy includes a legal connection with the land that is expressed in tradition and custom. Only proof that reflects this definition could confer native title rights.[494] Justice Brennan stated "[w]here a clan or group has continued to acknowledge the laws and (so far as practicable) to observe the customs based on the traditions of that clan or group, whereby their traditional connection with the land has been substantially maintained, the traditional community title of that clan or group can be said to remain in existence."[495]

The phrases 'substantially maintained' and 'as far as practicable' in this context are complex. The application of the doctrine of *terra nullius* that delayed legal protection of indigenous rights for more than 200 years creates this complexity. The history of settlement accepted by the Court includes the efforts made by settler society to sever Indigenous ties to the land through physical removal and the intentional destruction of their cultures. In an attempt to address the injustice that created the complexity, Justices Brennan and Toohey declared that modification of tradition did not necessarily render native title extinct.

Justice Toohey declared ". . . modification of traditional society in itself does not mean traditional title no longer exists. Traditional title arises from the fact of occupation, not occupation of a particular kind of society or way of life. . . An indigenous society cannot, as it were, surrender its rights by modifying its way of life."[496] Justice Brennan concurred and stated, ". . . in time the laws and customs of any people will change and the rights and interests . . . will change too. But so long as the people remain as an identifiable community, the members of whom are identified

[493] Toohey in *Mabo* (1992) p. 139.
[494] Toohey in *Mabo* (1992) p. 150. Toohey's formulation of how continuous connection is demonstrated encourages a 'frozen in time' approach to judicial inquiries in native title claims. This approach was criticised by the Yorta Yorta in their appeals to the Full Bench of the Federal Court and to the High Court.
[495] Brennan in *Mabo* (1992) p. 43.
[496] Toohey in *Mabo* (1992) p. 150.

by one another as members of that community living under its laws and customs, the communal native title survives. . ."[497]

The discussion of cultural modification provided a broad guideline for future legal determinations of the existence of native title. The idea of modification of traditional practices recognises that customs can change to incorporate European technologies providing that they do not represent a break with the past. Its loose definition of modification allows other judges to use their discretionary powers to determine whether Aboriginal groups have abandoned their culture and lost native title rights.[498] Where *terra nullius* was outright denial of Aboriginal land rights, continuous connection is disbelief that the modifying effects of settlement have not nullified Aboriginal rights until the contrary has been proven. This discretionary power in Australia was initially expressed in legislation enacted under the doctrine of *terra nullius*[499] and has not been disturbed by the Mabo decision but enhanced.

The High Court provided the mechanism to control the production of legal truth and the juridical tools to ensure that Australia's legal system could perpetuate its claims to moral authority. Justice Brennan, in upholding the principles of English law declared ". . . this court is not free to adopt rules that accord with contemporary notions of justice and human rights if their adoption would fracture the skeleton of principle which gives the body of our law its shape and internal consistency. . . [t]he peace and order of Australian society is built on the legal system. It can be modified to bring it into conformity with contemporary notions of justice and human rights but it cannot be destroyed."[500]

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[497] Brennan in *Mabo* (1992) p. 44. In these statements, Brennan and Toohey introduce the two-way loss, imposed on Aboriginal people, into Australian law. Remaining an 'identifiable community' means remaining a native community that is relatively unmodified.

[498] In chapter one, missionary activity in Spanish-held American colonies was discussed in relation to cultural modification. The proselytization of Indians made them lesser natives and, as a consequence, reduced their claims as Indians. In the final chapter, I argue that the authorisation of judicial discretion to ascertain the extent that cultural modification processes have reduced Aboriginality in the Yorta Yorta case allowed Justice Olney to determine that the Yorta Yorta people had abandoned their tradition and had lost their native title rights.

[499] See the earlier discussion regarding the *Aborigines Protection Act* of 1869.

[500] Brennan in *Mabo* (1992) pp. 18-19. As will be seen in the final chapter, these statements formed an almost impenetrable barrier to the admission of the Yorta Yorta people's evidence.

In concluding his opinion regarding modification, Justice Brennan declared ". . . when the tide of history has washed away any real acknowledgment of traditional law and any real observance of traditional customs, the foundation of native title has disappeared."[501] In this statement, Justice Brennan validates Australia's history of "unutterable shame."[502] He also stated that ". . . since European settlement of Australian, many clans or groups of indigenous people have been physically separated from their traditional land and have lost connection with it."[503] The tide that washes away native title is entirely of European making. The physical separation of Aboriginal people from their traditional lands and the destruction of their culture and traditions began with European settlement.[504] The High Court claimed moral authority through acknowledgment of past injustices perpetrated under the doctrine of *terra nullius*. It then re-affirmed the structures that produced injustice. The metaphor gave legitimacy to colonial use of unlawful force by including it in the concept of modification.[505]

As suggested in the introduction of this thesis, modification is a characteristic feature of colonisation. It catches Aborigines in a double bind. The 'tide of history' incorporates the modification practices that the High Court described as past injustices. Through these past injustices, colonial authorities sought to change Aboriginal people to resemble Europeans. Aborigines that succeed in becoming more like their colonisers[506] break with the past and no longer qualify as natives under the doctrine of continuous connection. Their rights as native inhabitants are extinguished by abandonment.[507]

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[501] Brennan in *Mabo* (1992) p. 43.
[502] The validation of Australia's history of Aboriginal and settler relations is clearly visible in the Yorta Yorta decision and Justice Olney's interpretation of the 'tide of history'.
[503] Brennan in *Mabo* (1992) p. 43.
[504] European presence in Australia was validated by antecedent legal structures that are traceable, as discussed in the previous section, to early Christian doctrine.
[505] As noted in the previous chapter, this strategy was applied in the justificatory discourses of the crusade era and during early colonialism. As discussed in more detail in the final chapter, Justice Olney's application of the doctrine of continuous connection confirmed the validity of illegitimate means of settlement in the Yorta Yorta case.
[506] This is not to suggest that Aboriginal people aspire to become like Europeans. Successful modification is determined by the judiciary.
[507] For those that maintain connection with the past, like the Meriam people, their rights as native inhabitants are subject to extinguishment. The array of ways to extinguish native title is described in more detail in the discussion below regarding the *Native Title Act*.

Although the decision revoked the applicability of the doctrine of *terra nullius,* it retained the structures built on it.[508] As Ian Hunter argues, "it makes little difference that *terra nullius* is used to formalise the exercise of sovereignty (rather than conquest or cession). . . "[509] That there has been no action or political pressure to reinstated the doctrine[510] suggests that it does not need reinstating. This observation was made by Justice Brennan. He stated, ". . . it is necessary to assess whether a particular rule is an essential doctrine of our legal system and whether, if the rule were to be overturned, the disturbance to be apprehended would be disproportionate to the benefits flowing from the overturning."[511] In other words, Brennan believed that the rejection of *terra nullius* would not fracture the 'skeleton of principle' that shapes Australian law.[512] Clearly, the rejection of the doctrine of *terra nullius* threatened no undue disturbance.

As noted in the previous chapter, the doctrine was a product of representations of native inhabitants as incapable of legal possession and the European modes of territorial acquisition. Neither has been disrupted as a result of the Mabo decision. As Cooray suggested "the judgement can be read as a legitimation of the status quo which clears the Court's conscience."[513] The changing conditions within the Australia state have not disrupted the structures and intentions of *terra nullius* in any substantial way. As Michael Mansell observed, "[t]he Court did not overturn anything of substance but merely propounded white domination."[514] The rejection of *terra nullius* by the High Court did not signal a retreat from the past injustice that is characteristic of colonisation, it reaffirmed it through the metaphor of the 'tide of history' and the doctrine of continuous connection. As Wooten observed, "[t]he common law doctrine enunciated in *Mabo* did not of itself put an end to dispossession."[515]

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[508] Hughes, I. & Pitty, R. (1994) p. 15.
[509] Hunter, I. (1994) p. 102.
[510] Wolfe, P. (1999) p. 203.
[511] Brennan in *Mabo* (1992) p. 19.
[512] Kirby, M. (1994) pp. 73-74.
[513] Cooray, L. J. M. (1994) p. 86.
[514] Mansell, M. (1992) p. 6.
[515] Wooten, H. (1995) p. 102.

To summarise, the rejection of *terra nullius* in the Mabo case was considered a triumph of Australian law as a dispenser of justice and protector of equality. However, the doctrine's rejection also saw the recognised of pre-settlement Aboriginal law then confirmation of its extinguishment. The decision introduced the concept of continuous connection, which imposes a two-way loss on Aboriginal people. It includes the ideas of tradition and its modification into legal discourse to validate the Crown's acquisition of territorial sovereignty. The Court selected the least disruptive type of native title to maintain the existing land management structures. It constructed the legal framework to manage future Aboriginal claims with its definition of native title and controlled possible outcomes with the use of the metaphors 'tide of history' and 'skeleton of principle'.

The Court retained the assumption that an act of state could not be reviewed in a municipal court. Through the non-reviewability of an act of state, the Crown retains its exclusive possession of Australia. *Terra nullius* denied the legal recognition of Aboriginal land ownership. The rejection of the doctrine provide an opportunity for the Australian State to acknowledge native title. How that acknowledgment informed the way that it was defined in the *Native Title Act* and interpreted in the Yorta Yorta decision makes the High Court's decision part of the 'tide of history' that Justice Brennan described.

The Mabo decision provided the stimulus for a national approach to Aboriginal land rights.[516] The decision gave Aboriginal people some hope in some areas of Australia and strengthened their land-rights claims. Some groups of Aborigines threatened to claim major cities under the *Racial Discrimination Act* and the Mabo decision. A group of Aboriginal leaders produced the Aboriginal Peace Plan[517] as a platform to negotiate with the government. Farmers and miners wanted quick legislative action to validate their land titles.[518] They were concerned that recognition of Aboriginal land rights would interfere with their economic activities.[519] Farmers expressed concerns about the finite nature of land for pastoral purposes and the impact native title may

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[516] Kirby, M. (1994) p. 79.
[517] The Aboriginal Peace Plan was presented to Cabinet in April 1993. It was also published in 1993 in the Aboriginal Law Bulletin, Vol 3, no 62 on page 8.
[518] Rowse, T. (1994) p. 111.
[519] Neittheim, G. (1994) p. 60.

have through its potential to reduce available farm land.[520] They lobbied the government and demanded that it provide certainty. [521] A combination of the High Court's desire for law to regain the moral high ground and to reassert itself as the declarer of Australian law,[522] and intense lobbying from farmers, miners and Aborigines,[523] produced in the *Native Title Act*.

THE NATIVE TITLE ACT [524]

The Mabo decision transformed the challenges to the legitimacy of the Crown's acquisition of sovereignty, made by Aboriginal political action and revisionist scholarship, into legal discourse. The High Court's response was then translated into legislation. The legislature selected legal principles espoused in the Mabo decision to suit the social and political circumstances at the time. The *Native Title Act* is the codification of the High Court's recognition, or rather re-animation, of Aboriginal traditional title. As discussed earlier, Aboriginal land rights were suspended at the time of sovereignty. The character of those rights has been modified by the expanse of time between their suspension and re-animation. Justice Brennan in Mabo refers to the events in between as the 'tide of history'.

Most of the judges in the Mabo decision, Justice Dawson dissenting, acknowledged the existence of an indigenous law before the time of sovereignty.[525] This acknowledgement had the potential to threaten the validity of the Crown's acquisition of sovereignty by settlement and its authority to grant land. The legislature acted to preserve Crown sovereignty and protected its possessions through extensive validation of Crown grants. It exercised its prerogative power to suspend the *Racial Discrimination Act* in section 7 (3)[526] where validation was discriminatory within the

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[520] Farley, R. (1994) p. 168.
[521] Hughes, I. & Pitty, R. (1994) p. 15.
[522] Hunter, R. (1996) pp. 54-72
[523] Hughes and Pitty, (1994) p. 16; Rowse, T. (1994) p. 111.
[524] The following discussion about the *Native Title Act* refers to the Act after the 1998 amendments unless otherwise specified. The Yorta Yorta claim was tried under the original Act. The appeal courts took the amendments into account. Although some aspects of this discussion may not be directly relevant to the Yorta Yorta case, they are included to examine the character of the Act.
[525] This is implied by the selection of traditional title
[526] This section of the *Native Title Act* reads:
7. Racial Discrimination Act
(1) This Act is intended to be read and construed subject to the provision of the *Racial Discrimination Act 1975.*

Act's terms.[527] The validation of settler legal action in relation to land grants is a powerful wave of the 'tide of history'. It not only validates titles but also the setter-colonial ideology that made the grants possible.[528]

The High Court insisted that legal jurisdiction and land ownership were separate aspects of Crown authority,[529] echoing revolutionary North American, anti-feudal arguments.[530] By extensively validating the Crown's grants of land in the *Native Title Act*, the legislature reconnects land ownership with legal jurisdiction. The validation of feudal titles relies on the fiction of the Crown's paramount lordship in Australia. According to Justice Brennan, citing Blackstone in the Mabo decision, titles granted by the Crown cannot be disturbed in a feudal system.[531] The Act not only protects existing titles from Aboriginal claims but also the feudal system that underpins radical title and Australian sovereignty against anti-feudal ideals.

The authority to construct the legislation in this way relies on the non-reviewability of the Crown's acquisition of sovereignty. The land management system that was constructed under the doctrine of *terra nullius* remains intact, preserving its clean slate. The validation of past acts[532] made under the doctrine is continued into the post-Mabo era through the validation of intermediate period and future acts.[533]

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(2) Subsection (1) means only that:

(a) the provisions of the *Racial Discrimination Act 1975* apply to the performance of functions and the exercise of powers conferred by or authorised by this Act; and

(b) to construe this Act, and thereby to determine its operation, ambiguous terms should be construe consistently with the *Racial Discrimination Act 1975* if that construction would remove the ambiguity.

(3) Subsections (1) and (2) do not affect the validation of past acts or intermediate period acts in accordance with this Act. (emphasis added)

[527] According to Hughes, I & Pitty, R. (1994) p. 16, the legislature used this power as a threat during negotiations with Aborigines during the drafting of the *Native Title Act*. See also Rowse, T. (1994) p. 119-129.

[528] This includes ideological formulations based on *terra nullius*.

[529] Brennan in *Mabo* (1992) p. 20; Reynolds, H. (1996) p. 3; McNeil, K. (1987) p. 79-80.

[530] See the discussion in the previous chapter.

[531] Brennan in *Mabo* (1992) p. 33

[532] The validation of a past act is defined in Section 228 (2) of the *Native Title Act*. Where native title existed at the time a grant was made, under *Native Title Act* that act would be invalid. Subsection (b) validates that act as "if the native title did not exist."

[533] A future act is defined as an act that validly affects native title or, apart from the *Native Title Act*, if it is not valid then the Act validates it. An intermediate period act is similar but applies to acts that occurred between the *Native Title Act* and later amendments.

The validation of colonial land structures satisfies legal requirements for the "clear" and "plain" intention to extinguish native title.[534] In section 15 (a) of the *Native Title Act*, validation of freehold title is described as synonymous with extinguishment. In leasehold title, at section 15 (b) extinguishment of native title is enabled through the inconsistency principle. The act being validated "extinguishes the native title to the extent of the inconsistency." Inconsistency is defined as the exercise of Aboriginal rights and interest that impairs leaseholders ability to enjoy the benefits of their lease. The validation limits Aborigines, especially in closely settled areas, to ever-dwindling proportions of their ancestral lands.

Validation of existing titles was selected over other possible legal avenues provided by common law. Poyton noted that Crown grants may be rescinded if the grant was made as a result of a deceit on the Crown. He argued that the application of the doctrine of *terra nullius* in Australia constitutes such a deception.[535] The legislature chose the more politically safe avenue of validation in response to settler demands.[536] Although this is understandable, it continues to subordinate native title rights and interests to settler-colonial objectives. That this pervaded the Act is visible in the non-extinguishment principle described in section 238 of the Act.

The principle provides for mining activities on land where native title has been legally determined to exist. The rights to exercise native title are suspended for the duration of mining activities. The Crown's authority to impose such a regime was preserved initially by the High Court's selection of traditional title over common-law aboriginal title, then by defining native title outside the system of land tenures. The principle maintains the Crown's control over sub-surface mineral wealth. Once mining activities are completed, native title rights and interests are restored.[537] How this

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[534] While the Meriam people were assisted in their claim by colonial authorities assuming rather than enacting extinguishment, future claims will not have the same legal advantage.

[535] Poyton, P. (1993) p. 13, referred to the common-law doctrine of *Scire Facias*. See Halsbury (1907) Vol 8, p. 655 paras 1053- 1054, in relation to the doctrine's application to corporations and Vol 9 p. 814, paragraphs 1332, 1396.

[536] See Rowse, T. (1994) p. 111-132, for a description of the political climate after Mabo and before and during the enactment of the *Native Title Act*.

[537] The validation of Crown grants and the non-extinguishment principle are underpinned by the logic of the Petrine mandate espoused by Pope Innocent IV. He believed that non-believers had natural-law rights to their possessions but these were modified by the Petrine mandate. In a similar manner, Vitoria and Grotius also acknowledged the rights of native inhabitants in European colonies. In the *Native Title Act*, Aboriginal rights are also acknowledged but are subject to colonial priorities.

principle will operate, in conjunction with the doctrine of continuous connection and section 13 (5) that provides for the revocation of native title,[538] is not immediately apparent. Where mining activities are prolonged, it may be difficult for affected native-title holders to prove that continuous connection has been substantially maintained if challenged. The sub-ordination of native title in this regard is clearly visible. No other rights to land are contingent upon the maintenance of custom and tradition in Australia.

In the Mabo decision, different ideas about the nature of native title and how it was situated within Australian law were discussed. Justice Toohey suggested that traditional title was based on occupancy and amounted to an estate in fee simple.[539] The rest of the judges, except Justice Dawson who did not acknowledge that native title continues to exist, argued that native title is not a common-law tenure and did not attract the status of an estate in fee simple. The judges' construction of native title is similar to that of Indian title in the United States. As noted in the previous chapter, Indians were also denied an estate in fee simple under the justificatory notion that Indians were incompetent and incapable of managing such an estate. The idea of ownership also involved the Lockean notion of property. Vattel had disqualified Indians as owners because of the way they used the land.

The judges decided that Aboriginal law and custom determines the nature and content of native title and insisted that it could only be recognised and protected by Australian law. The principle of title by occupancy, an essential element of both English law and international law, forms the basis of Aborigines' traditional title. The Crown recognised that Aborigines had rights and interests in the land conferred by traditional laws and customs. Upon the non-reviewable act of state that asserted British sovereignty, Aboriginal law ceased to function.[540] The definition of native title and its determination are constructed on these assumptions.[541]

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[538] Section 61 provides that an application for revocation can be made by a registered native title body corporate, or a commonwealth, state or territory minister.

[539] Toohey in *Mabo* (1992) p. 139; See also Deane and Gaudron in *Mabo* (1992) p. 3.

[540] This is discussed earlier in relation to the Mabo decision and its application of the *usucapion* mode of acquisition. The Court evoked the concept of 'time immemorial' to describe the Meriam people's relation to the land. It also provides the logic that underpins the idea that native title is not revivable and is codified at Section 237A of the *Native Title Act*.

[541] The interpretations of these definitions became a major aspect of the Yorta Yorta case, especially in the appeal courts.

From the above discussion, it can be concluded that describing Aboriginal rights and interests as native *title* is misleading.[542] The word 'title' carries with it connotation of ownership. It is clear that ownership in the feudal sense was not intended by the High Court in the Mabo case. In the Act, all validated land titles override native title because it does not confer a land title in a feudal sense. Following the United States, the Act allows Aborigines a conditional use and enjoyment of their land in traditional ways giving native title the character of permissive occupancy. Rather than applying the feudal and international law rules of occupancy to recognise Aboriginal rights to their land, the legislature constructed rules that governed an imagined space where Aboriginal law intersected with Australian law at the time of sovereignty[543] and added a cultural dimension. To suggest that native title exists in this space then claim that it is not part of common law is unsustainable. Although it may be accurate to state that Australian native title is not a form of land tenure, the existence of the *Native Title Act* makes native title undeniably part of Australian law. The imagined space where native title resides in Australian law is not within feudal conceptions but outside land law where it can be treated differently to land tenure.[544]

The *Native Title Act* does not require the Crown to prove better title, thereby suspending a fundamental principle of common law.[545] On the other hand, that the burden of proof is with Aborigines[546] accords with the feudal principle that a dispossessed person may re-establish their title if they can prove a better title.[547] In native title determinations, the Crown has exclusive possession, regardless of how it was acquired, until an Aboriginal group can prove a better title through continuous connection. The application process is based on this feudal logic. The *Native Title Act* demands that the application be made on the prescribed form accompanied by a sworn affidavit detailing the full extent and nature of the native title claim. Section 62 of the *Native Title Act* prescribes that Aboriginal people making a claim for native title must show that their title has not been extinguished by previous grants and

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[542] Toohey in *Mabo*,(1992) p. 139; Gray, T. (1993) p. 148.
[543] See *Fejo v Northern Territory*, 1999 and Chambers, R. (2001).
[544] Hunter, I. (1994) p. 105, 106.
[545] McNeil, K. (1987) p. 85.
[546] Wooten, H. (1995) p. 102.
[547] McNeil, K. (1987) p. 76.

provide details regarding their continuous connection or details of denied access, and the existence and exercise of traditional laws and customs.

The exercise of sovereign power through judicial discretion is apparent not so much in what the *Native Title Act* defines and controls but in what it does not define. The Act provides no definitions of tradition[548] or culture and does not codify acceptable modification. These issues are left entirely to the discretion of Federal Court judges. It leaves these critical issues within unwritten colonial law[549] where the judge is free to form an opinion on whatever historical material is deemed appropriate by the court.[550]

The judge's discretionary power to determine native-title cases is conferred in the *Native Title Act* in section 82 regarding the Court's way of operating.[551] This power is exercised through the application of the rules of evidence. The rules of evidence allow the Court to claim authority and objectivity by following the positivist-scientific method of observation.[552] The rules guide the Court in deciding what testimony given during a hearing can be admitted as evidence and contribute to the Court's findings of fact.[553] Through the rules of evidence, the sovereign expects a certain narrative to emerge[554] from its highly trained judiciary administering and applying its law.

Maintaining that the nature and content of native title is dependent on indigenous law allows Western human sciences, part of non-Indigenous tradition and custom, to dominate legal decision-making.[555] Noel Pearson lamented the form that Aboriginal

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[548] Neittheim, G. (1994) p. 56, suggest that the nature of native title does not lend itself to codification. Nevertheless, the *Aboriginal and Torres Strait Islander Heritage Protection Act* provides a definition of 'Aboriginal tradition' at section 3 (1).

[549] As discussed earlier, aspects of Aboriginal-settler relations during settlement that were not legally or morally defensible remain in unwritten law. It was there that the more brutal aspects of the colonial ideology to eliminate Aborigines from the land and take exclusive possession resided.

[550] This aspect of the *Native Title Act* was a significant feature of the Yorta Yorta judgement. As discussed in the final chapter, Justice Olney was able to construct a narrative on the metaphor of the 'tide of history'.

[551] According to Bartlett, R. (1993a) p.59, common law is a "judge-made law and seeks to resolve particular disputes and fact patterns that come before the court."

[552] Hunter, R. (1996) p. 180, argues that Court's accept evidence as most credible when given closer to the event leaving no time for embellishment. See also Goodall, H. (1992) p. 104-119

[553] Olney in *Yorta Yorta* (1998) at 15.

[554] Goodall, H. (1992) 104-119, discusses this in relation to the similarities and differences in court room methodology and historiography.

[555] Hunter, R. (1996) p. 1; Broome, R. (1996) p. 70; Cochrane (1998) p. 34; Ritter (1999) p. 4.

rights took in the *Native Title Act*. He argued that judges relied on anthropological evidence to determine the existence of native title and not legal principle.[556] In international law, the doctrine of *usucapion*, the source of the High Court's notion of 'time immemorial', occupancy is a question of fact and not law. This is a consequence of the High Court's selection of traditional title to form the base of Australian native title. Instead of the court being required to ascertain presence of native inhabitants at the time of sovereignty, traditional title requires information regarding the nature and content of Aboriginal rights and interest at that time. The reliance on anthropological evidence to determine the facts of a native title claim, more importantly, deny the direct admission of Aboriginal testimony into evidence.[557] This requirement makes the court reliant on anthropological expert testimony, filtered through legal principles of admissible evidence to make determinations. The evidence that the Court can accepted is determined by the judge.

That rights and interests are conferred by Aboriginal law and custom suggests the Court would be called upon to admit Aboriginal oral testimony into evidence.[558] McLaughlin argues that Aboriginal customary law is a reference tool and does not acquire status in law until after the existence of native title is determined.[559] As such, it is subject to the judge's discretionary power. The *Native Title Act* allows the Court to take into account Aboriginal cultural concerns but not if those concerns would be unduly prejudicial to other parties.[560] There is no similar provision regarding non-Aboriginal culture. Justice Brennan referred to this structure as part of the skeleton of principle.[561] To avoiding fracturing the skeleton of principle, the Court requires proof that the testimony is factual. Proof is preferred in written form but the sworn affidavit, submitted with the application, is not sufficient when respondents object to the claim. This is in part due to the hearsay rule that forms a barrier between Aboriginal ways of knowing and the Australian legal process.

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[556] Pearson, N. (2002) p. 15

[557] In the Yorta Yorta case, Aboriginal testimony is largely disregarded. The Court's justification is related to the discourses that characterise Aborigines as inferior and is discussed in more detail in the final chapter.

[558] Neittheim, G. (1994) p. 56, suggest that the High Court intended that the content of Indigenous peoples' rights and interests were matters for the Indigenous people themselves.

[559] McLaughlin, R. (1996) p. 6. It is not until native title is determined that customary law gains force.

[560] Section 82 prescribes that the prejudicial nature of testimony is assessed by the judge.

[561] Brennan in *Mabo* (1992) pp. 18-19. The judge expressed the opinion that most rules and precedents within common law would remain part of Australian law as its skeleton of principle. Only a rule that "seriously offends the values of justice and human rights" can be challenged.

Generally, the hearsay rule excludes statements of a person who is not called as a witness from being heard in court. The rule makes proving continuous connection difficult for Aborigines in native title claims. Much of the knowledge that connects Aboriginal people to their ancestors takes this form. The logic behind the rule is that witness's assertions are only reliable when made from direct experience.[562] This is symptomatic of longstanding reluctance of the judiciary and legislature to accept Aboriginal testimony.[563]

The approach the judge adopts to ascertain how evidence is received in court is crucial to the conclusions made. As discussed earlier, Australian history was revised to include Aborigines mainly through the application of a different methodological approach. The historical narratives produced by the conventional approach of starting with a past event and working forward were very different from those that started in the present and worked back in time. The revisionist approach provided High Court judges in Mabo with the material necessary to reject a long-standing doctrine. In native title, the difference in approach to the analysis of historical materials and the interpretation of tradition will influence the judge's determination of native title.[564]

The rules of evidence as an instrument to ensure a certain narrative is made visible in the amendments made to the *Native Title Act* after the High Court's Wik judgement.[565] In the original Act, the court was not bound by the rules of evidence. It was compelled to consider the cultural concerns of Aboriginal people and Torres Strait Islanders. In the amendment, passed in 1998, the court was compelled to observe the rules of evidence. The court's consideration of cultural concerns was

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[562] Rummery, I. (1995) p. 40.

[563] As noted earlier in this chapter, Aboriginal testimony could not be heard in court except in exceptional circumstances. See Markus, A. (1990) pp. 108-121, for an account of the admissibility of Aboriginal evidence in the Northern Territory. Castles, A. C. (1982) p. 533, observed that the admissibility of Aboriginal testimony remained unresolved in the Stuart case in 1959. Admissibility of evidence is linked to the legal status of Aborigines, which has its foundations in early expansion logic. See chapter one on the development of European law. It is also a feature of the Yorta Yorta decision where much of the evidence supporting the claim was not admitted under this rule.

[564] Approaches and interpretation are salient features of the Yorta Yorta people's grounds for appeal against Justice Olney's decision. The impact of judicial discretion is discussed in more detail in the final chapter.

[565] In *Wik Peoples v the State of Queensland,* 1996, the court found that native title could co-exist with some leasehold tenures. It became controversial and resulted in many amendments to the *Native Title Act.*

softened and became optional.[566] The amendment made the rules for the admissibility of evidence more stringent.[567]

The more stringent rules also impacted on the Court's approach in determining who the Act applied to. At section 253, the *Native Title Act* provides a definition of 'Aboriginal peoples' as "peoples of the Aboriginal race of Australia." Despite Justice Brennan's opinion that the membership of Aboriginal communities is determined by their own law and custom,[568] the *Native Title Act*'s definition is based on race, a European conception. The selection of the racial definition over Brennan's social definition[569] aligns the *Native Title Act* with early protection laws,[570] which makes it consistent with laws enacted under the doctrine of *terra nullius*. These laws reached into every aspect of Aboriginal life to remove them from the land desired by settlers. The *Native Title Act* reaches into their history to ascertain if Aborigines retain the right to move back onto the land in traditional ways.

Removing the power to determine membership from Aboriginal control and placing it within colonial jurisdiction re-establishes the pre-Mabo power relations between settler society and Aboriginal communities. The power to define enhances colonial power over Aborigines to legally include or exclude any person from being an Aborigine.[571] The other side of this power to define is that the judge is authorised by the sovereign to decide whom it includes in settler society.

The definition of race obscures Australian history of invasion and dispossession and contributes to the Court's determination of the extent an Aboriginal community has been modified. The power relationship within the determination of identity by race is a component of the local contribution to the 'tide of history'. In closely settled areas of Australia, sexual relations between Aborigines and settlers confound any

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[566] Olney in *Yorta Yorta* (1998) at 15.
[567] Ritter, D. & Flanagan, F. (2001) p. 294.
[568] Brennan in *Mabo* (1992) p. 44.
[569] Cohen, F. S. (1941) makes a similar distinction between racial and social definition and describes how law varies according to which is used.
[570] It is notable that protection remains a feature of Australian law regarding Aborigines. It was identified as an objective in the preamble of the *Native Title Act*.
[571] See the discussion above regarding the Victorian *Aborigines Protection Act*.

determination of Aboriginality made purely on race.[572] The racial definition was first included in the Victoria *Aborigines Protection Act* of 1869. The genetic quantification that determined race in the 1886 amendment to this Act is absent from the *Native Title Act* [573] but is available to judges within their broad discretionary power to incorporate when determining Aboriginality.

THE 'TIDE OF HISTORY' IN AUSTRALIA

Modern international law's secularisation of the Petrine mandate provided the British Crown with legitimacy to discover, explore and settle Australia. The Crown's exclusive possession was sought initially in Cook's instructions then through the Proclamations that established colonies. Similar to William's strategy after the Norman Conquest, the Crown linked sovereignty with paramount lordship to dominate Aborigines, control settlers and assert exclusivity.

The representations of non-Christian, non-European people made by Pope Urban II, Vitoria, Locke, Vattel and Dampier provided Cook and Banks with accepted ideas that informed their characterisations of the native inhabitants of Australia. The status of Aborigines was initially constructed on representation of them as primitive barbarians. Without prospects of developing trade relations and the perception that Aborigines posed little military threat, no treaty was concluded between the British Crown and the Aborigines. As settlement proceeded on the basis that Australia was a *terra nullius*, Aboriginal resistance brought conflict, which gave them the status of enemies of the state. As resistance diminished, individual Aborigines were brought into colonial society as violators of colonial law or as wards of the state. Similar to other European colonies, the construction of Aborigines brought with it a perceived responsibility for the Crown to uplift the natives from their apparent primitive state. The authority to uplift Aborigines was clearly articulated by Governor Hindmarsh in the Proclamation of South Australia in 1836.

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[572] Aboriginal communities also find this a difficult issue. Some communities have taken the step of DNA evidence to determine Aboriginal descent.

[573] It was also absent from the *Aboriginal Land Rights (Northern Territory) Act,* of 1975

These modification processes included dispossession, forced relocations, proselytization and education. The processes also included the deliberate destruction of traditional practices with the goal of making Aborigines like Europeans. The modifying effects of settlement on Aboriginal custom and tradition were legitimised in the Mabo decision by the 'tide of history' metaphor. The Court introduced the concept of continuous connection by evoking the Roman law doctrine of *usucapion* to frame the Meriam people's land rights within the notion of 'time immemorial'. The logic that underpins the concept of continuous connection is similar to sixteenth-century Spanish assertions regarding the rights of Indians.

The concept requires Aborigines to maintain a link with their ancestors at the moment the Crown acquired sovereignty. With the effects of settlement legitimised, any breakage of that link allows the sovereign to claim exclusive possession. The breaking of the link between Aborigines and their ancestors represents the success of modification processes. By becoming more like Europeans, Aborigines lose their status as native inhabitants and the rights this confers. Aborigines that do not break with the past and retain their status as natives have their rights subjected to the extinguishment provisions of the *Native Title Act*. In this regard, the rejection of *terra nullius* and the *Native Title Act* become components of the 'tide of history' that wash away Aboriginal land rights.

The doctrine of *terra nullius* provided the legal *tabula rasa* for the construction of Australian land-law and, together with the 1722 Memorandum, allowed the development of Australian law. The Crown's assertion of sovereignty extinguished Aboriginal law and suspended European law regarding their land rights until the rejection of *terra nullius*. The High Court re-animated Aboriginal land rights. The form those rights took was developed through recognition of their pre-existing laws. The introduction of colonial law at the time of sovereignty ended Aboriginal law's time, freezing indigenous rights in that moment. The construction of Australian native title from European colonial logic and the location of its source in Aboriginal law imposed the burden of proof on Aboriginal people. Brennan's 'tide of history' made the injustices of the past available as evidence of modification and provided the judiciary broad powers of discretion to maintain it. The High Court recognised the validity of the revisionist approach to analysing historical materials. It enabled the

judges to reject *terra nullius* but, as Dawson's dissent indicates, conventional methodology is still influential in the judiciary. The judgement of the extent that the effects impact on Aboriginal legal rights to their land is controlled by the 'skeleton of principle'.

Despite the rejection of *terra nullius* and the discursive separation of the Crown's acquisition of sovereignty from its claims to radical title, the Crown's act of state that acquired Australia remains non-reviewable. Nevertheless, the Crown's exclusive possession remains incomplete. The Mabo decision and the *Native Title Act* attempt to finalise the process through the recognition and protection of native title, which confirms the Crown's radical title. Extinguishment by abandonment through the effects of the 'tide of history' reduces the burden on the Crowns title and brings the goal of exclusive possession closer. The Yorta Yorta decisions demonstrate their effectiveness.

3. THE YORTA YORTA CLAIM

In 1994, the Yorta Yorta people of south-east Australia made a claim for recognition of native title. For the Yorta Yorta people, this was a least their twelfth major attempt to regain their land.[574] It was the first claim under the *Native Title Act* and was considered a test case for the doctrine of continuous connection.[575] The area claimed straddles the Murray River and takes in several large towns in Victoria and New South Wales.[576] It is described as a closely settled area. On the 18 December 1998, the Federal Court of Australia determined that native title to the area no longer existed. The judge who heard the case, Justice Howard Olney, concluded that, "[t]he tide of history has *indeed* washed away any real acknowledgment of their traditional laws and any real observance of their traditional customs. The foundation of the claim to native title . . .[has] disappeared."[577] The Yorta Yorta people appealed to the full bench of the Federal Court but were not successful. They then appealed to the High Court but again their appeal was dismissed. The Appeal Courts upheld Olney's determination.

It appears that Justice Olney expected that he would make a determination that referred to the 'tide of history'. In 1997, he made a decision regarding the admissibility of respondents' evidence that claimed a spiritual connection to the land. In his reasoning, Olney expressed the view that, although the evidence was irrelevant to the definition of native title in the *Native Title Act*, it would be admissible if such evidence contributed to the 'tide of history'.[578] In his interpretation of the *Native Title Act*, he believed that the Yorta Yorta people were required to provide evidence that allowed him to consider whether "the "tide of history" [had] washed away any real acknowledgment of traditional laws and any real observance of the traditional customs of the applicants' ancestors."[579] Olney's interpretation of his role follows Vitorian logic: the native inhabitants have rights but not where they interfere with

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[574] Olney in *Yorta Yorta*,(1998) at 119, Atkinson, W. (2001).
[575] Olney in *Yorta Yorta* (1998) at 12; Background Briefing (1997) p. 1.
[576] Olney in *Yorta Yorta* (1998) at 9.
[577] Olney in *Yorta Yorta* (1998) at 129 (emphasis added).
[578] Olney in *Yorta Yorta* (1997) pp. 10, 15.
[579] Olney in *Yorta Yorta* 1997 p. 14.

European progress.[580] The judge's focus on the 'tide of history' is evident throughout his reasons. His approach became a review of the cumulative effects of settlement rather that an examination of the facts of the case.[581]

In this chapter, Justice Olney's determination of the Yorta Yorta people's claim for recognition of native title is analysed through his use of the 'tide of history' and his construction of the Yorta Yorta people and their social organization. Olney's approach to interpreting historical materials and the concept of modification is then considered. The Yorta Yorta people's appeal to the full bench of the Federal Court is examined through its support of Olney's determination and the possible alternatives to his approach. The analysis of the High Court appeal examines the deeper colonial structures within the 'tide of history' that washed in from Europe to validate the Crown's acquisition of sovereignty in an inhabited territory.

THE FEDERAL COURT TRIAL

The legal instrument that Olney applied to examine the effects of the 'tide of history' was the rule of evidence. The rules of evidence govern legal proceedings in what can be said in Court and who can say it.[582] Referring to the Mabo precedent, Olney argued that, although the *Native Title Act* relaxes the rules, the Court was not free to depart from the basic principles of law. He followed Justice Brennan's statement that the Court is ". . . not free to adopt rules that accord with contemporary notions of justice . . . if their adoption would fracture the skeleton of principle which gives the body of our law its shape and internal consistency."[583] Justice Olney interpreted his responsibility in this regard and stated "[n]or is there any warrant . . . for the court to play the role of social engineer righting the wrongs of the past centuries and dispensing justice according to notions of political correctness rather than according to law."[584]

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[580] See the discussion on the development of European law in chapter one.
[581] Bergman, G. (1993) p. 458 made this observation in an analysis of a similar case in Vermont in the United States regarding the Abenaki people.
[582] Rummery, I. (1995) p. 40.
[583] Brennan in *Mabo* (1992) p. 18.
[584] Olney in *Yorta Yorta* (1998) at 17.

In the *Native Title Act*, the rules of evidence guide the judge in deciding what evidence the Court can hear through its prescription of the Federal Court's way of operating. The Act provides the judiciary with a large measure of discretion to select precedent and to draw conclusions.[585] Section 82 of the Act requires the Court to consider cultural difference and does not bind it to the "technicalities, legal forms or rules of evidence."[586] Olney interpreted the *Native Title Act* within accepted legal standards regarding the admissibility of Aboriginal evidence. As noted in chapter two, Aboriginal evidence needs only be admitted where it corroborates other evidence. Olney insisted that the Court can only regard testimony as evidence where it is "relevant, probative and cogent".[587] Although section 82 may have provided for a relaxing of legal process to admit indigenous forms of knowledge, Olney adopted a more stringent approach that maintained the 'skeleton of principle'. The limits placed on Aboriginal knowledge in the construction of the Court's narrative about the claim enhance European exclusivity in legal processes. The 'tide of history', being of European construction, is more visible through European eyes.

When discussing the history of land tenure in the claimed area, Justice Olney praised the body of evidence that the respondents had placed before the court. He stated the he " . . . was very favourably impressed by the diligence and attention to detail displayed by the witnesses who testified as to the nature of the available records and the processes whereby the required information was extracted and collated." [588] In contrast, he found that Yorta Yorta people's accounts were " . . . in some respects both credible and compelling" but criticised younger members for their "frequent . . . prolonged outbursts . . . of moral indignation." He dismissed their testimony as "unfortunate" because they had "embellished" oral tradition. [589]

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[585] This is consistent with the first special legislation regarding Aborigines. The Victorian *Aborigines Protection Act,* 1869, gave the judiciary unlimited discretion to decide who was an Aborigine for the purposes of the Act.

[586] This section was amended while the Yorta Yorta case was being heard. Olney decided that because the case started before the amendments took effect, the Court would abide by the provisions in the original Act.

[587] Olney in *Yorta Yorta* (1998) at 17.

[588] Olney in *Yorta Yorta* (1998) at 23.

[589] Olney in *Yorta Yorta* (1998) at 21 Olney had indicated his preference for older members' accounts in a case in 1999. In his opinion, Aboriginal societies were structure in such a way that elders had more knowledge regarding tradition and history than younger member, Ritter, D. & Flanagan, F. (2001) pp. 287-288.

In keeping with his predecessors and following the spirit of the New South Wales' *Evidence Act* of 1839 regarding the admissibility of Aboriginal evidence, Justice Olney only accepted Yorta Yorta testimony to the extent that it agreed with non-Indigenous evidence from anthropological surveys, the memoirs of early settlers, and official records. That Yorta Yorta oral testimony was often subordinated in this way is demonstrated in Justice Olney's reasons. He stated that the

> ". . . most credible source of information concerning the traditional laws and customs . . . is to be found in Curr's writings. . . His record of his own observations should be accorded considerable weight. The oral testimony of the witnesses from the claimant group is a further source of evidence but being based upon oral tradition passed down through many generations extending over a period in excess of two hundred years, less weight should be accorded to it than the information recorded by Curr."[590]

He preferred Curr's observations because, according to Olney, their written form fixes them closest to the Crown's assertion of sovereignty. The Court thereby reduces the possibility of offending the hearsay rule.[591] Regarding some of the other written evidence submitted by the Yorta Yorta people, Olney stated that he had ". . . paid no regard to the contents of the statements of persons who were not called to give evidence. I have not read those statements and do not regard them as being part of the evidence."[592] Olney argued that Edward Curr had a close association with the Yorta Yorta people's ancestors and was more likely to be accurate and objective than those described by the Yorta Yorta people themselves.

Ritter and Flanagan criticised Olney's approach in this regard and argued that the Yorta Yorta people were the best source of information because they were the experts in Yorta Yorta tradition.[593] Alford observed that "[t]here appears to be some inconsistency in placing less weight on the oral testimony of one group, Indigenous people, because of the passage of time and alleged scope for embellishment than the

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[590] Olney in *Yorta Yorta* (1998) at 106.
[591] See the discussion in chapter two regarding the rules that govern the admissibility of evidence in native title cases.
[592] Olney, in *Yorta Yorta* (1998) at 20.
[593] Ritter, D & Flanagan, F. (2001) p. 287.

retrospective recollections of a white man."[594] It appears that Olney took advantage of the *Native Title Act's* relaxation of the rules of evidence to allow Curr's memoirs to form a vital part of his narrative. As both forms are essentially cultural, the Court's preference for European forms is undeniable. Curr's recollections reflect nineteenth-century evolutionist discourse giving them a scientific flavour. The Yorta Yorta testimony is oral and has the capacity to offend the hearsay rule. Nevertheless, the inconsistency Alford describes is symptomatic of a deeper colonial logic.

It continued the long history of colonial exclusion of Indigenous ways of being. The Crusade era justification for war against infidels did not include infidel discourses. Vitoria's construction of Indian personality as lacking and Las Casas' social experiments to realise the universal Christian commonwealth were concerned only with infusing Indian society with Christian-Spanish characteristics. Indian ways of being and knowing were dismissed as inferior and in need of modification. Marshall's decisions acknowledged a limited Indian legal autonomy that did not allow Indian laws to enter United States legal order.[595] In Australia, Aboriginal law was excluded by the application of *terra nullius* and, after the rejection of the doctrine, remains outside Australian law in native title legislation.[596] The sovereign requirement for exclusive power to make and enforce law in secular and sacred expansionary contexts underpins these examples.

By restricting the admissibility of Yorta Yorta knowledge, the judge was able to ensure a narrative based on the 'tide of history' by maintaining evidence within European ways of knowing. As Goodall observed, the rules of evidence are designed to ensure that a certain narrative emerges from judicial inquiry. Olney's approach to the rules of evidence in this case disadvantaged the Yorta Yorta people in ways that are explored later in this chapter. His approach gave an advantage to the respondents, ensuring that most of their evidence was heard in court and could contribute to the judge's narrative.

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[594] Alford, K (1999) p. 78.

[595] See the discussions regarding the development of European law to accommodate colonial expansion and Chief Justice Marshall's decisions regarding Indian independence in chapter one.

[596] See discussion in chapter two regarding the rejection of *terra nullius* and the construction of the *Native Title Act.*

The processes dictated by the *Native Title Act* allow any person affected by the application to present any objections or supportive statements in submissions to the Court.[597] Within these respondents' submissions was an overwhelming assertion that Yorta Yorta interests would be inconsistent with settler activities. Those responsible for water resources appeared to fear Yorta Yorta intervention and asserted that their respective water management ideals were incompatible. Those with commercial interests including primary production and telecommunications submitted that their use of the land was more important because it produced goods and services and emphasised incompatibility with traditional use.[598] The respondents' submissions, as summarised by Justice Olney, reflect deeper colonial ideology. They assume their presence to be legitimate. As discussed in chapter one, the rights of Europeans to travel and settle anywhere in the world were justified by the Petrine mandate, which was secularised in modern international law. Combined with Lockean notions of property in land, the respondents' claimed that their more productive use of the land gave them superior rights.

Another recurring feature of the respondents' submissions was the allegation that the Yorta Yorta community had lost its character as a traditional Aboriginal community and that the 'tide of history' had washed away their connection with the land. Within this submission, the respondents express the colonial assumption regarding modification- that is, that the Yorta Yorta people have lost their character as native inhabitants and, with it, the rights that the status confers. Although this allegation appears inconsistent with objections regarding inconsistent use, Justice Olney accepted the submissions without challenge because it supported his narrative based on the 'tide of history'.

The submission by the New South Wales Aboriginal Land Council was supportive of the claim. It suggested that the Yorta Yorta people had been recognised as an Indigenous group through the *Aboriginal Land Rights Act 1983 (NSW)*. The Yota Yota Council[599] had been granted 11 parcels of land. Olney mentioned the submission but did not appear to consider that it was evidence that the Yorta Yorta

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[597] The *Native Title Act* in section 66 (3) (a) (iv) requires the registrar to notify anyone that may be affected by the claim. There were about 500 respondents in this case.
[598] Olney in *Yorta Yorta* (1998) at 19.
[599] In 1984, the Yorta Yorta community referred to itself as Yota Yota.

people remained an identifiable community with connection to the land. He made no attempt to analyse it in relation to other submissions.[600] The lack of judicial interest in this submission suggests that it had no place in the narrative Olney constructed.

To complete his exclusion of Yorta Yorta testimony regarding their laws and customs, Olney also discredited contemporary anthropological testimony. According to Keon-Cohen, conflicts arose between expert witnesses giving anthropological evidence. Olney avoided making a decision regarding the conflicting evidence, an approach that "abnegates the judicial function."[601] Olney stated that the "Court has derived little assistance from the testimony of various experts . . . apart from recorded observations of Curr and Robinson, much of the evidence is based on speculation."[602] In avoiding his responsibilities in this regard, Olney denied Yorta Yorta ways of being entry into his narrative. This unresolved conflict of expert evidence also allowed Olney to claim that he had to rely on nineteenth-century settler observations.[603]

The discretionary powers extended by the *Native Title Act* allowed Justice Olney to judge the credibility of witnesses as well as the facts of the case. Olney constructs Yorta Yorta testimony as inferior. His weighting of credibility is consistent with earlier Australian legal forms and United States' formulations of Indian incompetency, which reflect Vitorian characterisations of Indian inferiority. Olney's use of the rules of evidence allowed him to construct the Yorta Yorta people's legal status through his interpretation of the definition of native title.

Justice Olney identified distinct avenues of inquiry that arise from his interpretations. He construed tradition in this case to mean the customs and practices of the Yorta Yorta people's ancestors in 1788. Citing Justice Toohey in Mabo that "[t]raditional title is rooted in physical presence", Olney believed that it was necessary to first ascertain the existence of native inhabitants in the claimed area in 1788.[604] Olney

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[600] Olney in *Yorta Yorta* (1998) at 48-49, mentions the Yota Yota Aboriginal Land Council in his history of European settlement but only in a descriptive way.
[601] Keon-Cohen, B. (2001) p. 252. Brian Keon-Cohen was senior counsel for the Yorta Yorta people in this case.
[602] Olney in *Yorta Yorta* (1998) at 54.
[603] Ritter, D & Flanagan, F. (2001) p. 287. Olney mostly relied on the memoirs of Edward Curr who was a pastoralist and resided in the area between 1841-1851.
[604] Olney in *Yorta Yorta* (1998) at 3.

acknowledged that Yorta Yorta testimony corroborated early explorers' accounts and archaeological evidence that indigenous inhabitants occupied the area.[605] Again citing Toohey, he declared the Yorta Yorta people were required to prove "that the use of the land was meaningful" but acknowledged that this "is to be understood from the point of view of the members of the society."[606] He then proceeded to ascertain the nature and content of those inhabitants' traditional laws and customs.

Olney noted that there were difficulties in obtaining 'objective' pre-settlement data. By not reconciling the conflicting nature of expert anthropological evidence, Olney exacerbated these difficulties. His representation of the traditional laws and customs that burdened the Crown's radical title was developed from observations made by Edward Curr. Olney cited Curr's impression that, ". . . as they neither sowed or reaped, so they never abstain from eating the whole of any food they had got with a view to the wants of the morrow. . . In this they were like the beasts of the forest."[607] Justice Olney emphasised Yorta Yorta ancestors' wastefulness. Again citing Curr, ". . . so, also they never spared a young animal with a view to its growing bigger. . . I have often seen them, as an instance, land large quantities of fish with their nets and leave all the small ones to die within a yard of the water."[608]

Olney did not attempt to analyse Curr's recollections of Yorta Yorta customs in his reasons. He simply cited Curr and accepted his descriptions of how the Yorta Yorta people's ancestors did not value the land and how customary rights "were little insisted on."[609] The judge also accepted Curr's impressions that there was no authority or law but that the Yorta Yorta people's ancestors maintained a strict adherence to custom.[610] Olney did not refer to Yorta Yorta people's oral testimony. It appears that Olney believed that he had established the Yorta Yorta people's point of view regarding the meaningful use of the land though Curr's eyes. Reminiscent of

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[605] Olney in *Yorta Yorta* (1998) at 25.
[606] Olney in *Yorta Yorta* (1998) at 3.
[607] Olney in *Yorta Yorta* (1998) at 115. Olney cited Edward Curr from his memoirs of living in the area. Although the credibility of Curr's work has been questioned, the judge relied heavily on his work.
[608] Olney in *Yorta Yorta* (1998) at 115.
[609] Olney in *Yorta Yorta* (1998) at 111.
[610] Olney in *Yorta Yorta* (1998) at 111-116.

Vattel and Locke, he constructed their customs as barbaric and contrary to natural law, lacking the refinements of European juridical order and civilisation.

Curr's impressions of Yorta Yorta ancestors' personality and social organization echo those of Dampier, Cook and Banks noted earlier. Olney made no effort to consider the advances in knowledge, possibly available in the anthropological evidence that he had disregarded, that have discredited such historical misconceptions about Aboriginal society. He persisted in using a nineteenth-century impression that was typical of the strategies devised for cultural domination. Chief Justice Black argued that these misrepresentations sustained the fiction of *terra nullius*.[611] Contrary to the Mabo precedent,[612] Olney implied that the Yorta Yorta people's ancestors were so low on the evolutionary scale that they did not comply with the basic elements of natural law.[613] This construction of the Yorta Yorta people's ancestors does persist in characterising the indigenous inhabitants as inferior.

Olney's reliance on nineteenth-century colonial philosophy reinvigorates Vattel's proposition that native inhabitants have no sovereignty, law or system of property management. There is nothing in the *Native Title Act* that precludes such representations. It is apparent that Olney's persistence in representing the Yorta Yorta ancestors as primitive and barbaric is to justify the Yorta Yorta people's continuing dispossession through his interpretation of the *Native Title Act's* requirement that their tradition by recognisable to common law.

In the definition of native title at section 223 (1) (c), the *Native Title Act* prescribes that Aboriginal laws and customs must be recognisable to common law. The Crown can only recognise laws and customs that are not "repugnant to natural justice, equity and good conscience" and that their recognition would not 'fracture the skeleton of principle'.[614] Olney constructed the traditional practices of the Yorta Yorta people's

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[611] Black in *Yorta Yorta* (2001) at 57.
[612] Brennan in *Mabo* (1992) p. 2; see also the discussion regarding the rejection of *terra nullius* in chapter two.
[613] Brennan in *Mabo* (1992) p. 2. Brennan stated that the "common law of Australia does not embrace the enlarged notion of terra nullius or persist in characterising the indigenous inhabitants as people too low in the scale of social organization to be acknowledged as possessing rights and interests in land".
[614] Brennan in *Mabo* (1992) p. 44.

ancestors as unrecognisable to common law.[615] The Yorta Yorta people are presented with a judicially constructed double bind. To prove continuous connection, the Yorta Yorta people had to demonstrate that they continued to observe their ancestors' customs and laws. The Court constructed the character of the laws and customs as unrecognisable to common law, which conferred no rights. If the Yorta Yorta people could not prove connection, they would lose their rights through abandonment. Either way, the full beneficial ownership would be extended to the Crown giving it exclusive possession. This dispossession of the Yorta Yorta people is thereby justified.

The judge's representation of Yorta Yorta personality and social organization is reminiscent of earlier European expansion strategies to establish and maintain sovereignty and dispossess those considered infidels or barbarians. Popes Gregory I and Urban II's representations of infidels as inferior humans and Innocent IV's justification for dispossession rested on the assertion of a divine right conferred by the Petrine mandate. Vitoria's characterisations of Indians justified dispossession as part of the process of bringing the Indians to the faith. The United States justified dispossession by representing Indians as inferior and incapable of protecting their own interests.[616] In Australia, these representations were used to justify colonisation[617] and supported the doctrine of *terra nullius,* which was in essence dispossession on a continental scale. Olney facilitated the continuation of cultural misconception into the post-Mabo era.

Constructions of non-European inferiority underpinned the sovereign's right and duty to uplift native inhabitants to Christianity and civilisation. As argued throughout this thesis, this perceived duty entailed modification of the native inhabitants' culture and traditional practices to make natives resemble their European colonisers. In chapter two, this aspect of the 'tide of history' was traced as it washed through Australia from the Crown's assertions of sovereignty and legislative acts that modified Aborigines' rights.

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[615] This part of Olney's determination attained greater significant in Justices Branson and Katz dismissal of the Yorta Yorta people's appeal discussed in more detail below.
[616] See chapter one in relation to the discovery of North America and the United States' power of pre-emption.
[617] See chapter two regarding the doctrine of *terra nullius* and the discovery of Australia.

As noted in the analysis of the Mabo decision, a conception of adaptation was drawn into legal discourse based on the Meriam people's experience of colonisation. The 'tide of history' is a metaphor used by Justice Brennan in the Mabo case to describe the forces that modify Aboriginal cultural practices. There are fundamental differences between the Meriam people's case and the Yorta Yorta claim. The political climate had changed since the enactment of the *Native Title Act.* Its recognition of native title and extensive extinguishment of native title by validation of Crown grants provided a different legal base from which the Yorta Yorta people launched their claim. The experience of colonisation varies greatly between the two communities.

The Meriam people were subject to franchise colonialism and experienced the 'tide of history' in ways that adapted the way they expressed their customs and traditions and accommodated European technologies. It amounted to adaptation of Meriam society and not a process whereby they came to mimic Europeans in ways that disrupt their character as natives. In franchise colonies, sovereign power is exercised on the native inhabitants to extract wealth from labour, allowing much of their cultural life and their status as natives to remain intact. The Yorta Yorta people were subjected to settler colonialism. The primary focus was to extract wealth from the land. Sovereign power was exercised on the native inhabitants to clear the land for settler use. One of the strategies of land clearance was modification. The Yorta Yorta people experienced the 'tide of history' as attempts to break their traditional ties to the land.[618] The Yorta Yorta people's experiences amounted to modification of their status as native inhabitants.

The Mabo decision and, consequentially, the *Native Title Act,* reflect franchise colonialism as defined above. The concept of continuous connection and modification expressed in Mabo recognises that traditional laws and customs can continue to be observed even if they are expressed in different ways.[619] This suggests that adaptation to incorporate European technologies may be acceptable and may not impinge upon native title rights. The doctrine of continuous connection precludes

[618] Wolfe, P. (1999) p. 202.
[619] Toohey in *Mabo* (1992) p. 44; Deane and Gaudron in *Mabo,* p. 83.

recognition of practices that break with tradition because they have become impractical.[620] This suggests that the character of the native inhabitants has changed sufficiently to modify native title rights. In closely settled areas, the continuation of traditional practices was made impractical by dispossession and the actions of missionaries and colonial authorities[621] - that is, by the 'tide of history'.

This is not to suggest, however, that the Yorta Yorta people did not continue traditional practices in adapted ways. The focus of this judicial inquiry was whether the Yorta Yorta could prove that their laws and customs have survived the 'tide of history' as interpreted by the judge. Where a judge considers modification as replacement of traditional practices, it is not considered adaptation but abandonment.[622] Legally-defined abandonment of traditional practices disqualifies Aborigines from the status of native and furthers the Crown's claims to exclusive possession, confirming the validity of its acquisition of sovereignty.

Olney's interpretation of the Yorta Yorta people's contemporary practices places them in a position that is reminiscent of Black Jack's awful situation described by Melville in 1835.[623] While Black Jack's actions had led him into dispute with colonial authorities, they were valid in his own law. His own law was disregarded by the colonial legal system that made him guilty of a criminal offence. The Yorta Yorta people's accounts of traditional practices may be valid but are disqualified by the dominant legal order protecting its own validity. Both demonstrate how cultural pre-conceptions have produced cultural domination.

In his next avenue of inquiry, Justice Olney believed that it was necessary to "ascertain from the evidence the extent to which the known ancestors provide the necessary link between the present claim group and the original inhabitants of the claimed area. "[624] In other words, Justice Olney sought to ascertain whether the Yorta Yorta people had retained their status as natives through their genealogy. According

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[620] Brennan in *Mabo* (1992) p. 43.
[621] See earlier analysis of the *Aborigines Protection Act* of 1869 in chapter two.
[622] Brennan in *Mabo* (1992) p. 43.
[623] See the discussion in chapter two regarding the legal status of Aborigines during confrontation.
[624] Olney in *Yorta Yorta* (1998) at 88.

to Olney, the Court was assisted by Matthews'[625] diaries and reports, official records of births, deaths and marriages, and two genealogical surveys conducted in 1891 and 1938.[626] Justice Olney found these records invaluable and noted that they corroborated oral testimony. In his examination of the Yorta Yorta people's ancestors, he referred only to European sources.[627] In keeping with the rules of evidence, Indigenous testimony was only considered to the extent that it agreed with non-Indigenous sources. Consistent with the inadmissibility of Aboriginal evidence dating back to 1839, oral testimony did not add to the Court's knowledge.

Justice Olney concluded that "[i]t is clear that from an analysis of the evidence that a number of them must be eliminated from the outset" and " . . . I conclude that only the descendants of Edward Walker and those of Kitty Atkinson/Cooper, have been shown to be descended from the persons who were in 1788 indigenous inhabitants of the claim area."[628] Olney classified Edward Walker and Kitty Atkinson/Cooper as 'full-bloods'. Those eliminated were either described as 'half-castes' or people whose details in official records were inconsistent. It appears that Olney followed the opinion of Cooray who contended that it "seems reasonable that if title to land may be claimed by Aborigines, the claim should be limited to full-blood Aborigines and not to those of mixed racial composition."[629]

This power to define is derived from the earliest laws regarding Aboriginal people, which were products of *terra nullius*. As noted in chapter two, The *Aborigines Protection Act*'s racial definition of Aborigines was manipulated to settler advantage in later amendments. Both the surveys that the judge referred to were made after the *Aboriginal Protection Act* of 1869 and the 1886 amendments were enacted, when assimilation was dominant in colonial policy. One of the objectives of these legislative acts was to legally reduce Aboriginal populations. As McGregor[630] and Wolfe[631] have argued, mission and reserve records of census data was often based on

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[625] Daniel Matthews managed the Maloga mission on Yorta Yorta ancestral land between 1864 and 1888. See Cato, N. (1974).
[626] Olney in *Yorta Yorta* (1998) at 58.
[627] Olney in *Yorta Yorta* (1998) at 88-104.
[628] Olney in *Yorta Yorta* (1998) at 88 & 104 respectively
[629] Cooray, L. M. J. (1995) p. 91. Cooray was Associate Professor in the School of Law at Macquarie University in 1995.
[630] McGregor, R. (1997) p. 48.
[631] Wolfe, P. (1999) p. 185.

guesswork to further colonial policy objectives. There were also logistical difficulties in collecting such data. Although colonial authorities, as Watts observed, were aware of the numbers of Aborigines present in the area for military purposes,[632] their names and genealogical history would have been of little concern.[633]

Rather than simply ascertaining the facts of the case, Olney reproduced the intended effects of assimilation practices by legally disqualifying 16 of the 18 Yorta Yorta claimants from being Yorta Yorta people. He thereby included them in settler society, which advances the Crown's claim to exclusive possession not only of the land but the inhabitants as well. The exclusion of 'half castes' from his inquiries legitimates the processes of settlement that included the sexual relations between Indigenous women and settler men. Vattel's extraordinary proposition that native women were available to settler men for the reproduction of settler society is accepted as part of the 'tide of history'.

In this conclusion, Justice Olney imposed the two-way loss described in the introduction to this thesis. The change, whereby native had come to resemble Europeans was genetic as well as cultural. By physically resembling Europeans, they had ceased to be natives and were disqualified from the rights that native status conferred. Olney's reluctance to hear Yorta Yorta evidence suggests, however, that they remain not quite European either.

Olney also excluded some of the 'known ancestors' where he could not ascertain their link to the native inhabitants of 1788 because of his conception of Aborigines' geographical mobility. This was part of his interpretation of the High Court's contention that mere presence does not necessarily constitute traditional connection.[634] Olney acknowledged that the Select Committee reports[635] authorised the relocation of children away from the natives to stations for their education as Europeans. He noted that many young women were removed from the Echuca area and sent to Coranderrk, which was hundreds of kilometres away. He also

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[632] Watts, R. (2003) p. 41.
[633] This was also a consequence on the commonly-held belief that Aborigines were a dying race. See McGregor, R. (1997) p. 56.; Watts, R. (2003) p. 40.
[634] Toohey in *Mabo* (1992) p. 148.
[635] See the discussion in chapter two regarding the development of Australian law.

acknowledged that many of the women returned to Echuca when the Maloga mission was opened in 1864. Rather than considering the return of these women as an expression of a connection to their country, Olney argued that it was further evidence of Aboriginal mobility and modification.

Olney's analysis of the women's actions is consistent with his focus on the effects of the 'tide of history'. It does not reflect an objective process of finding the facts of the case. Olney followed the logic that informed removals that is reminiscent of that of Las Casas in his attempts to create the ideal Christian community. Las Casas' purpose was to bring native inhabitants to the faith, which maintained Church authority and furthered the Petrine mandate. The purpose of removals and education in Australia was also an exercise in sovereign power to bring native inhabitants to civilisation, which enhanced its objective of exclusive possession. The aim of modification in both instances was to remove the native inhabitants from the land so that settlement could proceed.

The cost to the Yorta Yorta community, however, was far greater in this case than a reduction in the number of claimants. Olney's genealogy reduced the capacity of the Yorta Yorta community to prove traditional connection to the land through observation of laws and customs. The coherence of communal title requires that all members bring their knowledge together.[636] Having established that only two family groups could demonstrate genealogical connection, Justice Olney' next avenue of inquiry was to examine whether their connection to the land had been 'substantially maintained'.[637] His inquiries were limited to the descendants of Edward Walker and Kitty Atkinson/Cooper and their connection to the land not subject to the validation provisions in the *Native Title Act*. Combined with Olney's reluctance to admit Yorta Yorta oral testimony as evidence, the difficulties facing the Yorta Yorta people to prove connection were formidable.

In keeping with his focus on the 'tide of history', Justice Olney's history of European settlement[638] was mainly the impact of European presence on the Yorta Yorta people. He referred mainly to early explorers and settlers' accounts. He relied on diaries and

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[636] Dodson, M. (1996) p. 3.
[637] Olney in *Yorta Yorta* (1998) at 4. This phrase became significant in the Federal Court appeal.
[638] Olney in *Yorta Yorta* (1998) at 26-49.

other documents relating to the Maloga mission and Cummeragunja reserve. He described the impact of broader European economic conditions on Yorta Yorta mobility. Yorta Yorta oral testimony was only included for corroborative purposes. He did not mention their continuous attempts to regain their land or their cohesion as an Indigenous community. He only briefly mentioned their continued observance to their customs. Olney's version of events is shaped by the conventional methodology that supported *terra nullius*.[639] The acknowledgement of Yorta Yorta experience of European settlement is used as evidence by the Court to support the 'tide of history' narrative.

With his construction of the history of Yorta Yorta people as being swamped by the 'tide of history', Olney concluded that by the 1880s there was no evidence of continued observance of tradition and, of their own volition, the Yorta Yorta people's ancestors had abandoned traditional practices.[640] Justice Olney again appears to follow Cooray, who argued that "[m]any Aborigines voluntarily left their land to seek new horizons and pursue new opportunities offered in the cities, towns, farming properties and the missions. They also left because of the lure of material goods, jobs and opportunities. Others left because they wanted to escape the harsh operation of tribal laws and customs."[641] The judge's conclusion is also reminiscent of Chief Justice Marshall's assertion that the gifts of civilisation were enough compensation for any loss Indians may have incurred. Marshall, Cooray and Olney suggest that native inhabitants are complicit in abandoning traditional practices as if settlement was peaceful and simply offered Aborigines an alternative lifestyle. At the same time, Olney maintained that the 'tide of history' was a coercive force that resulted in the Yorta Yorta people abandoning traditional practices. Either way, they lost their character as natives and, with it, their native title rights.

The Yorta Yorta people's loss, as a product of both coercion and peaceful settlement, confirmed the Crown's claim to exclusivity. The construction of the *Native Title Act* and Olney's use of the Mabo decision as precedent in the Yorta Yorta case demonstrate the effects of blurring the modes of acquiring sovereignty and territory.

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[639] See chapter two regarding the rejection of the doctrine and the use of conventional history.
[640] Olney in *Yorta Yorta* (1998) at 120-121.
[641] Cooray, L. M. J. (1995) p. 91.

As noted in chapter one, the lack of distinction enhanced William the Conqueror's ability to exercise sovereign power, which produce the feudal fiction of paramount lordship. The resulting structures were used to protect and validate British sovereignty in Australia. In the Yorta Yorta case, the legal doctrine of continuous connection, based on the universal application of settlement as the mode of territorial acquisition, was imposed on the Yorta Yorta community, whose experience of colonisation more closely resembles subjugation. The maintenance of indistinct modes of acquisition allowed Olney's determination that the Yorta Yorta people's native title was extinguished by abandonment. Again, the British Crown strengthens its claim to exclusive possession of Yorta Yorta people's ancestral lands.

It appears that Olney believed that modification processes, a component of the 'tide of history', had been successful. He referred to a petition made in 1881 to the Governor of New South Wales and stated that it was ". . . positive evidence emanating from the Aboriginals themselves. . ." that the traditional owners were no longer in possession of the land and that "by force of the circumstances in which they found themselves, ceased to observe those laws and customs based on tradition."[642] The petition requested that land be set aside for Aborigines at the Maloga mission and was signed by 42 residents. The petition stated that settlers and the government had taken all the land within their tribal boundaries. They expressed a desire to change from traditional lifestyles and to settle into station life. The petitioners referred to themselves by station names rather than tribal names.[643]

Olney acknowledged that Daniel Matthews, the manager of the Maloga mission at this time, was probably involved in drafting the petition. He considered that Matthews might have used it for his own political purposes.[644] At the time, Matthews had unsuccessfully lobbied the Governor of New South Wales for more land to make the mission viable. Matthews sought to secure his own position and continue his work.[645] Matthews worked to destroy Aboriginal tradition and languages, and to provide Christian-European education for the residents of the mission. Olney acknowledged the possibility that the content of the petition did not reflect the

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[642] Olney in *Yorta Yorta* (1998) at 119 & 121.
[643] Olney in *Yorta Yorta* (1998) at 120; Attwood, B and Markus, A. (1999) p. 52-53.
[644] Olney in *Yorta Yorta* (1998) at 121.
[645] Cato, N. (1976).

petitioners' aspirations but concluded that there was no supporting evidence for such a proposition.[646] He concluded that the Yorta Yorta had come to resemble Europeans.

The judge did not mention in his reasons the existence of two other requests made by Yorta Yorta people around this time. In 1887, another petition was sent to the Governor of New South Wales. Several of the 1881 petitioners requested that their rights as the former occupants of the land be recognised. William Cooper[647] also lobbied a member of parliament in the same year stating, "I do trust that you will be successful in securing this small portion of a vast territory which is ours by divine right."[648] Although Olney was alive to the effects of the 'tide of history', he does allow evidence to the contrary to disturb his narrative. He also did not refer to the social and political climate to which the Yorta Yorta people were subjected at the time. After fifty years of physical confrontation and the effects of disease, the *Aboriginal Protection Act* of 1869 provided missionaries such as Matthews with the legal force to pursue their activities of replacing Aboriginal tradition with European Christianity. [649] It is possible that the petitioners had adopted a strategic position that improved their chances of remaining on their traditional land.

Olney's dating of the cessation of Yorta Yorta observance of traditional customs and laws at 1881 is further challenged by his own interpretation of the events that led to the closure of the mission in 1888. He acknowledged that the failure of Maloga stemmed from dissatisfaction and unrest among the mission's residents on account of restrictions that Matthews placed on traditional practices. Maloga was replaced by Cummeragunja and, according to Olney, continued to experience similar problems under different managers.[650]

Olney discussed an experiment conducted at Cummeragunja.[651] In 1895, George Harris became manager of the reserve. He divided the reserve into 40-acre

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[646] Olney in *Yorta Yorta* (1998) at 121.
[647] William Cooper was also one of the1881 petitioners.
[648] The 1887 petition and William Coopers letter are reprinted in Attwood, B. & Markus, A. (1999) pp. 52-53.
[649] Christie, M. (1979) p. 205.
[650] Olney in *Yorta Yorta* (1998) at 40.
[651] Cummeragunja replaced the Maloga mission in 1888.

allotments.[652] According to Olney, the Yorta Yorta people's ancestors succeeded in making a profit from agricultural pursuits even though they had to contend with adverse environmental conditions including drought and a rabbit plague.[653] Olney considered that the success of the allotment experiment was evidence that assimilation processes had destroyed their traditional way of life.

Consistent with his reasoning regarding removal policy, Olney again interpreted this event as a component of the 'tide of history'. The 'tide of history' in this instance flowed from the United States. The allotment system was used in the United States and was devised as a replacement for treaty-making to dispossess and modify Indians. Indians participated in the system to maintain their connection with the land.[654] At Cummeragunja, it was also applied to modify and dispossess. Similar to the results in the United States, Cummeragunja was reduced from 1800 acres to 800.[655] Participation in the system may have allowed the Yorta Yorta ancestors to stay on their land and maintain their connection in the context of colonial dispossession. Olney's focus on the 'tide of history' did not allow him to consider that the Yorta Yorta people might have adopted similar strategies to those of Indians.

Some of the examples of contemporary practice that the Court made its conclusions about require more scrutiny than the Court afforded them.[656] He interpreted Yorta Yorta people's lack of observance to traditional burial rites as demonstrating loss of connection. According to Olney, during re-burial of returned remains, traditional burial ceremonies as described by Curr were not observed. Leaving aside the possibility that Curr's recollections were not accurate, the first reburial took place in 1984. It is not possible for Curr to have observed a re-burial ceremony. The fact that reburials occurred at all, whether traditional or otherwise, suggests a strong sense of community with links to the land and the past. As inconsistent as Olney's interpretation may seem, it is typical of Olney's 'tide of history' narrative.

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[652] The allotment system was not widely applied in Australia and this experiment was abandoned. The allotments were resumed in 1908 and the land was leased to non-Indigenous farmers.
[653] Olney in *Yorta Yorta* (1998) at 42.
[654] Cohen, F. S. (1941) p. 273.
[655] Olney in *Yorta Yorta* (1998) at 47. By 1960, the reserve was reduced to 200 acres. The land was leased to non-Indigenous farmers.
[656] Black in *Yorta Yorta* (2001) at 86.

Olney also followed the respondents' assertions regarding Yorta Yorta contemporary practices. They claimed that the Yorta Yorta people's environmental practices were learned from Europeans. Although Olney considered the Yorta Yorta people's active conservation of the natural environment admirable, he concluded that it was not traditional according to Curr's observations.[657] He implied that Yorta Yorta conservation practices reflected their loss of tradition because they had embrace the European standards and values lacking in their ancestors' practices. In other words, he asserted that the modification of the Yorta Yorta people's ancestors and their way of life was successfully completed.

Through his use of the rules of evidence, Olney characterised the Yorta Yorta people's ancestors as inferior to their British colonisers. He created a narrative about the modification of the Yorta Yorta people's traditional practices and concluded that they had abandoned their customs and laws. Olney's narrative constructs the Yorta Yorta people as resembling Europeans. As the Crown's validity is derived from settlement,[658] the Yorta Yorta people challenged the legitimacy of the Crown's acquisition of sovereignty simply by making the claim in this closely settled area. This process effectively defends against the Yorta Yorta people's challenge to the validity of the Crown's sovereignty.

As discussed in chapter two, the validity of the Crown's acquisition of sovereignty in Australia has been challenged on the grounds that Australia was inhabited at the time. The suppression of evidence submitted by the Yorta Yorta people where it relates to their cultural connection also suppressed this challenge to the Crown's validity. The respondents' submissions, in contrast, support the Crown's assertions. A further challenge to the validity of the Crown's acquisition of sovereignty was made with reference to Locke and Vattel's natural-law proposition that the Crown's sovereignty and possession can only be asserted over land that is used and controlled by the Crown.[659] The proposition is consistent with the English-law principle that ownership requires possession obtained through settlement. The Yorta Yorta case demonstrates

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[657] Olney in *Yorta Yorta* (1998) at 128. As suggested earlier, Curr's observations were laden with nineteenth century ideology and, as Cook and Banks before him, are now discredited as cultural misconceptions.

[658] See the discussion in chapter two regarding the European settlement in Australia.

[659] See the discussion on the Crown's acquisition of sovereignty in Australia in chapter two.

the difficulties that arise when the Crown claims sovereignty over land not yet occupied by its subjects.

When Captain Cook claimed the eastern half of Australia in 1770, he performed ceremonies of discovery, giving the Crown an inchoate title. The Crown acquired sovereignty over New South Wales in 1788 by establishing settlements and legal institutions. Justice Olney conceded in his reasons that there was no effective European occupation[660] of the Yorta Yorta people's ancestral lands until the 1830s.[661] Although there were no ceremonies of discovery in the area, he assumed that the Crown's inchoate title extended to these lands. Olney maintained that the Crown acquired sovereignty over the Yorta Yorta people and their land in 1788. That acquisition was not consummated by settlement until the 1830s makes the date of the acquisition of sovereignty at 1788 fictitious in Yorta Yorta territory.

The significance of the date of the Crown's acquisition of sovereignty is disputed.[662] Some judges[663] have found it unimportant in native title cases because neither the Mabo decision nor the *Native Title Act* specify the date within the definition of native title or its determination. Others[664] have argued that it is important because it is the native title rights and interests at the time sovereignty was acquired by the Crown that burden its radical title.[665] In this case, the date of sovereignty is significant because after the 1722 Memorandum it marked the commencement of colonial law. Olney's acceptance of the Crown's acquisition of sovereignty at 1788 assumes the Crown's effective occupancy from that date. The rejection of *terra nullius* and the recognition of Aboriginal law suggest that Yorta Yorta law would continue until consummation by settlement and the establishment of colonial legal structures. The judge did not consider that the Yorta Yorta people effectively occupied the land during that time.

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[660] Oppenheim, L. (1948) p. 508, made a distinction between occupation as mere presence and effective occupation that included a form of governance.
[661] Olney in *Yorta Yorta* (1998) at 24.
[662] Generally, after the 1722 Memorandum, the date that the Crown acquired sovereignty was significant. It was a that moment the a new legal order commenced making it an important aspect of the colonial project. See earlier discussion in chapter one regarding the discovery of North America.
[663] See Beaumont and von Doussa in *Commonwealth of Australia v Yarmirr* (1999)
[664] See Merkel in *Commonwealth of Australia v Yarmirr* (1999).
[665] Howie,R. (2001) p. 224. The High Court declared that date of acquisition was important in the Yorta Yorta appeal case discussed below. (Ross Howie was senior counsel for the Yorta Yorta people during the appeals.)

Olney's treatment of the gap between the acquisition of sovereignty and settlement characterises the Yorta Yorta people as incapable of governing themselves. The gap becomes a legal void, which reinvigorates the doctrine of *terra nullius*. His treatment of the gap also effected how the judge interpreted the commencement of colonial law, which affected the way he determined the facts of the case. Olney acknowledged that the gap between 1788 and 1830 presented the Court with some difficulties but believed that they could be overcome by making inferences from existing evidence. The need to make inferences enhanced his discretionary power to explore only parts of the evidence that were consistent with the 'tide of history.'

To summarise, Justice Olney constructed the legal status of the Yorta Yorta people's ancestors through his representations of their social organization as primitive. He went beyond the *Native Title Act's* definition of native title as an inferior form of land rights. He portrays Yorta Yorta custom and laws as unrecognisable to common law. With similar logic to that of expansionist Popes and sixteenth-century Dominican priests,[666] Olney justified the attempts to modify Yorta Yorta traditional practices through his support and furtherance of the 'tide of history'.

Through his discretionary power to construct Yorta Yorta legal personality and justification of the 'tide of history', Olney has contributed to the development of Australian law regarding Aborigines by maintaining the status quo. The powers conferred on colonial authorities to construct Australian law, conferred by the 1722 Memorandum, are embraced by Olney to maintain the 'skeleton of principle. The logic that underpinned earlier expressions of native title in the 1763 Royal Proclamation, that native inhabitants have a usufructuary interest in land rather than dominion over it, is maintained in this decision.

The reinvigoration of *terra nullius* in the gap between sovereignty and settlement preserves the *tabula rasa* of Australian land law in Yorta Yorta territory. Brought together, these features of Olney's decision validated the Crown's claim to exclusive possession of the Yorta Yorta people's ancestral lands. The way the judge approached his inquiries and his interpretation of the requirements of the *Native Title*

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[666] See the discussions in chapter one regarding Popes Gregory I, Urban II and Innocent IV, and Dominicans Vitoria and Las Casas.

Act became the focus of the Yorta Yorta people's appeal against Justice Olney's determination to the Full Bench of the Federal Court.

FEDERAL COURT APPEAL[667]

The Yorta Yorta people appealed against Justice Olney's decision on the grounds that he had failed to make the necessary findings of fact. They contended that he applied a 'frozen in time' approach, which led him into error. By 'frozen in time', the Yorta Yorta people meant that Justice Olney attempted to ascertain their ancestors' traditions at the time of sovereignty, by making inferences from traditional practices observed at the time of settlement, then compared his findings with contemporary observance of those traditions.[668] He relied on conventional methodology to construct Yorta Yorta history and tradition.[669]

To support their contention that this was erroneous, they included references to Justices Deane and Gaudron's opinion expressed in the Mabo decision. Deane and Gaudron stated, "the contents of the rights and identity of those entitled to enjoy them must be ascertained by reference to that traditional law and custom. The traditional law and custom is not, however, frozen at the moment of establishment of a colony."[670] The Yorta Yorta people claimed that to adopt a 'frozen in time' approach was contrary to the spirit of the Mabo decision and was not required by section 223 of the *Native Title Act*.[671]

The appeal judges, Chief Justice Black, and Justices Branson and Katz, considered the nature of tradition, its modification and the concept of practicability.[672] All the judges agreed, with reference to the authority of the Mabo decision and subsequent cases, that tradition can be adapted without disturbing native title. Black observed that there

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[667] The appeal process does not allow the Federal Court to challenge the ideological foundation of either the Mabo decision, the *Native Title Act* or Justice Olney's decision. The Appeal Court can only re-examine findings of fact made by the primary judge.

[668] See Black in *Yorta Yorta* (2001) at 83.

[669] Alford, K. (1999) p. 69.

[670] Deane and Gaudron in *Mabo* (1992) p. 83.

[671] Branson and Katz in *Yorta Yorta* (2001) at 133.

[672] The idea of practicability was advanced by Brennan in *Mabo* (1992) p. 43. In his discussion of modification he stated "Where a clan or group has continued to acknowledge the laws and (so far as practicable) to observe the customs . . . the traditional community title of that clan or group can be said to remain in existence."

was nothing in the *Native Title Act* that precluded adaptation of traditional practices. Branson and Katz noted that, although it was difficult to ascertain the intended scope of the definition of native title and tradition at section 233 of the *Native Title Act*, tradition should not be construed as remaining the same as observed in 1788.[673] Nevertheless, they asserted that there was a limit to acceptable adaptation of traditional customs and laws. They expressed the view that the "changed laws and customs will not be traditional in character if they reflect a breaking with the past rather that the maintenance of the ways of the past in changed circumstances."[674] Black concluded that even the most severe effects of settlement do not necessarily mean that indigenous people have lost connection with the land from their point of view.[675]

As noted earlier in this chapter, it is not simply the effects of settlement that wash away native title. The 'tide of history' includes the logic that justifies and legitimises colonial expansion. Modification of traditional practices has always been a significant aspect of colonial legitimacy, first in relation to proselytization to secure Papal donation,[676] and later to civilise native inhabitants to increase the land available to settlers.[677] The primary goal of modifying practices in settler-colonial contexts was to break native inhabitants' ties to their history and land, the source of their rights. In the preceding analysis of Olney's reasons, it was demonstrated that this logic also underpins the judicial role in determining native-title claims. The effects of settlement are not important in themselves. It is how the judge interprets them that determine native-title rights.

The judges' opinions differed regarding the appropriate approach to ascertaining whether a particular modification was a break or continuous with the past. In Chief Justice Black's opinion, the language used in the *Native Title Act* was in the present tense, suggesting that judges need to make findings of fact regarding present practices and trace these back in time to ascertain if they are traditional in character.[678] He

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[673] Branson and Katz in *Yorta Yorta* (2001) at 111
[674] Branson & Katz in *Yorta Yorta* (2001) at 122.
[675] Black in *Yorta Yorta* (2001) at 49.
[676] This is discussed in chapter one in relation to Spanish expansionism.
[677] The logic beneath efforts to civilise is examined through the development of European law discussed in chapter one and the development of Australian law in chapter two.
[678] Black in *Yorta Yorta* (2001) at 34.

criticised Olney for starting with the past and working forward.[679] As noted earlier, this methodology supported the application of the doctrine of *terra nullius* in Australia. In the Mabo decision, the doctrine was rejected through the Court's acceptance of the alternative method of looking at present practices and working back. The two methods produce two different narratives. The conventional method swims with the 'tide of history' and reproduces its effects. The alternative method, in swimming against the 'tide of history', brought Aborigines and their experiences of settlement into Australian history and provided a clearer understanding of the present. In contrast to Black's perspective, Branson and Katz supported Olney's method of inquiry. In their opinion, the *Native Title Act* required the judge to first ascertain the nature and content of the native title rights that burdened the Crown's radical title at the time of sovereignty.[680] It is this approach that the Yorta Yorta people considered 'frozen in time'.

The appeal judges defined the 'frozen in time' approach as applying where a judge attempts to ascertain tradition at the time of sovereignty then compare it to contemporary practices. Olney's conclusion that "[n]o group or individual has been shown to occupy any part of the land in the sense that the original inhabitants can be said to have occupied it . . ."[681] is indicative of that approach. Chief Justice Black did not consider that Olney had applied a strict 'frozen in time' approach. He stated, however, that the approach he did use "carries with it the danger of producing what is in effect a 'frozen in time' approach."[682] He concluded that he was "persuaded . . . that the learned judge was in error in that he applied too restrictive an approach to the concept of "traditional"." Olney's restrictive approach was a consequence of applying a methodology that was conducive to his application of the idea of the 'tide of history' to his guide his inquiries. This contributed to his forming the opinion that the processes of settlement between 1788 and 1994 restricted observance of traditional and custom to the point of extinction.

Branson and Katz also concluded that Justice Olney was not in error in his approach. They contended that his method of inquiry was necessary to establish the nature and

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[679] Black in *Yorta Yorta* (2001) at 51.
[680] Branson and Katz in *Yorta Yorta* (2001) at 145, 182.
[681] Olney, in *Yorta Yorta* (1998) at 121.
[682] Black in *Yorta Yorta* (2001) at 69.

content of the native title that burdened the Crown's radical title at the acquisition of sovereignty. The judges did not believe that Olney intended to use 1788 tradition to compare with present practice as alleged by the Yorta Yorta people.[683] Nevertheless, they asserted that, even if the judge was in error in this regard, it would not have affected the determination.

They maintained that the burden of proof was with the Yorta Yorta people to demonstrate that their connection to the land expressed in traditional laws and customs had been substantially maintained. The judges shifted the emphasis of their inquiries from Olney's methods and interpretations and conclude that any errors made were the result of the Yorta Yorta people's lack of credibility and legal effectiveness. In retaining the native characteristic of incompetence to support Olney's conclusion that the Yorta Yorta people have become like Europeans, Branson and Katz condemn them as being not quite European. The Yorta Yorta people have lost their rights as natives but continue to be treated as natives.

The majority judges embraced Olney's construction of the Yorta Yorta people's legal personality then extended its effects. Initially, the judges framed their response to this aspect of the appeal within a logic similar to that which underpinned Spanish and United States justification for colonisation in America. The judges constructed the Yorta Yorta people as incompetent and unable to function effectively within European institutions. They then echoed the logic of the Spanish *Requerimiento* by attributing responsibility for the failure of the claim, not with the source of the determination but with the way the Yorta Yorta people presented their case.[684] Olney's use of the 1881 petition, submitted by the Yorta Yorta people as part of their claim, is an exemplary application of this logic.

Black criticised Olney's use of a single event, the "essentially political" petition of 1881, to demonstrate a loss of connection. He contends that tradition adapts and changes overtime and loss of connection should be demonstrated over a longer period.[685] He discussed other evidence that was submitted but apparently not taken

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[683] Branson and Katz in *Yorta Yorta* (2001) at 173.
[684] The development of the idea of native inhabitants as incompetent is discussed in chapter one.
[685] Black in *Yorta Yorta* (2001) at 59.

into account by Olney. As discussed earlier in this chapter, Olney's selection of the 1881 petition demonstrated that he only admitted evidence that supported his narrative about the 'tide of history'. Black contended that Olney's use of the petition was "indicative of the possibilities of adaptation and evolution being put to one side."[686] Black concluded that because "important aspects of the evidence that should have been, but were not, dealt with" Olney's determination cannot stand.[687]

Branson and Katz also criticised Justice Olney's use of the petition. In their opinion, although the petition supported the finding that "the petitioners had lost their traditional means of support and were turning away from traditional ways," it should have been given only a limited evidential weight. They suggest that the petition could be interpreted in a number of ways.[688] Although critical, they concluded that Olney's judgement that the Yorta Yorta people had abandoned their traditional life and not established a continuous connection was correct.[689] In support of Olney's use of historical materials, they asserted that the quantity of evidence was so vast that it was impractical for him to refer to everything in his reasons. They believed that Olney did not disregard the material that he did not include.[690]

In contrast, the Yorta Yorta people submitted that Olney failed to consider testimony from Yorta Yorta witnesses about their connection to their ancestors and the land.[691] In response, Black expressed the opinion that to make the necessary findings of fact regarding a tradition based on oral transmission, Olney should have included Yorta Yorta oral evidence to a greater extent. Black criticise Olney for dismissing Yorta Yorta testimony where it conflicted with written European historical accounts. He referred to Merkel in *Commonwealth v Ward* and asserted that oral and written histories conflict for various reasons including cultural misconceptions. Cultural misconceptions form the basis of the Crown's validity to assert sovereignty in Australia. Although Justice Brennan declared that Australian law could no longer persist with such misconceptions when rejecting *terra nullius*, Olney based his reasoning of these misconceptions. The treatment of conflicts based on

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[686] Black in *Yorta Yorta* (2001) at 73.
[687] Black in *Yorta Yorta* (2001) at 86.
[688] Branson & Katz in *Yorta Yorta* (2001) at 185.
[689] Branson & Katz in *Yorta Yorta* (2001) at 194.
[690] Branson & Katz in *Yorta Yorta* (2001) at 202-203.
[691] Howie, R. (2001) p. 227.

misconceptions is informed by the logic that place European forms above Indigenous forms of knowledge.

The Yorta Yorta people contended that Justice Olney relied on some historical materials while disregarding other materials.[692] Black responded by criticising Olney's reliance on 'untrained observers.' In his criticism he follows Olney's perspective regarding the rules of evidence, that is, that testimony must be credible and accurate to be counted as evidence. He believed that the sources Olney relied upon had their own difficulties and limitations emanating from the fact of observers "writing from their own cultural preconceptions and for their own purposes."[693] Black's criticism reflects the methodology that produced the rejection of *terra nullius*. At the same time, he retained and supported Australian law's 'skeleton of principle'. This suggests that legal inquiry can be flexible and accommodate different forms of knowledge without fracturing the 'skeleton of principle'.

In conclusion, Black was concerned that Olney had made a number of errors when making his determination of native title. He was especially critical of Olney's use of historical materials and concluded that the appeal should be upheld. He ordered that Olney reconsider the historical material submitted in the trial.[694] The majority, Branson and Katz, also found that Olney had made errors but were of the opinion that the errors would not have affected the final determination that the Yorta Yorta people's native title was extinguished by abandonment. They dismissed the appeal and restated Olney's determination in the following terms. "This loss of traditional character resulted . . . from physical separation from traditional lands following European settlement and from drastic reduction in numbers consequent upon disease and conflict."[695] The judges' conclusion reinforces Olney's narrative of 'tide of history' as both the cause and effect of cultural loss.

The two approaches produce different conclusions but are based on similar logic and work towards a similar goal. The validity of the Crown's acquisition of sovereignty and its claims to paramount lordship are supported by the recognition of native title in

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[692] Black in *Yorta Yorta* (2001) at 11.
[693] Black in *Yorta Yorta* (2001) at 55.
[694] Black in *Yorta Yorta* (2001) at 92.
[695] Branson & Katz in *Yorta Yorta* (2001) at 194.

the Murray Islands where the 'tide of history' was a modifying rather than a destructive force. The Crown's validity is expressed in its capacity to recognise and protect native title. In the Yorta Yorta people's case, the Crown's validity is expressed in its exclusive possession of the land. In closely settled areas, settlement was the instrument on which the Crown relied to legitimate its sovereign assertions. Denying Aboriginal possession, as expressed in the validation of grants in the *Native Title Act*, enhances the Crown's validity.

Branson and Katz upheld Olney's construction of the legal personality of the Yorta Yorta people's ancestors. The judges then characterised the Yorta Yorta people as lacking credibility and effectiveness in legal matters. The judges also extended Olney's reasoning regarding the modification of the Yorta Yorta people's traditional practices within the logic of early expansionism. They attribute responsibility for any errors Olney made to the Yorta Yorta people. The judges also uphold Olney's contribution to the continuing development of Australian law within the 'skeleton of principle'. Yorta Yorta ways of being remain excluded. The judges preserve Olney's validation of the Crown's claims to exclusive possession. That the Yorta Yorta claim was a threat to the Crown's validity and that the Courts responded to address that threat is made more visible in the judicial response to the appeal to the High Court.

HIGH COURT APPEAL[696]

The High Court had a number of avenues through which it could respond to the appeal. It was possible for the Court to rebut Olney's representations of the Yorta Yorta people and their social organization. Then, following Chief Justice Black's conclusions, the Court could instruct him to review his determination by including Yorta Yorta people's oral testimony and other historical materials that conflict with his narrative based on the 'tide of history'. The dissenting judges, Kirby and Gaudron, followed such an approach. They declared that Olney's adherence to this definition was an error in law. They contend that the *Native Title Act* does not require Aboriginal customs to be 'substantially maintained'. They argue that because native

[696] As demonstrated in the Mabo decision, the High Court declares Australian law. It has the legal jurisdiction to examine challenges to the Federal Court's application of the *Native Title Act* and the Yorta Yorta determination. It cannot change the *Native Title Act* itself.

title is a creature of Aboriginal custom, the main test should be whether the claimant group has remained an identifiable community. They assert that Olney had not considered that aspect of native-title law and should be compelled to do so in this case.[697] This avenue preserves the 'skeleton of principle' of Australian law by maintaining law as a dispenser of justice and equality. Instead, the majority of judges Gleeson, Gummow, Hayne and Callinan chose to preserve the 'skeleton of principle' by upholding Justice Olney's opinion and methods of inquiry.

Justice Callinan cites much of Olney's reasons in his dismissal of the Yorta Yorta people's appeal.[698] Callinan is also critical of Chief Justice Black's criticism of Olney's approach.[699] To recap, Justice Olney relied mainly on colonial evidence and only incorporated Yorta Yorta testimony to the extent that it agreed with documented settler recollections and official records. In his examination of the 'known ancestors', he exercised his discretionary power when analysing the evidence before him. In his reasoning, he relied mainly on official records and anthropological surveys. During the process of establishing the facts of pre-1788 tradition and custom, he again relied on colonial evidence in the form of early settlers' memoirs. Justice Olney limited Yorta Yorta contributions by questioning the validity of much of their oral testimony.

Chief Justice Gleeson and Justices Gummow and Hayne accepted Olney's interpretations of the evidence. They stated that the "assessment of what is the most reliable evidence about *that* subject was quintessentially a matter for the primary judge who heard the evidence. . . His assessment of some evidence as more useful or more reliable than other evidence is not shown to have been flawed."[700] In this statement, the judges support Olney's focus on the 'tide of history'. Similar to Branson and Katz, the High Court judges suggested that what ought to have been considered by the primary judge was contemplated, even though it is obvious that evidence that was contrary to the 'tide of history' was not included.[701] They retained Olney's scepticism toward Yorta Yorta evidence and appeared to maintain a disbelief that Yorta Yorta tradition could be recognisable to Australian law and that it had

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[697] Gaudron and Kirby in *Yorta Yorta* (2002) at 123, 125.
[698] Callinan in *Yorta Yorta* (2002) at 143-164.
[699] Callinan in *Yorta Yorta* (2002) at 190-191.
[700] Gleeson, Gummow and Hayne in *Yorta Yorta* (2002) at 63 [emphasis in original].
[701] See Black in *Yorta Yorta* (2001) at 73.

survived the processes of settlement. As suggested in chapter two, disbelief replaced the outright denial of *terra nullius*.

The majority judges chose to respond to the Yorta Yorta people's claim by confirming the founding assumptions that underpin the Crown's acquisition of sovereignty. These assumptions, as noted earlier, are that the native inhabitants are inferior to their European colonisers, that the Crown has the prerogative power to create the rules to establish its own sovereignty, and that the Crown's exercise of power is not reviewable without its consent.[702] By selecting this avenue of response, the judges allow the 'tide of history' to wash through their reasoning

The Yorta Yorta people criticised the Full Bench's approach and claimed that the judges applied tests that were consistent with a 'frozen in time' approach. They argued that the majority of the full bench supported Olney's method of ascertaining Yorta Yorta ancestors' tradition as practiced in 1788 then comparing it with contemporary practice.[703] In response, Gleeson, Gummow and Hayne stated in their reasons that the judges' approach was shaped by the way the Yorta Yorta presented their case. Following Branson and Katz, they maintained that the burden of proof is with the Yorta Yorta people to demonstrate their continuous connection.

On four occasions,[704] the judges discussed the way the Yorta Yorta had made their case and stated that the trial judge can only decide the matter on the evidence they provide. As noted earlier, Justice Olney claimed that much of Yorta Yorta oral testimony could not be accepted into evidence because of the rules of evidence. These rules provided Olney with the discretion to formulate his narrative of extinguishment by abandonment. Gleeson, Gummow and Hayne accepted Olney's approach as correct and swam with the 'tide of history'. They reaffirmed Olney's construction of the Yorta Yorta people as inferior and Branson's and Katz' extension of that construction to assert Yorta Yorta legal incompetence. The colonial logic that underpinned the majority judges' criticism of the way the Yorta Yorta people had

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[702] These assumptions are linked to the Petrine mandate as described in chapter one.
[703] Gleeson, Gummow and Hayne in *Yorta Yorta* (2002) at 24.
[704] Gleeson, Gummow and Hayne in *Yorta Yorta* (2002) at 13, 27, 29, 30.

presented their case flowed through to their discussions regarding the character of Aboriginal law.

After the rejection of *terra nullius* in 1992, the High Court had to acknowledge that the Yorta Yorta people's ancestors had law before 1788. Gleeson, Gummow and Hayne applied this legal requirement in an ambiguous way. The judges referred to Aboriginal law as a body of norms, or a normative system. They refer to the Indigenous normative system as "existing before sovereignty", suggesting that, although the Yorta Yorta people had a normative system, they were not necessarily a sovereign nation.[705] The justices included a discussion of some theoretical perspectives on the differences between sovereign legal systems and 'observable patterns of behaviour' but then disregarded the issue as irrelevant to the *Native Title Act*. The inclusion of this discussion, however, implies that they questioned the character of Yorta Yorta people's law but did not express their conclusions.[706] Later in their reasoning, the judges referred to 1788 as the time when sovereignty changed, suggesting that the Yorta Yorta people were descended from a sovereign people.[707]

The ambiguity in acknowledging Yorta Yorta sovereignty is reminiscent of Pope Innocent IV and Vitoria's formulations of Indian rights.[708] Where the Mabo decision acknowledges those rights, the characterisation of Yorta Yorta personality modifies them. According to the judges, before the British Crown acquired sovereignty, Aborigines had rights and interests in relation to land and waters under their own normative systems. Olney characterised the Yorta Yorta 'normative system' as barely existing in a primitive culture. According to Gleeson, Gummow and Hayne, after British sovereignty, there could be no parallel system of law-making, only British legal order.[709] As the judges stated, "[r]ights and interests in land created after sovereignty and which owed their origin and continued existence only to a normative system other than that of the new sovereign power, would not and will not be given

[705] Gleeson, Gummow and Hayne in *Yorta Yorta* (2002) at 38.
[706] Gleeson, Gummow and Hayne in *Yorta Yorta* (2002) at 42.
[707] Gleeson, Gummow and Hayne in *Yorta Yorta* (2002) at 55.
[708] See chapter one regarding the status of infidels during the Crusades and Indians during Spanish expansion.
[709] Gleeson, Gummow and Hayne in *Yorta Yorta* (2002) at 43, 44.

effect by the legal order of the new sovereign."[710] The judges froze native title rights in that moment. This statement suggests that the Yorta Yorta people are considered a subjugated people. From 1788, Australia becomes a legal void again, to be filled by colonial law. [711]

English common law and international-law rules of conquest include the requirement to maintain the indigenous legal system until it is repealed by the new legal order. It could be argued that the application of *terra nullius* repealed indigenous law. With *terra nullius* disregarded, indigenous law has never been repealed by a positive act of the colonial legislature. The other option available to repeal indigenous law at the time was for the Crown to conclude a treaty with Aboriginal nations, but this was not taken up.

Under both international law and English law at the time, the act of acquiring the sovereignty of another sovereign nation was considered an act of war. During the mediation process, some of the opposing respondents argued that the Yorta Yorta people were conquered and, as a conquered people, had lost their rights to land.[712] The respondent's power in this respect is suggestive of early feudal forms. William the Conqueror granted land to members of his conquering armies as rewards for loyalty. It is also reminiscent of George Washington's assertions regarding the legitimacy of United States' claims to Indian land. The contention that Yorta Yorta territory was acquired through conquest strengthened the Crown's claims to validity and exclusive possession in colonial law.[713]

The Crown did not formalise the relationship of confrontation and dispossession with a declaration of war. The characterisation of Aborigines as primitive, constructed on the impressions of early explorers, and the subsequent assumption of *terra nullius*, made the declaration of war unnecessary. As noted earlier, the rejection of *terra*

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[710] Gleeson, Gummow and Hayne in *Yorta Yorta* (2002) at 43. The judges describe the age-old requirement for the sovereign to have exclusive power to make, enforce and suspend laws. The High Court's contribution to the Crown's exclusive possession is discussed in more detail below.

[711] In chapter two, in the examination of the rejection of terra nullius, its was argued that the High Court left the structures the doctrine produced intact.

[712] Atkinson, W. (1999).

[713] The term 'colonial law' is used here to mean the rules that govern colonial conventions, or the unwritten law of the land. See discussion in chapter two regarding the development of Australian law.

nullius was accompanied by the rejection of such characterisations as cultural misconceptions. The majority judges maintained Olney's representations of the Yorta Yorta people's ancestors in pre-Mabo terms. Rather than consider the rejection of *terra nullius* as the rejection of such representations, the judges supported the Crown's capacity to assert sovereignty in Australia by maintaining representations of Aborigines as inferior to their British colonisers. In keeping with the logic of the Mabo decision,[714] the rejection of *terra nullius* was interpreted in this case as recognising pre-1788 Aboriginal law then confirming its immediate extinguishment.

Theoretically, that the High Court asserted that the British Crown acquired Aboriginal sovereignty suggests that either non-indigenous Australia remains in a state of war with Aborigines or that *terra nullius* continues to apply in this case. Despite implying that the British Crown acquired Yorta Yorta territory by conquest and subjugation, the judges maintain settlement as the mode of acquisition. The ambiguity within the judges' recognition of Aboriginal sovereignty maintains the mode of acquisition as monolithic - that is, incorporating the rules of conquest and settlement. As discussed earlier, this was a strategy used to enhance sovereign power. William the Conqueror applied a similar strategy to assert his sovereignty over England in 1066. He blurred the accepted legal modes of acquiring the English Crown. This lack of distinction remained in English law until the 1722 Memorandum. Then, the discrete modes of territorial acquisition it declared were only maintained for the construction of settler legal status.[715]

The need for a sovereign power to have exclusive rights to make, enforce and suspend laws and to decide the life and death of its populations has a long genealogy. The struggles between the Christian church and secular authorities over sovereignty even with distinctly drawn boundaries demonstrate the irreconcilable tensions between sovereign entities.[716] In settler colonies, the struggle is between native inhabitants and invaders. In Australia, this struggle was initially expressed in physical confrontation but now takes the form of administrative and legal battles.

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[714] See chapter two for a discussion regarding the rejection of *terra nullius*.
[715] See also the discussions in chapter one regarding the discovery of America and chapter two regarding the discovery of Australia.
[716] See chapter one regarding relations between Church and State.

To maintain exclusivity, the majority judges insist that the Crown's acquisition of sovereignty is a non-reviewable act of state.[717] Gleeson, Gummow and Hayne restated that the Crown's acquisition of sovereignty was not reviewable in the following terms "But what the assertion of sovereignty by the British Crown necessarily entailed was that there could thereafter be no parallel law-making system in the territory over which it asserted sovereignty . . . that is not permissible".[718] Non-reviewability is derived from the idea that the acquisition of sovereignty is ordained by God and not challengeable in a human court. The British Crown, through the secularisation of the Petrine mandate in the Reformation and the emergence of international law, assumes the authority that the Pope once held as God's representative on Earth.[719]

Adherence to the non-reviewability of this act of state made it possible for the judges to imagine legal significance in 1788. As Justice Olney found in the primary trial, the lack of European settlement until the 1830s presented difficulties for the ascertainment of Yorta Yorta ancestors and their traditions from 1788. The High Court did not examine the gap as an anomaly with the potential to disrupt the basic assumptions in the *Native Title Act*. Rather, it was construed as providing a space for the exercise of judicial discretion that was ultimately destructive of the Yorta Yorta claim. The judges' argument relied on the non-reviewable nature of the act of state that asserted British sovereignty in 1788 to interpret the essence of native title and the processes and procedures that determine its existence.

At the time of sovereignty, the majority of judges proposed, the normative systems of Aborigines and Britain intersected in relation to land.[720] The judges declared that native title is the product of this intersection and thereby not a creature of common law.[721] All the judges in this case accepted that native title obtains its form and content from the traditions and customs of Aboriginal tribes as they were practised at the time Britain acquired sovereignty. Although a number of issues are raised in the majority judges' reasons regarding the nature of tradition and custom, they did not

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[717] Gleeson, Gummow and Hayne in *Yorta Yorta* (2002) at 37.
[718] Gleeson, Gummow and Hayne in *Yorta Yorta* (2002) at 44.
[719] See the discussion in chapter one regarding the development of European law.
[720] Gleeson, Gummow and Hayne in *Yorta Yorta* (2002) at 31, citing *Fejo v Northern Territory, 1999.*
[721] Gleeson, Gummow and Hayne in *Yorta Yorta* (2002) at 45.

challenge this fundamental assumption made in the Mabo decision. Nevertheless, Gleeson, Gummow and Hayne insist that native title rights are the products of the acquisition of British sovereignty[722] despite Brennan's declaration that native title rights have their origins in Aboriginal society. This blurs Justice Toohey's distinction between traditional title and common-law Aboriginal title[723] suggesting that the judiciary have discretion to interpret native title to suit the demands of the case.

Justice McHugh argued that the spirit of the *Native Title Act* contained the intention that "the content of native title would depend on the developing common law". McHugh cites senator Nick Minchin, who stated in 1997 that native title "is a common law right" and is determined by common-law principles.[724] The Mabo decision was made within Australian law because that is the extent of the High Court's jurisdiction. It follows that Australian native title cannot be understood outside its legal structures, least of all within Aboriginal legal structures. Native title is part of a legal regime imposed on Indigenous people by colonial legislators. To extend their reasoning, it can be concluded that native title is a creature of colonialism that is regulated by Australian law.

The judges disowned native title by locating its source within the intersection between two normative systems. The emphasis that the judges placed on native title not being of common law[725] continues the legislature's refusal to acknowledge Aborigines common-law land rights.[726] The judges continued the exclusion strategy that Olney had established through his use of the rules of evidence. The High Court extended this strategy to construct their interpretation of native title. Aborigines' land rights remain excluded from settler land-management structures,[727] where the exercise of the sovereign's prerogative power of extinguishment can be exercised. Extinguishment can be done by a positive exercise of this power. Olney demonstrated that it can also occur through abandonment. It was suggested by Olney, Branson and Katz that the Yorta Yorta people abandoned their tradition through a positive exercise of their own power as a community. However, as this thesis has attempted to demonstrate, the

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[722] Gleeson, Gummow and Hayne in *Yorta Yorta* (2002) at 37.
[723] See chapter two regarding the rejection of *terra nullius*.
[724] McHugh in *Yorta Yorta* (2002) at 129, 130.
[725] Gleeson, Gummow and Hayne in *Yorta Yorta* (2002) at 32-35.
[726] See the discussion in chapter two on the Mabo decision.
[727] See chapter two in regard to the development of Australian law.

'tide of history' is the cumulative effects of the exercise of many sovereign powers over many centuries.

The Yorta Yorta people contended that Justices Olney, Branson and Katz misconstrued section 223 (1) of the *Native Title Act,* which defines native title. The Yorta Yorta people asserted, and Chief Justice Black concurred, that the *Native Title Act* required proof of traditions and customs presently observed, rather than those observed at the time of sovereignty. Gleeson, Gummow and Hayne devoted much discussion on the weight placed on each of the three components required in the *Native Title Act*. The judges concluded that both the primary judge and the full court were in error when they focused on paragraph (c), relating to the recognition of native title in Australian law, "to locate questions about continuity of acknowledgment and observance of traditional law and custom". They concluded that paragraph (a) was the more appropriate focus of inquiry in this case.[728] Their conclusion allowed the judges to focused on 'traditional' and what it means in determining native title.

The judges defined 'traditional' as the practices observed by the Yorta Yorta people's ancestors before the Crown acquired sovereignty.[729] They constructed a definition of tradition that supported Justice Olney's methodology. They included the oral transmission of knowledge as traditional. They contended that, while tradition refers to the means of transmitting laws and customs,[730] usually oral, they added that, in native title cases, the origins of the content of laws and customs must be found to exist before the Crown's acquisition of sovereignty. It is only those laws and customs that are traditional and they must have had a continued "existence and vitality since sovereignty."[731] The judges state that adaptation of traditional laws and customs over time is not necessarily fatal to a native title claim but they leave very little room for change. They reaffirm the effect of Justice Olney's decision that those who have lost the most due to settlement have the least to gain from native title.[732] The High

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[728] Gleeson, Gummow and Hayne in *Yorta Yorta* (2002) at 92. Paragraph (a) states that "the rights and interests are possessed under traditional laws acknowledged and traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders."

[729] Gleeson, Gummow and Hayne in *Yorta Yorta* (2002) at 46.

[730] Although it seems that this definition undermines Olney's reasoning that led him to discount much of the Yorta Yorta people's testimony, the majority judges do not disturb his determination.

[731] Gleeson, Gummow and Hayne in *Yorta Yorta* (2002) at 47. This appears to be a 'frozen in time' approach.

[732] Wolfe, P. (1999) p. 206-207.

Court's majority decision swims with the 'tide of history' and sanitises the dispossession of the Yorta Yorta people and their ancestors.

The judges' interpretation of the source of native title not only extinguishes Aboriginal law. Together with their discussion of the "inextricable link between a society and its laws and customs", Gleeson, Gummow and Hayne implied that Aboriginal society was also extinguished at the time of sovereignty. This enhances the Crown's claims to exclusive possession of Australia as sovereign. Considering the High Court's discussion of the law as reflecting society, its decision has serious consequences for non-indigenous society as well as the obvious consequences for Aboriginal communities.

Gleeson, Gummow and Hayne uphold the characterisation of the Yorta Yorta people's legal personality made by Olney, Branson and Katz. The judges assert that the Yorta Yorta people have come to resemble Europeans and as a consequence have lost their rights as natives. At the same time, the judges rely on the Yorta Yorta people's characteristics as natives to control the 'tide of history' narrative. In concluding that the 'tide of history' has washed away the Yorta Yorta people's native title, the judges condemned the Yorta Yorta people to being not quite European.

The decision maintains the Crown's exclusive possession of Yorta Yorta territory. The authority for the High Court judges to declare that the Crown's acquisition of sovereignty was not reviewable is derived from the ancient idea that the battlefield is the highest court. This idea remains unassailable in Australian law. The requirement for exclusive power to make, enforce and suspend laws is expressed in the relationships between sovereign powers throughout history. The relations produced legal instruments, including the *Encomiendo* system, the *Requerimiento*, missions, treaty-making, Cook's instructions and the *Native Title Act*. All of these instruments are part of the 'tide of history', which now includes this native title determination. The encounter between the Yorta Yorta people and the Crown has produced a legal precedent for future claims in settled areas, which maintained the Crown's exclusivity.

CONCLUSION

The Yorta Yorta people's claim for recognition of their native title was a challenge to the validity of the Crown's claim to have extinguished it. For this closely settled area, the judiciary responded by invoking the metaphor of the 'tide of history', with all its underpinnings in expansionist ideology. Within this ideology, infidel and native rights to their possessions are recognised. In the discourse of discovery, the rights of native inhabitants have been acknowledged since at least Francisco de Vitoria's lectures in 1535 and possibly as far back as Pope Innocent IV's thirteenth-century theology. It can be concluded that, the Yorta Yorta people have rights to their land conferred both by their own law and by European law.

The logic that underpins European expansion is that native inhabitants have rights but not where those rights are inconsistent with European ambitions. This logic forms the ideological base of Australian law and is expressed is the *Native Title Act.* The objective beneath this logic is to provide the sovereign with exclusive power to make, enforce and suspend law. The sovereign need for exclusivity was demonstrated in the relations between Church and secular authorities since Roman times. In settler-colonial contexts, the coloniser establishes exclusivity by invalidating the indigenous legal system at the moment it claims sovereignty. In Australia, native title rights are frozen in this moment. The recognition of those rights by Australian law is contingent upon the character of the Yorta Yorta people's ancestors.

The status of the Yorta Yorta people's ancestors as native inhabitants was constructed by the Federal Court and confirmed by the Full Bench and the High Court. The Courts' characterisation of the natives as primitive was underpinned by a similar logic as that on which Popes Gregory I and Innocent IV based their conceptions of infidels as barbarians. This logic is evident in Vitoria's construction of Indians as inferior. The logic persists and appears as the founding assumptions of United States Federal Indian law and Chief Justice Marshall's judgements. In North America, Indians were characterised as incompetent. These constructions of native inhabitants' personality underpinned their exclusion from settler colonies and the protection of colonial law.

The representations of natives as less than European exposed them to strategies and processes designed to convert them to Christianity and civilisation. Their exclusion from the protection of law allowed the cultural modification of native inhabitants to proceed almost unimpeded. The Church justified proselytization to uplift infidels and natives and bring them to the faith. St. Thomas preached the merits of labour to bring infidels to virtue. Vitoria and Las Casas contended that native inhabitants could be brought to civilisation through the infusion of European virtues and work habits. In the United States, Indians were encouraged, and at times coerced, into European lifestyles. In Australia, colonial authorities and missionaries, with the power of law behind them, sought to change the natives and restricted their observance of native customs and laws. Within expansionist ideology, as natives began to resemble Europeans and lost their character as natives, they also lost such rights as they had had as natives.

Justice Olney imposed this two-way loss on the Yorta Yorta people. He sought and found evidence of the 'tide of history' that incorporated strategies that changed Yorta Yorta people's characteristics as natives. He constructed the Yorta Yorta people as resembling Europeans and, as a consequence, disqualified them from the land rights that accompanies native status. The appeal Courts confirmed Olney's construction of the Yorta Yorta people and their conversion to European mores. By emphasising the failings in the way that the Yorta Yorta people presented their case, the appeal majority constructed them as no longer natives but not quite European either. In Homi Bhabha's terms, the Yorta Yorta people were constructed by the Courts as "white but not quite".[733]

The apparent contradiction of claiming a retreat from past injustice, while relying on its effects to perpetuate it, is rendered consistent within this logic of modification. The modification of natives' rights enhanced the Crown's claims to exclusive possession. In the Yorta Yorta case, the 'tide of history' served this function. The enhancement of the Crown's exclusive sovereignty renders benign the conception of the Crown's acquisition of sovereignty as illegitimate but valid.

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[733] Bhabha, H. (1994) p. 89.

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