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ABORIGINAL PEOPLES, COLONIALISM AND INTERNATIONAL LAW

RAW LAW

INDIGENOUS PEOPLES AND THE LAW

IRENE WATSON

ROUTLEDGE

Aboriginal Peoples, Colonialism and International Law

This work is the first to assess the legality and impact of colonisation from the viewpoint of Aboriginal law, rather than from that of the dominant Western legal tradition. It begins by outlining the Aboriginal legal system as it is embedded in Aboriginal People's complex relationship with their ancestral lands. This is Raw Law: a natural system of obligations and benefits, flowing from an Aboriginal ontology. This book places Raw Law at the centre of an analysis of colonisation – thereby decentring the usual analytical tendency to privilege the dominant structures and concepts of Western law. From the perspective of Aboriginal law, colonisation was a violation of the code of political and social conduct embodied in Raw Law. Its effects were damaging. It forced Aboriginal Peoples to violate their own principles of natural responsibility to self, community, country and future existence. But this book is not simply a work of mourning. Most profoundly, it is a celebration of the resilience of Aboriginal ways, and a call for these to be recognised as central in discussions of colonial and postcolonial legality.

Written by an experienced legal practitioner, scholar and political activist, *Aboriginal Peoples, Colonialism and International Law: Raw Law* will be of interest to students and researchers of Indigenous Peoples' Rights, International Law and Critical Legal Theory.

Irene Watson is a Professor of Law at the University of South Australia and has published extensively on the impact of colonialism on Indigenous Peoples as subject/objects in international law. She is currently working on the Australian Research Council project 'Indigenous Knowledges: Law, Society and the State'.

Indigenous Peoples and the Law

The colonial modalities that resulted in the pillaging of the 'New World' involved wholesale dispossession, genocidal violence and exploitation of their original inhabitants. It was not, however, until the latter part of the twentieth century that Indigenous peoples attained some degree of legal recognition. This book series focuses upon the manner in which Indigenous peoples' experiences of law have been transformed from an oppressive system of denying rights to a site of contestation, and the articulation of various forms of self-governance. Encouraging a range of theoretical, political and ethical perspectives on Indigenous peoples and the law, this book series aims to provide a comprehensive survey of the experience of Indigenous peoples and their changing relationship with national and international juridical frameworks.

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Raw Law

Irene Watson

Routledge
Taylor & Francis Group
a GlassHouse Book

First published 2015
by Routledge
2 Park Square, Milton Park, Abingdon, Oxon, OX14 4RN

and by Routledge
711 Third Avenue, New York, NY 10017

a GlassHouse Book

Routledge is an imprint of the Taylor & Francis Group, an informa business

British Library Cataloguing in Publication Data
A catalogue record for this book is available from the British Library

Library of Congress Cataloging-in-Publication Data
Watson, Irene (Irene Margaret) author.
Aboriginal peoples, colonialism and international law: raw law/ Irene Watson.
pages cm—(Law and the postcolonial)
Revision of author's thesis (doctoral—University of Adelaide, Dept. of Law, 2000) issued under title: Raw law: the coming of the Muldarbi and the path to its demise.
1. Aboriginal Australians—Legal status, laws, etc. 2. Aboriginal Australians—Legal status, laws, etc.—Social aspects. 3. Indigenous peoples (International law) 4. Aboriginal Australian law. 5. Philosophy, Aboriginal Australian. I. Watson, Irene (Irene Margaret). Raw law. II. Title.
KU354.W38 2015
342.9408′72—dc23
2014019031

ISBN: 978-0-415-72175–2 (hbk)
ISBN: 978-1-315-85899–9 (ebk)

Typeset in Garamond by
Florence Production, Stoodleigh, Devon, UK

To all my relations

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Acknowledgements

Much of what I have written about in this work I have lived and inherited, and during the process of writing contemporary events continued to draw me away from the task. I now look back and I see how those events have enriched and become a valuable part of 'Raw Law'. I found myself weaving them into the writing and I watched the interaction between activism, thinking and writing grow. I am grateful to all of their initiators for these diversions and wish to thank in particular Kungari, Kupa Pita Kungka Tjuta, Kevin Buzzacott, the Aboriginal Tent Embassy in Canberra, and the Chiefs of Ontario for convening the First Nations' International Court of Justice.

Throughout my life I have lived and worked with family, senior Indigenous people and elders who have shared their knowledge with me. They are many but to me each one has equal importance, bringing what they did to the way I think and live my life. I hope the ideas I have written about bring justice to their teachings. I acknowledge the stories that have nurtured my life and the oral history that my mother, aunts and uncles taught me, and the knowledges we have collectively shared as I learned to grow up a Nunga mimini – sorry business, laughter and joy. It is that spirit, which has carried this work to completion.

I had the opportunity to participate in a number of United Nations international fora in the early 1990s; I am grateful to Paul Coe for his support and I also acknowledge Sharon Venne for her generosity in sharing her immense knowledge of international law. The Chiefs of Ontario provided the opportunity to practise in this knowledge with other members and co-judges of the First Nations International Court of Justice. I am also grateful for the insights that fellow judges and those who gave evidence to the court gave me.

I would like to acknowledge the prosecutors who initiated the ACT Supreme Court Genocide case and those who mounted interventions, for the opportunity they provided me to work collectively on what began as the impossible and against-all-odds case. It had to begin because all else had failed. The experiences of the genocide case, like the First Nations International Court of Justice, are materials, which I have woven into the fabric of this work.

I am grateful to Michael Detmold for his kind and thoughtful supervision of this work when it began as a doctoral thesis. I am also grateful for the many readings and comments provided during the long and various stages of this work's development; thanks to Ward Churchill, Greta Bird, Jeannine Purdy, Mary Heath, Valerie Kerruish and Kathy Bowrey for reading and commenting on more recent drafts. Thank you so much.

Early research and editorial assistance provided by Peter Burdon, Debbie Bletsas, Eve Vincent and Simone Bignall. More recently Kate Leeson and Jo Bird's support has been most appreciated.

My husband Michael has read drafts, kept the house warm, fed and loved the children and animals; without this I could not have found the space to write, and for his support I thank him. I wrote 'Raw Law' for my daughters and grandchildren, but also for all the children: as a song and for their ongoing future relationships with all things in the natural world.

In 2012 I was awarded an Australian Research Council, Discovery Indigenous Award; this research fellowship has assisted with the completion of this book. The University of South Australia VC Development Fund is also acknowledged. I owe my thanks to Colin Perrin and the editors of this series, Denise Ferreira da Silva, Brenna Bhandar and Mark Harris, for the opportunity to publish this body of work.

I acknowledge the work of Lionel Fogarty and his permission to include in this book extracts from his poem *Imbara I am-Generation of Existence.*

A number of sections in this book were previously published and have been reproduced with permission: 'Kaldowinyeri' (1999), 3, *Flinders Journal of Law Reform*, 1; 'Naked Peoples; Rules and Regulations' (1998), 4, *Law Text Culture*; 'Raw Law', Isabelle Schulte-Tenckhoff (ed.), *Altérité et droit: contributions à l'étude du rapport entre droit et culture* [*Alterity and Law: contributing to the study of the relationship between law and culture*] (Brussels: Bruylant (2001): 367–397; 'Aboriginal(ising) International Law and Other Centres of Power' (2011), 20, *Griffith Law Review*, 619; 'The Future is Our Past; We Once Were Sovereign and We Still Are' (2012), 8, *ILB*, 12.

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Chapter 1

Introduction[1]

Much of what is written about here began at a time immemorial and when law was raw. This work tells the story of 'Raw Law',[2] First Nations law, but also the coming of the colonial project, or, as we saw it, the muldarbi. The word 'muldarbi' translates loosely as 'demon spirit', although 'demon' is an idea more familiar to non-Aboriginal religions. The context here refers to Muldarbi, an ancestor spirit who failed to uphold the best interests of the collective in relation to the natural world. I have used the term 'muldarbi' to describe the phenomenon of colonialism and the impact it has had upon Indigenous Peoples' lives, laws and territories, worldwide. This work excavates the history of the foundation of colonial states and how it is foundational not only to the laws of those states, but to international law itself. But in the unearthing of that history a focus is brought back to the fact of the still-existing, living, breathing, Raw Law. I argue that the colonial project has emerged and grown from a denial of Raw Law, constructing instead First Nations Peoples as beings without law – uncivilised and without society. The colonial 'civilising' mission was to absorb the 'native' into the society of the colonising state. That mission still prevails, but it has failed itself.

Civilisation demanded the total absorption of First Nations Peoples, but this has not occurred and across the planet more than 300 million Indigenous people have survived the genocide of colonialism. Here, I critique accounts of Indigenous Peoples' survival and make an enquiry into the future possibilities of living beyond survival, to re-emerge as we were at the first sunrise, free peoples. Perhaps at this point the reader might think of closing the book on what could be considered a romanticised utopian dream of a First Nations past and future, but that would be to commit to a renewal of the same old histories. The colonial nations have closed the book a multitude of times, ignoring Aboriginal ontologies and with that have ignored the possibility of there being other ways of knowing the world beyond theirs – a hegemonic, positivist and raced view of the world, with the planet as a commodity. White male views prevail over all other ways of knowing[3] and claim the centre from where all other ways of knowing are not only deemed marginal, but often not to exist at all.

Decentring the muldarbi

From the earliest sightings of the muldarbi, First Nations Peoples resisted the genocide and ecocide it threatened – and we continue to resist it. After more than 500 years, the colonial project is ongoing, and it is still striving to assimilate indigenous survivors into its societies. Here I review some of that long history of Aboriginal resistance, but limitations of time and space preclude a full review; moreover, there are many other authoritative contemporary histories of it. Instead, this work focuses on the resistance to the annihilation of the subjectivity of First Nations Peoples in international law. In illustrating that resistance, I have drawn from my Tanganekald and Meintangk First Nations identity. In writing myself into this work I have written in a voice that could be regarded as polemical, but this work is more than a polemic. I discuss this and the position of my voice further in Chapter 2.

Anthony Martin Fernando lived on the fringes of the colonised and settled lands of his ancestors in the vicinity of Sydney, New South Wales, in the 1860s.[4] He was of the Dharug First Nation. He later left Australia and lived the remainder of his life in Europe and Britain, and we know from archival records that he waged a campaign against the violence of colonialism throughout the rest of his life. Fernando travelled to Switzerland in 1921. On 30 June of that year he published a letter in the Berne press in which he called upon the international community to support self-governance by Indigenous Peoples of Indigenous lands. [5]

Since then, that call has been made many times by many other people, but in spite of its urgency and importance, the calls have almost always been ignored by the international community. In the 1970s, the United Nations was approached by members of the American Indian Movement from Turtle Island,[6] requesting that the situation of First Nations Peoples and the genocide, which was a fact of their lives, be placed on the UN agenda. At the same time but in another place – the 'Indigenous Australian' context of the 1970s – 'Aborigines' were coming out from under the oppressive regimes of the Aborigines Acts of the various Australian states. The Aboriginal Tent Embassy had been created in Canberra in 1972, and the struggle for land rights and self-determination was proclaimed by a growing number of First Nations Peoples across Australia. In response to those demands, the Australian states came up with various laws and policies supporting 'Aboriginal recognition'. However, recognition by the coloniser of the colonised inevitably reinstates colonial law and remains holding the colonised captive.[7] The illusion of recognition works its power so as to conceal the ongoing character and intent of the colonial project – that is, to maintain hegemony and do nothing about returning balance and power to the colonised. First Nations Peoples' experience of colonial recognition is the recognition of our sovereignty only when that recognition enables the 'native' to transfer our sovereignty, our territories and natural resources. Recognition only falls to First Nations at the moment we become dispossessed, by way of transferring our sovereignty to the colonising

powers.[8] The muldarbi only allows for the recognition of 'cultural' differences where there is no threat to its hegemony, the hegemony of the state. And where Indigenous Peoples' relations to the natural world intervene and are in the way of the development agenda of a state or corporation, the idea of 'cultural recognition' is shrunk back to whatever fits with and is accommodated by the proposed development. In denying Indigenous relations to land, the state denies the authenticity of these relationships. White experts and anthropologists are engaged by the state to 'test' native authenticity; I discuss this further in Chapters 5 and 6. In the colonial purview, recognition can only become the recognition of colonial power. The First Nations context is different. Power to damage or kill ruwe and or people is against our law and is a muldarbi translation of a First Nations' idea of recognition. I discuss this further in Chapter 7.

The Australian Commonwealth and its constituent states all provided their own interpretations and translations of the meaning of 'land rights' and 'self-determination'. The states translated 'land rights' in the context of the natural resources boom starting at that time and 'self-determination' as being concerned with transforming Aboriginal individuals as replacements for the colonial mission managers of the past. State policy was (and remains) all about co-opting Indigenous Peoples and individuals into the colonial project. The states took an Indigenous bid for freedom in the form of land rights and self-determination and subverted it back into the process of assimilating the 'native' into the colonial project, or business as usual. This was manifested in the establishment of the Aboriginal and Torres Strait Islander Commission (ATSIC). With ATSIC, 'self-determination' became the management of colonialist policy by indigenous people for Indigenous Peoples. We also saw the creation of 'native title' by way of the *Native Title Act 1993* (Cth).[9] Native title was a superficial recognition of Aboriginal relations to land in one move and the extinguishment of that recognition in the next. Both ATSIC and native title were 'gammon'[10] acts of recognition, and these gammon actions continue, despite the tenacity of Indigenous Peoples' resistance.

The states remain at the helm, holding power by force – but not by law. Power continues to be wielded by all the colonial states who work together in the translation and interpretation of Indigenous Peoples' rights; they ensure that we remain objects in international law, subjugated to their power. In Chapter 3, Arabunna elder Kevin Buzzacott gave evidence before Justice Crispin in the genocide case, *Nulyarimma*,[11] in which the tension between the state and First Nations' legal and political systems was highlighted. In that conversation Buzzacott clearly enunciated his obligations to Arabunna law and country, which were to ensure they remain intact and not absorbed or assimilated into a white way of knowing the world.

As part of the resistance to the demise of First Nations projected by the colonial powers, a global movement emerged in the 1970s demanding change. Calls for change were interpreted by the UN and its institutions as an opening

for the development of international standards to protect Indigenous Peoples' rights in law and life. This culminated in the 2007 *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP).[12] However, the UNDRIP was not the outcome First Nations' advocates had intended when in the 1970s they first engaged with the UN.[13] What began as a positive attempt to shift the balances of power from their centres in the colonial states ended with no shift, nor any possibility of a shift in power occurring. While Article 3 in the UNDRIP recognises Indigenous Peoples' right to self-determination, the body of UNDRIP limits self-determination to that which the state concerned will allow or enable. Article 3 is 'gammon' self-determination and UNDRIP has ended up no more than a pragmatic and empty gesture, which has altered nothing in the world of First Nations' and colonial state relations. As an effective instrument UNDRIP is impotent, unable to be used in moving anywhere or shifting the matrix of colonial power. UNDRIP has been held out as remedy against genocide; however, it is a weak remedy,[14] and those limitations are discussed further in Chapters 5 and 7.

A further United Nations goodwill mission and promises now follow on from UNDRIP in the form of the UN World Conference on Indigenous Peoples.[15] It is not a real UN conference; it is actually a high-level plenary meeting (HLPM) and the states are not compelled to attend. The HLPM is shaping up to be another 'gammon' event, promising much and delivering very little. Perhaps it is another of those hopeful moments as we have had in the past, which have not only led us up the path to nowhere but over the cliff – into the oceans of assimilation. It is forecast that the HLPM will be no more than a performative event,which will provide the states with another opportunity to take a bow and congratulate themselves on more than 500 years of successful colonial machination. The planning for this event was done without Indigenous Peoples globally being fully informed, or given a proper opportunity to consider its merits or otherwise. Thus, they have not been able to determine whether to attend it with full and proper participation. The flaws in the process of preparation for the HLPM were highlighted when the North American Indigenous Peoples Caucus withdrew.[16] At the time of writing, other UN-designated Indigenous global regions' caucus groups are still considering their options to withdraw or to stay in the process. Australia has been relegated to the 'Pacific region'. Meetings of the caucus are held away from the Australian mainland; this makes access to any meeting difficult to resource and attend. The question to ask is perhaps: are the UNDRIP and the planned HLPM merely performative illusions that have been devised to 'pacify and tranquilize' the 'natives' into an acceptance of the situation.[17]

First Nations at the centre

This work is drawn from Aboriginal ontologies about the origins and intentions of law. It retells perspectives that I have grown up with and

gathered from relations, elders and First Nations Peoples.[18] Our First Nations' legal systems are embedded in our relationships to the natural world and that which I have described as Raw Law: a natural system of obligations and benefits, flowing from an Aboriginal ontology. I discuss Raw Law further in Chapters 2 and 3. The West no longer has any concept of the natural world as a relation. The West is obsessed by dreams of wealth and fuelled by a colonial history, which justified and constructed international law out of the dispossession and genocide of Indigenous Peoples. The millionfold crimes of colonialism were legally sanctioned and normalised by international law, while the ways of First Nations were demonised and deemed to be in need of extermination, or at least civilising, changing and assimilating. That colonial history has been one of denying First Nations' identity as subjects of international law.

The myth of colonialism is that it carried with it and applied sovereignty. The truth is that state sovereignty was claimed and constituted through colonialism.[19] It is from an Aboriginal ontological perspective that this work assesses the legality (or otherwise) of colonisation. Within the horizon of Aboriginal law, instead of the dominant Western legal framework, there is a different assessment. This work decentres the usual analytical tendency, which privileges the dominant structures and concepts of Western law and places Raw Law at the centre of an analysis of colonisation. From the perspective of Aboriginal law, colonisation was a violation of the code of political and social conduct long embodied in Raw Law. Its effects were damaging. Though this is well known, Western liberalism rarely addresses the intersection of settler and Indigenous Peoples' worlds, nor differences and conflicts in which law and policy get played out.[20] This work examines those spaces.

While this work is about the global colonial project, much of it takes its cue from the standpoint of Indigenous Australia. And while there are differences in the way the colonial project impacted across First Nations territories in different parts of the world, there are more commonalities than there are differences.[21] Indigenous Peoples' territories everywhere were and remain the focus of colonial desires. In satisfying those desires, the colonial project deployed the same techniques over and over when securing and gaining control over other peoples' territories. The 'Doctrine of Discovery' colonising myth was constructed to legally justify the dispossession and genocide of First Nations from their territories. Culturally, Indigenous Peoples became 'known' to the West as backward savages. When it came to Indigenous Australia, the British used another legal fiction, terra nullius – the myth of a land empty of peoples, laws and systems of governance to colonise. The end result was the same; these myths both worked to construct and constitute colonial sovereignty and unlawful foundation. The cultivation of the land formed part of the colonial argument supporting the legitimacy of its foundation to come. The writings of the Swiss philosopher and international law theorist Emer de Vattel in the mid 1700s were influential in establishing

a justification for the dispossession of hunter-gather peoples; he argued that peoples had the obligation to cultivate a territory's soil before they could claim sovereignty over it.

Baron de Montesquieu regarded the cultivation of land and the institution of private property as being the foundation of nationhood,[22] but these ideas were alien to the Aboriginal ontology, which knows the relationship between human and ruwe[23] as our identity as Peoples. The colonial project is a different way of being in relation to ruwe and law. Our First Nations world became colonised and 'worlded' with other ways of knowing law. Those ways became the dominant order. Our ancient ruwe and lives became a blank canvas, a terra nullius space on which the coloniser projected its own images. Their 'new world' fantasies would appear and become reality for all beings, including the natives, the flora and the fauna. It was necessary to the 'new world' to deny that First Nations Peoples held ancient relationships to their lands or, in the special case of Australia, that we ever existed.[24]

Colonial sovereignty and colonial legal systems were created to account for relations between the European and First Nations,[25] and the First Nations territories deemed without law and society were filled with them. Meanwhile, an evolving international law constituted by colonialism padded relations between the rival colonial powers. To conceal its evil intent, colonialism was badged as a civilising mission, a mission to convert savagery into the universal civilisation of Europe. Antony Anghie argues that the colonialists used difference as a wedge between cultures, demarcating between 'universal' and 'civilised', 'particular' and 'uncivilized'. The colonial project was intended to 'bridge the gap' by civilising the uncivilised.[26] Remarkably, contemporary Australian politics uses the same rhetoric: the current policy is called 'closing the gap'.[27] It is a popular, 'well-intentioned' policy to bring Indigenous Peoples up to speed and to improve the dire and shameful state of Indigenous health, unemployment, education and poverty. However, nowhere on the radar, anywhere, is there a conversation about reversing First Nations' dispossession and genocide.

The unmaking of First Nations' sovereignty was justified by the colonial settler construction of the savage and international law recognised only by those states considered sufficiently 'civilised' for inclusion into the 'family of nations'.[28] In the late nineteenth century, positivism replaced naturalism as the principal jurisprudential technique of the discipline of international law.[29] Positivists engaged in the subordination and exclusion of the 'native', and their thinking can be identified in the modes of justification developed in international law for the acquisition of First Nations' territories.[30] In the shift to a positivist world view, law was created by 'civilised' human societies and their institutions, but the native was nowhere included.[31] The positivists' concept of society enabled colonialists to negate the fact that First Nations had indeed been regarded as sovereign.[32]

The colonial paradigm that emerged was of a European civilisation presiding over the exclusion of all other ways of being in the world, and the universalisation of an international law founded on that same illusion. The colonial project now archives an historical narrative where Europe is the subject of sovereignty and non-Europe the object of sovereignty. The dominant conceptual framework is of a non-European world written about as the object of the disciplines of history and anthropology, and the ultimate absorption of that object into the European world order, in order to progress towards the ultimate point of acquiring sovereignty.[33] But in that framework and equation and the efforts installed to erase First Nations, does sovereignty ever arrive? And why is the discussion about a sovereignty to come when First Nations have always been sovereign?

Our exclusion from being known as subjects in international law is fuelled by ideas of savagery. Robert Williams Jr argues that without the idea of the savage, the West would not have been able to invent itself; the idea of savagery is perpetuated by the West as a justification for colonial foundation.[34] In becoming the object of colonial desires for expansion, territories and natural resources, First Nations were murdered, and their peoples enslaved, debased and incarcerated. And our colonial histories have been very long.[35]

More than survival

In Chapter 6 I explore the possibility of place away from the genocide and a future for First Nations Peoples beyond annihilation and assimilation. While the recognition of the human rights of the vulnerable may sometimes ease the muldarbi threats of genocide, they do not stand as a resolution because they are unable to dismantle the muldarbi and its mechanisms of reproduction.[36] And while human rights might serve First Nations as some protection from the worst aspects of genocide, that same recognition reinscribes muldarbi power because it enables our further regulation through muldarbi processes.[37] This is because the muldarbi badges liberal universalism as the basis for human rights and in doing so it prolongs the terror of the 'wronged victims' as never being able to help themselves. First Nations are stereotyped as never ever existing in any way other than as objects in need of christian mercy and salvation. I discuss the tensions that arise from colonial constructions of the native further in Chapter 5.[38] And in our desire for justice it might be thought that justice had arrived. However, many of these gestures are no more than a performative illusion, installed to 'pacify and tranquilize' the 'native' into an acceptance of the situation.[39]

In the United States, the law of extinguishment is also embedded into discourses of native recognition. While the focus of this work is largely on Australia, there are strong parallels in the approach the colonial project has taken globally. The extinguishment approach was adopted in *Mabo (No. 2)*

in Australia. The idea of extinguishment of First Nations Peoples' relationship and connection to the land is an idea that is alien to an Aboriginal ontology. There is no rule that would enable the extinguishment of the law and/or the extinguishment of our relationship to our ancient territories. Aboriginal peoples could not hand over authority and our responsibility for the land; there can be no agreement to enable, for example, uranium mining and nuclear waste dumps, and other harmful developments. These developments would be agreements against Raw Law.

Decolonising the colonial project is a way out of the matrix of colonial power; the question is how this might proceed. Many First Nations have started the process, and part of that process is a decolonisation from the colonial mindset. This involves resistance to the ongoing colonial project, which is ingrained within the education, languages and mass culture of the colonial state. It is a resistance to further assimilation into the mind, body and psyche of the state. The idea of naked peoples is about being rendered naked of the colonial legal system, and building resilience and the capacity to shed the colonial 'cloth' and the many layers of colonialism. I discuss these ideas further in Chapter 4.

This work interrogates the violence of colonialism and moves beyond the simplistic slogans that are directed at First Nations in common, the calls to 'get over it' and 'move on'. But in moving on and getting over it, what is never really understood is that which has to be got over – that is the intergenerational impact of colonialism, which is a phenomenon that has never ended. The question in respect of the call to 'move on' is this: where is there to move on to? This work critically engages contemporary calls heard across Australia and beyond for the First Peoples to 'move on' and 'get over it', in an attempt to tease out the whole matter. This is a conversation that calls for a mindful approach. The death of the native is no future resolution for either the native or the west, or the rest who call themselves non-native.

Notes

1 This work began as a doctoral thesis, 'Raw Law: The Coming of the Muldarbi and the Road to its Demise'. The doctoral thesis was awarded by the Faculty of Law at the University of Adelaide in 1999. Muldarbi means 'demon spirit'.
2 Raw Law is what I have described as a natural system of obligations and benefits, flowing from an Aboriginal ontology. The metaphor 'raw' is used to describe Indigenous laws and to draw a connection to pre-invasion identities as naked peoples.
3 Aileen Moreton-Robinson, *Talkin' up to the White Woman* (University of Queensland Press, 2012).
4 Fiona Paisley, *The Lone Protestor, AM Fernando in Australia and Europe* (Aboriginal Studies Press, 2012).
5 A letter written by Anthony Martin Fernando, 'A Call for Help from Australia' was published in *Der Bund*, 30 June 1921, cited in Fiona Paisley, *The Lone Protestor: AM Fernando in Australia and Europe* (Aboriginal Studies Press, 2012), 54–55.
6 Great Turtle Island has become more commonly known as including the colonised territories appropriated by Canada and the United States of America.

7 Elizabeth A. Povinelli, *The Cunning of Recognition: Indigenous Alterities and the Making of Australian Multiculturalism* (Duke University Press, 2002), 268.
8 Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press, 2008), 105.
9 For discussion on the limitations placed on Indigenous self-determination and land rights, see Irene Watson, 'Sovereign Spaces, Caring for Country and the Homeless Position of Aboriginal Peoples' (2009) 108 *South Atlantic Quarterly* 27.
10 Gammon means to make out something is what it is not.
11 Re *Thompson*; *ex parte Nulyarimma* (1998) 136 ACTR 9.
12 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295 107th Plen Mtg, UN Doc A/RES/61/295 (13 September 2007).
13 Sharon Venne, 'The Road to the United Nations and Rights of Indigenous Peoples' (2011) 20 *Griffith Law Review* 557.
14 UNDRIP; for an early critique of the draft declaration, see Colin Perrin, 'Approaching Anxiety: The Insistence of the Postcolonial in the Declaration on the Rights of Indigenous Peoples' (1995) 1 *Law and Critique* 55, and discussion on the problematic for the West in locating Indigenous Peoples.
15 Although it has come to be known as the World Conference for Indigenous Peoples (WCIP) the WCIP is actually designated as a high-level plenary meeting (HLPM) of the UN General Assembly. A HLPM session differs significantly from an event designated by the UN as a WCIP, including financial support, prominence of the event and the number of representatives able to attend. The HLPM was planned to be held in September 2014; one outcome planned was to produce an outcome document. However, the process has failed to engage the full participation of Indigenous Peoples in the production of an outcome document; instead, the UN and the states have dominated the process. First Nations expected the opportunity to address the UN and its vital organs on our current position regarding the ongoing colonialism. That opportunity will not happen because the HLPM allows for a mere 180 minutes of UN time to consider how they might advance the limited opportunities to which the UNDRIP provides. At the time of writing, March 2014, the meeting was yet to be held and many First Nations had called for a cancellation of the meeting.
16 See *Call for the Cancellation of the United Nations HLPM/WCIP* (North American Indigenous Peoples Caucus, 3 March 2014), available at: www.youtube.com/watch?v=iUgTgB771ks&feature=youtu.be.
17 Oscar Guardiola-Rivera, 'What comes after Sovereignty?' (2010) 6 *Law, Culture and the Humanities* 191.
18 I use the following terms 'First Nations Peoples' and 'Indigenous Peoples' throughout this work. First Nations and Peoples are terms known to and used by Indigenous Peoples. I refer to Indigenous Nations as being 'geographically bounded territories of a common people' and that a nation is made up of communities of people who see themselves as 'one people' on the basis of common ancestry, history, society, institutions, spirituality, language, territory, and distinguish themselves from adjacent and distant peoples and countries.
19 Anghie, above, n. 8, 38.
20 Morgan Brigg, 'Biopolitics meets Terrapolitics: Political Ontologies and Governance in Settler-Colonial Australia' (2007) 42 *Australian Journal of Political Science* 404, 403–417.
21 There are similarities as to the impact upon Indigenous Philosophies on relations to land – see Eric Cheyfitz, 'What Is a Just Society? Native American Philosophies and the Limits of Capitalism's Imagination: A Brief Manifesto' (2011) 110 *South Atlantic Quarterly* 291, 296.

22 Robert Williams Jr, *Savage Anxieties: The Invention of Western Civilization* (Palgrave Macmillan, 2012), 206–207.
23 Ruwe means the territories of First Nations Peoples.
24 Jodi Byrd, *The Transit of Empire: Indigenous Critiques of Colonialism* (University of Minnesota Press, 2011), 64–65.
25 Anghie, above, n. 8, 3.
26 Ibid., 4.
27 Close the Gap policies exist at both commonwealth, and state and territory levels. In his introduction to the *Closing the Gap* report, Prime Minister Tony Abbott writes 'for the gap to close, we must get kids to school, adults to work and the ordinary law of the land observed. Everything flows from meeting these three objectives.' See Department of the Prime Minister and Cabinet, *Closing the Gap: Prime Minister's Report* (2014), 1.
28 Anghie, above, n. 8, 29–30.
29 Ibid., 33.
30 Ibid., 36.
31 Ibid., 55.
32 Ibid., 5, 99.
33 Ibid., 102.
34 Williams, above, n. 23, 223.
35 Byrd, above, n. 25, 12.
36 Wendy Brown, 'Suffering Rights as Paradoxes' (2000) 7 *Constellations* 231, 230–241.
37 Ibid., 232.
38 Drucilla Cornell, *Defending Ideals: War Democracy and Political Struggles* (Routledge, 2004), 104.
39 Oscar Guardiola-Rivera, 'What comes after Sovereignty?' (2010) 6 *Law, Culture and the Humanities* 191.

Chapter 2

Kaldowinyeri

Kaldowinyeri is a concept, which is difficult to translate, but in part it means 'a long time ago, the beginning of time itself'; the word originates in the languages of the First Nations Peoples of the Lakes and Coorong region in the south-east of South Australia. It is also the place where I belong. I belong to the ruwe of the Tanganekald and Meintangk[1] First Nations Peoples who at Kaldowinyeri arrived on the oceanside of the Coorong, singing their arrival in the following tunjari:[2]

Guru'nulun 'and 'wardand 'wanunj ganji
'goronjkanjal 'lei a' meinjg 'nainj'gara'nal
'guru'nulun 'and 'wardand 'terto'lin
(h')end 'barum ai! 'walanjala talanja'leir
r'einamb 'maranj'gara'nal.[3]

The tunjari sang the law into being. Kaldowinyeri was a time when song, stories and law were birthed, as were the ancestors – out of the land. The old people heard the crashing sound of the ocean and the sound made them frightened as they hesitated and stood still. Some wanted to return to the north, but they agreed to stay and settle down. One of our old people called out Tanjo'walo'njan – 'what will you do now?' The call brought our peoples – the Tangane – into existence, and today we again face this question: what should we do now? The 'doing' is to reposition our 'lawful being', and to reassert a Tanganekald and Meintangk Peoples' way of knowing the world from within a space that is occupied and dominated by the colonisers' legal history with its foundation of terra nullius.[4] We are occupied by a colonising terra nullius space which is being emptied of First Nations Peoples' ways of knowing and living in the world. It is a space in which our laws are taken to be 'myth' or non-existent, and our being as originating from some other place. First Nations Peoples continue to resist theories that work to exclude and delegitimise our ancient relationships to the natural world, a world of which we as humans are a part of the whole and not the whole itself. For example, the European idea that First Nations Peoples crossed ancient land bridges to

arrive at their territories works to break our connections to country. It is an explanation, which runs counter to First Nations' understandings, belonging and connections to place.[5]

Raw Law

Our First Nations ancestors were once naked. I see a connection in that with our sung laws and the land, all of which are also naked or 'raw', undressed from the baggage of colonialism. From my Tanganekald and Meintangk standpoint, what I know as law, what I have named 'Raw Law', is unlike the colonial legal system imposed upon us, for it was not imposed, but rather lived. It is a law way, which emanates from the ruwe and connects the collective or mob[6] of First Nations Peoples. Knowing law through living, it is different from colonial manifestations of law. The First Nations' view of law now has little place in which to live and living law as a way of life is no longer a possibility or an experience known to the greater part of humanity. The greater part of humanity has come to know 'law' as a complex maze of rules and regulations while the body of Raw Law is being buried beneath muldarbi layers of colonialism.

Many of our First Nations legal systems are embodied in stories and songs. Our ancient laws were not written down; knowledge of law came through living, singing and storytelling. Law is lived, sung, danced, painted, eaten and in the walking of ruwe. Law inheres in all things and is alive in all things, but these days it is an ongoing struggle to keep many things alive in the face of the attempts to bury our law ways as a part of the ongoing colonial project.

First Nations laws are still in conflict with the imposed colonial legal system; in the past our old people struggled and many of our people today continue to struggle against colonialism. In particular we struggle to keep the body of First Nations law alive for future generations. We keep a view of law, which lives in all things and emanates love, caring and sharing, and respect for all things in the natural world. It is a view of the world that supports the capacity of peoples to care for country and all our relations, including those we have with the animal, plant and broader natural world. In pre-colonial times the natural world was 'undeveloped', not because of an inability to transform the ruwe, but because of a relationship of connectedness with all things in the natural world. Those safe and harmonious relationships were maintained by, for example, fire management, fish farming and other sustainable practices that worked with the natural world rather than changing and fundamentally altering that natural world order.

In this work I use the metaphor 'raw' to speak of law and to draw a parallel with my ancestors who were naked people. Prior to colonisation the ancestors lived from birth until death as naked peoples. In death, our naked bodies were rolled in a woven grass mat, smoked and later buried. Only the skull of an ancestor was retained for the living to drink the water of life from.[7] Many of

us remain naked, not all the time physically, but spiritually, and we struggle to remain undressed of colonialism and all that would cover over our naked selves and our ways of knowing.

Throughout this work, I use the term 'colonial' in preference to 'post-colonial'; this is because the position of First Nations Peoples in relation to the colonial project has not shifted. It is still a relationship of conflict. Colonialism seeks the subjugation of our First Nations identity and we resist it.[8] While I acknowledge the relationship between colonialism, imperialism and capitalism, I privilege the term colonialism because it retains a reference to the 'invasion – colonisation – settlement' event. This has not ended; indeed, it carries the same power, force and intent of the 1788 invasion of Australia. So while the term 'post-colonial' is used to illustrate conditions that arise out of colonialism, its use does not negate the fact that the phenomenon of colonialism remains ongoing. A major objective of the ongoing colonial project is to annihilate the core identity of First Nations Peoples and smother our relationships to law, land and the natural world. Those relationships become 'dressed' and subjugated to the rules and regulations of the laws of the colonial state. The colonial project raises important questions for First Nations' understandings of ourselves and our futures: when the laws of naked peoples are dressed in the laws of the colonisers, what do we become? What happens to our naked identity? Are we still naked under the layers of colonial laws and does First Nations Peoples' law maintain its naked self under the layers of colonial rules and regulations? I will consider these questions throughout this work.

We are related to the natural world

The ancestors – human, animal and plants – are our relations and connect us to law and Kaldowinyeri. A relationship that links us to the past is a connection that is lived in the present and to be recreated in the future. This is the cycle of our ancestors; it is their path or journey, and we continue that walk from Kaldowinyeri. We will continue that walk, for it is a way that the people of the future may just come to understand and reckon with – many now are looking for ways of living beyond that of 'possessive individualism'. In a conversation between Judith Butler and Athena Athanasiou on settler colonialism, both considered whose interests were served by a 'possessive individualism' in respect of land. They also considered whether a 'possessive individualism depended on a disavowal of more primary social, dependent, and relational modes of existence'.[9] Does individual possession of land ownership cancel out other ways of being? I think it is obvious: mostly it does – this is while many First Nations Peoples successfully hold on to a relational philosophy.

Relational philosophy is embedded in Indigenous knowledge systems; 'knowledge belongs to a people and the people belong to a landscape'.[10]

Indigenous knowledges, unlike those of Europe, carry obligations and responsibilities, such as custodial obligations to ruwe that bind future generations. There are a number of other philosophical differences and those differences present problems for entering into a communication or dialogue with the non–Indigenous world. The following examples illustrate some of those differences:

Indigenous	*Non-Indigenous*
obligations to renew land	land ownership
balance and renewal	progress, accumulation, control
lateral thinking	linear thinking
consensus	hierarchical patriarchy
reciprocity	one-way exchange
justice, harmony	adversarial punishment
relationships	binaries
eternal time	linear or machine time

Relational philosophy is found in our stories. The Seven Sisters story, song and ceremony lives in the land and lives of women who still know the ancestors and are still talking with them, even though the sisters live in the constellation of stars known as the Pleiades. The sisters travelled throughout the galaxy and landed on earth, leaving holes to mark where they had landed. Travelling across the desert they came across a wild fig tree that was full of fruit, but they passed over that tree, because there was a man waiting to grab them and the sisters were aware of this, 'old lover boy, they call him – so they walk past and stop at a funny little tree with no leaves and just a little fruit'. The sisters also pass on green grass and a waterhole, instead stopping to drink at a muddy, dirty puddle of water, and sit under a stunted tree casting a small circle of shade instead of a cool, shady spot.[11] This was all to avoid 'old lover boy'.

It is our practice to avoid referencing songs and stories that have not previously been published because of the obligation to keep oral traditions and their interpretation in the hands of the storyteller. In our way the story belongs to the storyteller and cannot be told by others without permission. The retelling of stories outside this context has the potential to erode oral traditions and the protection those traditions afford to the integrity and maintenance of the story. Colonial legal systems, both international and domestic, and their intellectual property laws do not protect law stories. It is not usual practice for the custodians to give permission to publish one small part of the Seven Sisters story, and the public telling of this story was originally a response to a proposal to develop a nuclear waste dump on the lands travelled by the Seven Sisters. Often the pressure to protect country will draw stories of country into the public domain for the purpose of protecting

and caring for country. It is important to note that law songs or stories are often multilayered – that is, an initial layer may be presented to the public, but the story is further layered by dimensions, which are private or secret and sacred. So, while this story is now in the public domain, it continues to have embedded layers of knowledge that will remain within the realm of the secret, sacred business of the owners of that knowledge. The country where this part of the Seven Sisters song lives is in a region known as Billa Kallina,[12] a place where the Australian federal government proposed the development of a nuclear waste depository. The Seven Sisters' custodians explained that the story was ancient and of the land, and is about how life in the desert is hard but sustainable if you are very smart and settle for less. At the time the story was told, the Seven Sisters' custodians and members of the Kupa Piti Kungka Tjuta were working to protect the site. Currently, the Billa Kallina site is no longer threatened. However, the federal government plans to develop another nuclear dump site, in the Northern Territory.[13]

Many Nungas[14] believe we are descended from beings of Kaldowinyeri; they are our ngaitji. Our ngaitji represents the relationship or kinship we share with our surrounding natural world. It is a relationship, which teaches us about the unity we share with all natural things. At Kaldowinyeri, the ancestors were human, animal and plant, and the relationship between humans, animals, plants and the environment is our ngaitji relationship, for we are kin. This relationship affirms our connectedness and relationship to the natural world. From our ngaitji we learn about the interconnectedness of all life and the earth, and are reminded that humanity is just a small part of the overall fabric of life and the natural world. The ngaitji relationship determines the inter-relationships between human and other natural forms, while humanity's relationship to the natural world is brought to our awareness through song and stories.

For First Nations Peoples, ownership of the land is an alien idea. In capitalist thought, ruwe becomes 'property', a commodity, which can be traded or sold. The Nunga relationship to ruwe is more complex. We live as a part of the natural world; we are in the natural world. The natural world is us. We take no more from the environment than is necessary to sustain life; we nurture ruwe as we do ourself. Settler societies have lived on Nunga lands and taken more than is needed to sustain life and the result, as we know, is the depletion of ruwe and the exhaustion of natural resources. Colonialists consider the land as belonging to them. This is a different idea from that of belonging to land and having a kinship or ngaitji relationship to it. When Nungas approach ruwe we often talk to the spirit ancestor of the place. We will tell the ancestors who we are and also who we might have brought with us to the place. We seek permission from the ancestors for our actions; nothing is assumed. When we take food from the ruwe, we give thanks to the ancestors as a sign of respect and blessings for the future generations to come.

Being of cycles

Kaldowinyeri, or a long time ago, in the beginning, is also the time now, and time into the future. The beginning, the present and the future encircle the place of Kaldowinyeri. The Nunga 'I am' is not like the other, dominant Western subject of being, which is represented by a straight line of thought – beginning, middle and ending. Instead, a Nunga process encircles; within there is a process that allows a person to become one and to begin again. This process is non-hierarchical and non-linear; rather, it takes the form of a cycle, of the continuity of being, becoming another cycle, nurntikki.[15] Many Nunga Peoples have never left nature time: a time in which the 'old people' – the elders and the ancestors – lived by the seasons and moon cycles. Many still live by these rhythms and co-exist with the imposition of the clock. The law way of Nungas is not in the past; it is a way of life carried with great struggle into the present, and I argue in this work that Raw Law is the way back to the future and to Kaldowinyeri.[16]

Our Nunga law ways are still with us but they are suppressed by the Australian state. We are like the animals in the story of the greedy frog struggling to bring water back to the land. The frog story tells of a time when a giant frog drank up the water until the land was all dried up and in drought. To survive, the collective of animals agreed it was necessary for the frog to release the water it had drunk back on to the land. They decided that the strategy most likely to succeed was to make the frog laugh; by laughing the frog would release the water. After many attempts at humouring the giant frog, the animals succeeded and the frog let forth a large laugh and with it released the water back on to the dry lands, filling up lakes, creeks and riverbeds. As a future precaution, the animals then decided that they would prevent the event occurring again by reducing the power of the frog. So, instead of there being one giant frog, many smaller frogs were created and the frog was never again in a position of power to monopolise the land's waters. This frog remains relevant to our colonial present as this same behaviour can be seen in those tyrants who hold power to dominate many regions of the world. The frog today can be seen, for example, in the body of a transnational mining company, mining for uranium. There is a mine in a very fragile area of South Australia in one of the driest regions of the world.[17] The regional underground artesian water supplies have been threatened by the mine's vast thirst for water. While the animals faced off the giant frog in Kaldowinyeri, the relatives of those ancestors similarly resist greed and are challenged today. Today resistance is mounted against colonialism and state-backed multi-national corporate power. The ancestors are in a constant state of being, knowing the world as at Kaldowinyeri, being immersed in the law and ceremony of Kaldowinyeri, knowing it in all the places it takes form – in the body of law, land and peoples. We come back into the future, to where we began at Kaldowinyeri to begin another cycle, and we are met by the ancestors to begin all over again.

In general, in the dominant tradition of non-Aboriginal thought, time proceeds in a straight line, travelling from a to b. Thinking in terms of space limits the movement of persons from a to b. Time in most non-Aboriginal thought is viewed as existing in a separate dimension relative to space. In general, in a Nunga perspective, time and space are encompassed within a circle of becoming. We are always returning to the beginning and are walking into both the future and the past; time and space are encompassed and encircled as one. There is no hierarchy that evolves from the circle. Likewise, also in contrast to the model of majority over minority rule, decision-making in many First Nations societies is consensual. There was often no concept of majority rule, because the objective was not to find the most popular decision; the decision that best maintained the harmony of the natural world was the one adopted. Within the circle, all life forms are equally valued; there is no hierarchy separating humanity and the natural world. Consequently, the natural world has a voice.

Similarly, the cycle of being does not support the idea that, for example, a god gives 'man' dominion over the natural world.[18] The history of Western thought has marginalised 'natives', animals, plants[19] and all things of the natural world. The question of being was no longer relevant when science became the dominant paradigm.[20]

Being is a continuous cycle; being always returns to become another, returning to its beginning, past, future. This process cannot be extinguished; it is the law. While colonial societies direct that Nunga processes and structures can be extinguished, those Nunga processes or ways will always exist in the natural world and for those who live with those laws and views of the world. A colonialist view privileges ideas on 'progress'.

When I began writing this text the media was filled with talk of colonising Mars. There have been battles in Afghanistan and Iraq, and then some years later came the US financial collapse and its impact on global economies. From a colonialist perspective, the future is unclear. Some predict an ecological disaster, at which moment the environment and humanity are annihilated. The question remains: what, if anything, survives annihilation? This is a question the community addressed in its dealings with the frog. In reducing the size and power of the frog the water was released and life returned following the drought. But the law of that story is that power must be addressed for the continuity of community and life.

Muldarbi – colonialism

Muldarbi law said that the Australian continent was clothed with a blanket terra nullius of the land, law and people. The Nunga subject in law was deemed not to exist. We were instead defined as British subjects, but subjects without the legal status of British subjects. Nunga laws thereby became covered by the rules and regulations, part of the muldarbi's colonial project of genocide.

An analysis of genocide and its impact on Aboriginal Peoples follows in subsequent chapters of this work.

Muldarbi colonialism has survived for centuries, spreading across continents, always finding contemporary forms in which to embody itself. Across the centuries colonialism has claimed legitimacy for its spread of christianity, civilisation and 'progress'. In 'Australia' today it finds new ways to feed legitimacy. The muldarbi masks its intentions and is often disguised in a form that suggests popular support for the colonial project. Popular support is important to its survival, also increasing its potency.[21] By claiming popular affirmation the muldarbi's colonial intentions remain covert. It is covert and goes unnoticed as it drains the lifeblood and identities from ruwe and Nunga Peoples. The muldarbi is also disguised by claims to 'recognition' of the Nunga subject. In popularising the muldarbi in the minds of the many, people live under the illusion of well-being in the lands of the colonised, as the muldarbi sucks silently, hidden in the background. The muldarbi is normalised in the minds of the majority. The muldarbi is frequently behind many ideals of recognition of the Nunga subject.

Illusion of recognition

The idea of the coloniser recognising the colonised is strange. Since the advent of colonisation, First Nations Peoples have been asking the question of the invaders: 'by what law have you come on to our lands, and breached our laws?' Perhaps the question needs to be reversed – that is, 'how might the colonised recognise the colonisers?' But we already know the colonisers as tricksters, thieves and murderers, so maybe the rhetoric of recognition is another part of the great colonial game. Is 'recognition' another route to legitimising the colonial project and again diverting the focus away from the violation of First Nations Peoples' laws and lives and the analysis of those crimes? The modern colonial state would, in the first instance, ignore these questions and in the second, position them as simple 'native' ones, because the answers to them lie in the complexity and mystery of international law. It is international law that has legitimised colonial exploitation and the mechanisms to prevent any claims for reparations against colonial states.[22] We know the kind of recognition we might expect from this colonialist web – that is, our absorption into the colonial project itself. What is intended goes beyond a conflict of laws between the colonised and the coloniser. It is the annihilation of Indigenous Peoples' way of being in the world. A conflict 'between laws' is a part of the process of annihilation. Our way of being was deemed to be open to replacement by a mythic age of the European states, which magically morphed into a family of nations; we became in their eyes the object of their sovereignty. Our First Nations' history shifted from the 'pre-historic' towards our absorption into their European world.[23] This was without our land, of course; they got that. That is their 'his-story'.[24] This work

attempts to untangle that 'his-story' by reclaiming our voice, to speak as subjects of First Nations and to tell our story, as a means of laying tracks for a new cycle, back into the future.

The muldarbi has many faces: terra nullius was one of them. Even though the Australian High Court made the notion of terra nullius unpopular in *Mabo* v *Queensland (No. 2)*, the myth that our Nunga lands were 'practically unoccupied' in 1788 still justified the colonial seizure of our territories.[25] Likewise, the doctrine of discovery was used to underpin the colonial foundations of states such as the United States of America, Canada and New Zealand. The US Supreme Court case *Johnson* v *McIntosh*, 21 U.S. 543 (1823) has been considered the major precedent by the English language-speaking settler states and they adopted Chief Justice Marshall's opinion on the doctrine of discovery: 'and its principle that the first European discoverer of lands occupied by non-christianized tribal savages could claim a superior right to those lands under the European Law of Nations'. [26] The Supreme Court decided in *Johnson* in accord with 'European international law and customary practice of the time, the discovering European nation had "an exclusive right to extinguish the Indian title of occupancy, either by purchase or conquest"'.[27] Australian colonialism was even more killing; terra nullius was applied to the entire territories of hundreds of First Nations Peoples who were deemed at the time to be so backward and uncivilised as to not exist as legal subjects.[28]

The High Court in *Mabo (No. 2)* referred to *Johnson* v *McIntosh* as the origin of Aboriginal title and it became the source of 'native title', a construct of the Australian state and the courts. Native title became 'known' as that which will 'save' Nunga people from the trauma of terra nullius. This trauma actually has never ended other than in the imaginings of the colonialist. Native title became widely accepted and affirmed as the formal recognition of Indigenous rights to land, but native title was not land rights, and behind this construction of rights to land lurked the muldarbi and its power to extinguish. The illusion of 'recognition' created a potency, which allowed victims to be more easily drained of their lifeblood as they were caught unaware. Many were persuaded that native title would put life back into the land and its people, but I argue in this work that this has not happened to date and will not in the future.

Native title does not free me to be who I am, a being of my people's own Raw Law. It is the killer of Raw Law because native title continues to dispossess us from cycles of Nunga being. It is a muldarbi that will legalise the further, future rape of ruwe. It will make legal the continuing processes of colonialism and cultural genocide. It hides undetected behind its mask of popularity, making new forms of dispossession legal, like the terra nullius muldarbi colonisation did beforehand.

We have been told that the muldarbi is here to protect us, but how can we be protected by a power that subjugates us? Muldarbi thinking continues to spread; its path creates chaos. The muldarbi thought occurs in one straight

line. It no longer has a concept of Kaldowinyeri, nor any thought or idea of how the chaos it is creating will end. The muldarbi is a beast of the now, consuming and killing all; it is a killer of Raw Law. It is among us; it was imposed on us and has been dominating the planet for centuries. The muldarbi has brought us to a critical point; here we must endeavour to think of a future that appears to disappear before us. At first a future appears like no other time we have known before, but the story of the frog tells us we have travelled to this muldarbi place before. The song has already been sung and is being sung now. So, why is it that there are those among us who continue to try gaining protection and the recognition of 'rights' from the muldarbi, which continues to oppress us?[29] Why do they not go outside of the colonially imposed system and its mirage ideas of 'recognition' and reclaim Kaldowinyeri? Why do we remain captive within the domestic paradigm of the colonialists? Is it because the illusion of recognition has corrupted our visions? The illusion needs to be shattered. We have to enable ourselves to recreate our own ways of seeing.[30] In writing of the muldarbi, I will unpack and expose its colonial project in an attempt to exorcise it, and to clear a path that seeks to decolonise every aspect of the afflicted, colonised being.

Ruwe and peoples

Our ruwe is an extension of ourselves; to take the land from us, and to develop and damage the ruwe is also to damage our relationship to country. What began in 1788 with the beginning of colonisation was more than a dramatic loss of life and violent dispossession of country. It was also the time the colonialist began the covering of Raw Law and the unsettling of country. Wherever the coloniser came to dominate and occupy the land, the songs and ceremonies for country were no longer free to express connections to country and law. Our ancestors were forced to wear clothes; the covering of the Nunga body and way of being took form in both a physical and an ideological sense. The Raw Law also went undercover. The rape of our land and people violated our relationship with the ruwe. Our ability to care for our self and land diminished. The dispossession of the naked peoples and the Raw Law is mirrored in the environmental devastation visited upon the ruwe.

When speaking of First Nations Peoples, I use the plural 'peoples'. The idea of 'us' being one big mob, or one homogeneous First Nations People of 'Australia' or the 'Aborigine', is a colonial myth. There are hundreds of distinct laws, cultures and peoples of this place now called Australia. My ancestors, the Tanganekald and Meintangk Peoples shared a common language and occupied a continuous territory. Our family clan groups carried an intimate knowledge and relationship to the land, seas and the greater universe. Distinct peoples were connected to all parts of the continent, all having distinct languages, cultures and territories. Thus, the Tanganekald regard themselves as a people, sharing a common culture and language, and occupying a

continuous territory with definite boundaries. Nungas were not how the colonist projected us – one big mob roaming aimlessly. At the time of the invasion we comprised 100 per cent of the population; today we are just under 2 per cent.[31]

Another myth created by the British colonialist is that women were without authority and status in traditional societies.[32] Throughout this work I demonstrate that this is not true. Nunga women have laws as the men have laws. White male anthropologists have tended to reflect the patriarchal sentiment of colonial Australian culture upon us; in imposing the misogynist values of the white patriarchal state they created the assumption that Nunga women were oppressed in the same way that the colonialist states had oppressed their own women. In reality, Nunga women had a considerably higher status within their communities. Ethnocentric anthropologists, themselves historically male, have consistently ignored this reality, remaining largely unable or unwilling to acknowledge the position of Nunga miminis[33] as lawful women and carriers of law.[34]

My ancestors walked in the law, as they walked over the land. They sang the law; they danced the law, becoming beings of the law, living in the way of the law. That practice has now become fragmented due to the laws of colonial and state governments. It is difficult to practise the law when a car park lies on your ancestors' graves, or a place for ceremonial gathering and the practice of the law has become a derelict and toxic mine site. Or your brothers and sisters live in fear of jail, early death, poverty and ill health. Nunga views on human 'rights' and obligations and the law are entwined and are inseparable from our natural environment. The overriding principle we live by is a love of the land, a relationship of custodianship between the land and Nungas. But there are few places on earth left where that principle is respected and recognised. The land is viewed by states and the dominant culture as an economic resource to be exploited in the pursuit of development and progress. Concessions are made to create zones of protection for some First Nations Peoples, but this is not enough; it will not allow the law to draw breath and the land to survive. Muldarbi law only tolerates Nunga relationships to land where those relationships are not in conflict with state and development agendas. It is as if Nunga interests are being tolerated until there is a demand for exploitation and development; then the lands in question are harvested and appropriated for integration and assimilation into the capitalist project.[35] We are constrained in our obligations to protect the land due to the force and power of the state.

The Nunga relationship to law and land is different from the relationships that states and state-protected corporations have with the land. Justice Isaacs in the High Court decision *Commonwealth* v *New South Wales* expressed the white man's most valued interest in land as one which 'since the beginning of legal history conferred, the lawful right to exercise over, upon, and in respect to the land, every act of ownership, which can enter into the imagination'.[36]

Australian property law institutionalises ownership and control over land; ownership is measured by capital. By contrast, Nunga laws acknowledge ownership in terms of ancestral and spiritual connections to the land. This form of ownership carries with it obligations in accordance with the law. At the ceremony to celebrate the Aboriginal Tent Embassy's placement on to the register of the Australian Heritage Commission's National Estate on 9 April 1995, Dennis Walker argued for the real land and law business of First Nations to be 'done'. He responded to the common assertion that we had lost our land, stating, 'we didn't lose it anywhere', the land is still here and we have the responsibility to care for country. Walker highlighted the problem as not being given the

> power in the non-Aboriginal legal system to fulfil that custodial right. Until our Elders in Council decide on these matters through their customary laws and until that consent, which Captain Cook was supposed to get, is properly given, then we still live under bad laws.[37]

The 'bad laws' Dennis talks of are muldarbi laws, which violate Nunga laws, our lands and our peoples.

Voice and song

First Nations Peoples' law is of the beginning: of the first songs, sung by the ancestors. When the first steps were walked across the ruwe, country was sung into creation. Law conceived as a way of living is difficult to write about and cannot simply be described or easily translated into a foreign language that is empty of the ideas that our law ways carry. Our law was not written in the way in which the West conceives of writing. Law was painted in ceremonial design and symbols were marked on boundary markers, identifying traditional owners and their ngaitjis. The differences between Nunga and non-Aboriginal legal systems are so extensive that there is no basis upon which comparison can be drawn. The idea of 'Raw Law' came to me as a way of resolving the problem I had in describing or defining the 'law'. Nunga law is undressed of the layers of positivist rules and regulations, which many non-Aboriginal societies have come to accept as inherent to their legal systems. 'Raw Law' is the essential basis of social conduct: respect, reciprocity and caring for country, to name a few. These ethical principles convey the essential nature of the law, which still exists for Nungas, but barely breathes under the introduced layers of colonial rules and regulations.

This is writing from 'inside'. I am of the Tanganekald and Meintangk Peoples, and my Nunga position is the place from which I write, as I write to regenerate Raw Law and to dismantle the muldarbi law. This writing required that I engage in my own struggle[38] to decolonise. This is the writing of a song that still sings within me. As a song makes circles, so does this

writing; it does not privilege the rules of grammar, or 'normal' or conventional academic structure. This is an important strategy in decolonisation, as the Murri[39] performance poet Lionel Fogarty explains:

> In my writing I don't believe in compromise at all. I don't want to be a reconciliation writer or a reformist writer. I like to hit psychological minds and cross boundaries. It doesn't matter if it is in correct grammar or their style of writing.[40]

For me, writing about Nunga law was a struggle to find a voice that was proper and law-full, and which was situated beyond the colonial matrix of containment and power. As a Nunga woman of the Tanganekald and Meintangk Peoples, I do not pretend to write, speak or be representative for all Nunga peoples. I do not claim to be the spokesperson for the 'mob'. The mob can speak for itself when the time and opportunity arise. I am one voice among many; all of the people in our Nunga law ways have a voice, even our children. This writing is not an attempt to narrate the Nunga position; I do not locate myself as the native informant providing a master narrative on Nunga law. Rather, I see this work as one theoretical intervention, which may or may not extend beyond the self in bringing the mob to gather.

This work began its life as a thesis in 1994 and initially I spent time describing Nunga law in contrast to Australian law. I found myself trying to fit a system of laws into something which was so fundamentally different and alien that I abandoned that approach when part way into the project. Out of that process I decided I would not deal solely with the problem of conflict and reconciliation between Nunga law ways and the Australian legal system. Instead, I decided to take a leap into the known places of the ancestors and the task of recentring First Nations law. This took me to a place the muldarbi determined did not exist – a place where the muldarbi has no power; a place where law lives. I have sought to write on law from 'inside' my Nunga being, rather than to write on Nunga law through the colonial layers of the master narrative on law.

Ultimately, this work has been a difficult process, not only for the reasons that writing and communicating are difficult, but because in the act of writing I was also engaged in a struggle to decolonise. Writing enabled me to break out of a mould, a colonial mould formed of and about my Indigenous being and not by my Indigenous being in connection to law, land and peoples. Early colonial ethnographers made plaster casts of Nunga peoples' heads and faces, which were to become a permanent record of those whom the muldarbi perceived as the last of the 'Aborigines' and plaster moulds of my ancestors have been kept in the South Australian Museum. But we have remained connected to our law and land and have not passed on; we live and have a voice, which is working to decolonise the colonial project.

My voice is not objective;[41] I am not pretending that it is. It comes from within my Tanganekald and Meintangk being, from a place I hold as my centre. It is a struggle to hold, because the Nunga voice is always threatened with being extinguished by the conventions of 'truth' and 'objectivity' imposed by the disciplines of science. In using my own voice I assert my right to be, and in doing this I resist the erosion and dismantling of my Nunga being. I am one voice. The voices of my ancestors are those of a circle of peoples, and they sang the song, repeating the process over and over. That was the law. The song was sung. The circle formed. It was repeated over and over, circles of song sung across the lands and seas. This is law. In speaking in my voice, I am not attempting to sing the song or tell the story of place; and I will not speak of the sacred, for that is the law. And in a way there is little of Nunga law, which I will seek to describe in my writing, because that is the law.

I have reflected a lot on why and how I speak and write because I feel a pressure to perform. I feel this pressure because of my juxtapositioning as a Nunga woman, surviving in a colonial environment and working in an academic context. The pressure comes from my understanding that to write and to publish in an academic forum means that I must locate myself within a space in which the muldarbi has been working for centuries to dismantle my Nunga being. The risk of entering this space is that I become assimilated by the muldarbi; the challenge is to live and remain a Nunga. In writing this book, I see myself engaged in a process of decolonisation and translation, rather than one of co-option into an academic narrative. This work will be taken up by readers as they see fit, but I hope that it is taken up as an intervention, or a seeding for a different narrative.

I write because our voice, the song and the grandmothers' laws, have been being killed for so long that writing is an act of survival and resistance in a long and continuing struggle against the killing of the song, and the rape and the murder of the ruwe. This voice may be interpreted by others as being proselytising, a bit angry, and sad, and a bit too spiritual. It is all of this and more as I work towards a more 'proper' place, a place where the grandmothers sit.

Notes

1 In colonial times, our old people became known as 'Ngarrindjeri', but before colonisation our identities were more diverse and included the Yaraldi, Tanganekald and Ramindjeri, among others. I belong to and identify with my Tanganekald and Meintangk Peoples.
2 Tunjari means 'song'.
3 Sung by Milerum, translated and recorded by Norman Tindale, 'Native Songs of the South-East of South Australia' (1937) 67 *Transactions and Proceedings of the Royal Society of South Australia* 107, 108–109.
4 The *Western Sahara Advisory Opinion*, International Court of Justice Reports, 16 October 1975, and *Coe* v *Commonwealth* (1978) 18 ALR 592 raised the question of

the application of terra nullius to colonial territories where sovereign peoples were living at the time. The partial rejection of terra nullius in *Mabo* v *Queensland (No. 2)* (1992) 66 ALJR 408 and its relevance to the justification of the settlement of Australia has been debated. The debate focused on the relationship between international law and the common law. To some the question of the existence or otherwise of terra nullius was unimportant and whether the doctrine was rejected or simply a device to establish native title had no effect on the authority of the decision. This work intends to reopen this debate.

5 In North America the Bering Strait theory has been used as one explanation of the origins of the First Nations Peoples, while in Australia our ancestors are 'known' to have crossed the Torres Strait from Asia. For further discussion on the Bering Strait theory, see Ward Churchill, *Since Predator Came: Notes from the Struggle for American Indian Liberation* (AIGIS Publications, 1995), 265.

6 Mob is a term Aboriginal Peoples of Australia use to describe their kinship relations, or First Nations Peoples' affiliations.

7 My ancestors the Tanganekald kept the skulls of their dead for use as drinking vessels.

8 Gayatri Spivak, 'Culture Alive (Notes)' (1995), 5, *Australian Feminist Law Journal*, 10, Spivak suggests the language of the word 'post-colonialism' itself is like throwing words around and is as meaningless as the idea of decolonisation – that is, the idea is thrown around without being based in any truth of decolonisation or moving beyond the event of colonialism.

9 Judith Butler and Athena Athanasiou, *Dispossession: The Performative in the Political* (Wiley, 2013), 8–9.

10 David Peat, *Blackfoot Physics: A Journey into the Native American Universe* (Fourth Estate, 1996), 63.

11 Penelope Debelle and Martin Daly, 'Are They Trying to Kill Us?', *The Age* (Melbourne), 28 February 1999, 1.

12 Billa Kallina is about 600 km north-west of Adelaide, South Australia.

13 The Kupa Piti Kungka Tjuta is a group of senior Aboriginal women from the Arabunna, Kokatha, Yankuntjatjara and other peoples who were based in Coober Pedy, South Australia, and were most active against the nuclear waste dump proposal during the 1990s and until the federal government decision not to site the dump at Billa Kallina. Regarding the proposed Muckaty dump site, see David Sweeney, 'Plan to Use Aboriginal Land as a Nuclear Waste Dump is Flawed and Misguided', *The Guardian* (London), 31 July 2013. A film about the Muckaty situation is discussed further in Chapter 3.

14 'Nunga' is a generic term meaning 'first peoples of the land'. I use this term across this work to describe First Nations Peoples.

15 Nurntikki is a Kaurna word meaning 'to go on forever'.

16 Irigaray, perhaps similarly to Aboriginal philosophical thought, looks at time from a cyclical standpoint; Luce Irigaray, *Je, Tu, Nous-Towards a Culture of Difference* (Routledge, 1993), 75.

17 Western Mining Corporation began mining uranium at Roxby Downs about 800 km north of Adelaide in the state of South Australia in 1988. They created one of the world's largest uranium mines. In 2011 the State Government of South Australia approved an extension to the mine that at the time was under the control and ownership of BHP. However, uranium prices dropped and BHP has not yet gone ahead with its plans to expand the mine.

18 Noted in Genesis.

19 Michael Marder, *Plant-Thinking: A Philosophy of Vegetal Life* (Columbia University Press, 2013).

20 Ibid., 2.

21 Popularity is the linchpin of democracy, in never risking making an unpopular decision there is a greater likelihood of holding on to power.
22 Antony Anghie, *Imperialism, Sovereignty and the Making* of *International Law* (Cambridge University Press, 2008), 2.
23 Ibid., 102.
24 'His-story' is taken from a presentation made by Russell Means about the impact of patriarchy, arguing for a return to matriarchy as a solution to the violence. Russell Means, 'Patriarchy: The Ultimate Conspiracy; Matriarchy: The Ultimate Solution' (2011) 20 *Griffith Law Review* 515.
25 *Mabo* v *Queensland* (1992) 66 ALJR 408, hereafter *Mabo (No. 2)* 541 (Deane and Gaudron JJ). In a ruling of six to one the court held that the lands were not terra nullius or 'practically unoccupied' in 1788.
26 Robert Williams Jr, *Savage Anxieties* (Palgrave Macmillan, 2012), 224.
27 Ibid.
28 Ibid., 226, 227.
29 Noel Pearson, 'The Concept of Native Title at Common Law' in Galarrwuy Yunupingu (ed.), *Our Land is Our Life* (University of Queensland Press, 1997), 150, and Richard Bartlett, *The Mabo Decision*, (Butterworths, 1993) are among a number of commentators quick to sing the praises of common law Aboriginal title. For an early critique of the limitations of Aboriginal title in US jurisprudence, see Robert Williams Jr, *The American Indian in Western Legal Thought: The Discourses of Conquest* (Oxford University Press, 1990); Robert Williams Jr, 'The Algebra of Federal Indian Law: The Hard Trail of Decolonizing And Americanizing The White Man's Indian Jurisprudence' (1986), 1, *Wisconsin Law Review*, 219, and also Peter Fitzpatrick, *Modernism and the Grounds of Law* (Cambridge University Press, 2001).
30 Sheila Rowbotham, cited in Catharine MacKinnon, *Towards a Feminist Theory of the State* (Harvard University Press, 1989), 84.
31 For a further discussion of early population figures, see Noel Butlin, *Our Original Aggression: Aboriginal Population in South East Australia 1988–1850* (Allen & Unwin, 1983).
32 Prior to the work of female anthropologist Phyllis Kaberry, *Aboriginal Woman, Sacred and Profane* (Routledge & Sons, 1939) the field was covered by male anthropologists who engendered what was to become the dominant view of colonial settlers – that is, Indigenous women were subservient to Aboriginal men. Kaberry's work began to dispel those myths.
33 Mimini means 'woman'.
34 I have previously discussed the colonial project's ignorance of and incapacity to understand the central position of Indigenous women within First Nations law and culture; Irene Watson, 'The Power of Muldarbi and the Road to its Demise' (1998) 11 *Australian Feminist Law Journal* 28. Aileen Moreton-Robinson, *Talkin' Up To The White Woman, Indigenous Women and Feminism* (University of Queensland Press, 2012) also discusses the disjuncture between Indigenous standpoint and white feminist representations of Indigenous women.
35 Wendy Brown, *Regulating Aversion, Tolerance in the Age of Identity and Empire* (Princeton University Press, 2006).
36 *Commonwealth* v *New South Wales* (1923) 33 CLR 1, 42.
37 Cited in Irene Watson, *Kaldowinyeri-Munaintaya in the Beginning* (2000), 4, *The Flinders Journal of Law Reform*, 3, 6. See also Gary Foley, Andrew Schaap and Edwina Howell, *The Aboriginal Tent Embassy: Sovereignty, Black Power, Land Rights and the State* (Routledge, 2013).
38 I use the word 'struggle' throughout, as I write from the inside: the story I tell is one of trauma and struggle to survive an attempted genocide. There are no other words

that better describe the process. Perhaps some people might see a more academic description as more appropriate, but in adopting other language it would fail to express the story I tell in the way I have chosen. It would become someone else's story.

39 Murri means 'Aboriginal person', a term used throughout northern NSW and Queensland.

40 Lionel Fogarty, *New and Selected Poems, Munaldjali, Mutuerjaraera* (Hyland House, 1995), x. Diana Eades, 'That's Our Way of Talking: Aborigines in South-East Queensland' (1981) 2 *Social Alternatives* 11, refers to this way of speaking as a form of Aboriginal English, but it is more than this, it is a form of resistance to the colonial order of things.

41 I am nevertheless experienced in Indigenous knowledges, and also Australian and international law. I have worked as a legal practitioner and advocate in international forums and also have experience in the academy.

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Chapter 3

Raw Law, song, ceremony, ruwe

Ev'ry valley shall be exalted, and ev'ry mountain and hill made low; the crooked straight and the rough places plain.

(Isaiah 40: 4)

Law in the margins

Here I am writing about 'Raw Law' in the now and how it manifests in the face of modernity. I don't view First Nations law as being merely pre-existing and of the past but as also alive in the present, seeking place beyond the margins to hold and carry First Nations Peoples into the future, as it has always done. This time in which we are now living is like the time of the Waargle,[1] when a handful of individuals lived in accord with Nyungar[2] laws. The story of the Waargle calls for a return to law; it is about an ancient time when unlawful and dysfunctional behaviour had become the collective norm, and only a handful of people retained their practice and respect of law. The Waargle tells of a flood and of the few survivors who clung to the head of a giant serpent that rose above the floodwaters, which destroyed all of those who no longer had a connection to and respect for the law. Those few people who survived went on to live in harmony with the laws of the Waargle.[3] The Waargle story describes how the law survives all things, including natural phenomena. It also speaks to the ongoing cycle of re-engagement with law and life.

First Nations Peoples now comprise a minority of humanity's global population; our numbers are estimated to be 300 million out of 7,000 million and we struggle to maintain our laws and culture living among non-Aboriginal peoples who have no connection or relationship to First Nations Peoples' ways of being. Law stories lie across the land: they are alive and can be revived and regenerated, even after being too long in the belly of an attempted genocide. Dreamers are awakened by the law as the stories and songs are returned by the ancestors. Our old people speak to us in dreamed songs and stories. They carry law in their being. The law is my centre, from which my life forms. I believe it is why I am here. Being here now, in the law, in the present, is a

struggle against the muldarbi – lawlessness. But I am still here as I have always been – the same soul, the same spirit, a lawful being.

The crime is that the colonial settler society purported to be the bringer of law to what was perceived to be an empty, terra nullius space. Laws brought to Indigenous Australia from the United Kingdom were created by an alien parliament and courts. So different were (and are) these imported colonial laws to 'Raw Law' and, in particular, so different from the idea of law growing out of relationships to land, First Nations Peoples and the natural world that the new colonial state did not see the existing laws, and did not identify them as law. Instead, our laws have been patronised by the state political and legal systems, and deemed mere custom, storytelling and songs to entertain. Inherent in this is a racist idea of a lack of sophistication. So prevailing is the racism and the colonial insistence upon extinction that our laws reside in a marginal space within the modern Australian state.

I might ask myself at this point: why do I have the urge to express law beyond myself? Why do I carry the obligation to advocate for law and to expand this view outside of myself? I do this because it is the obligation one carries as a being of the law, to sing its song. The obligation of living in the law is onerous, particularly now, when the law is being violated frequently and on so many different levels by those who are ignorant and dominating to a point of being completely unaware that any violation of law has even occurred.

Michel Foucault sees ignorance as the significant concern behind government violations of 'these laws of nature'. Foucault writes that 'the greatest evil of government, what makes it a bad government, is not that the prince is wicked, but that he is ignorant'.[4] However, by claiming to be ignorant the state might consider itself 'off the hook' from culpability and claims of genocide against First Nations Peoples who are vulnerable to state power. At the initial stages of colonisation the colonists deemed that the Australian colonies were founded in a terra nullius space and this view prevailed over initial forms of recognition of Raw Law in *R* v *Ballard* [1829].[5] It was seen as a land of 'natives', without sovereignty and any form of governance. Now post-*Mabo* and the High Court rejection of terra nullius, the state continues to plead ignorance of the complex legal systems inherent in First Nations Peoples' laws and uses that as one of its excuses to deny First Nations sovereignty to govern.[6]

Different law ways

The First Nations law of the land was birthed by song. Law is sung into place, land, waters, people, the natural world and the cosmos, the sky-world. It is law that I speak of here, not 'customary law', lore, myth or story. With the invasion of Australia came a colonial legal system that was and remains today clothed by layers of rules and regulations comprising a system of positivist

laws that have been used to justify dispossession and the attempted genocide of First Nations Peoples. They justified the violence of colonialism, a violence, which now hides behind the excuse that it was just ignorant. The state's violent acts were and are without law, and the layers of colonial law derived from theories of terra nullius do not justify and make for a lawful foundation.

In *Mabo (No. 2)*, in 'recognition' of Aboriginal title the High Court of Australia said that Aboriginal law 'has its origin in and is given its content by the traditional laws acknowledged by the traditional customs observed by the Indigenous inhabitants of a territory'.[7] We called the land 'ruwe', mother or grandfather, not 'Aboriginal title' or 'native title'. Native title is a construction of the High Court and it is a very different idea of land from a First Nations perspective. We know ruwe as a relationship in the same way that we are birthed of the mother and are in kinship relationships to the mob or our peoples.

First Nations law speaks to principles. One is respect. In our law there is a 'respect law' for all things – not just humanity, but the whole environment: plants, birds and animals, the earth and the natural world in its entirety. Respect law provides a base-line for human functionality. First Nations laws in Australia are ancient and at one time everyone knew them; there was no need to write them down. Law lived in the practice of it, in the singing and in the ceremonies. Songs were a constant reminder of the law, an act of reliving and being in law.

Murrabina

Laws are inherent to the Murrabina[8] where ceremony serves to gather community and to pass on knowledge of law and culture. It is law in action. Murrabina is law as it connects cycles, land, song, story, dance and the people, through the ceremonial gathering of people. Murrabina is the honouring of law. It sustains and revives the law, and it is the collective song for law and life of a people. Murrabina is a celebration of the renewal of life and the changing of seasons; this is law. Murrabina is a declaration, an agreement with the spirit world, the air, earth, water, fire, animals, plants, rocks, the fullness and oneness of the natural world. It is an agreement for the continuance of law, land and peoples. The song is akin to an agreement to engage in the wholeness of the creative process of living in the law.

Law creates an obligation for its custodians to maintain the ceremony. However, this obligation was compromised with the advent of settler colonialism that worked to obliterate the ceremony everywhere it went over the greater part of the continent. The physical singing of songs and the speaking of our languages was stopped over much of our ruwe. Custodians kept the song in spirit, dreams and visions, and still hold the obligation to carry on the song even when the physical place has become compromised and it is difficult to continue its practice.

While the Murrabinna has been impacted by the colonial project, the process of learning and the transference of knowledges continue to be passed on to each new generation. This is so, even while anthropologists have said that our songs, stories and languages have been 'lost'. Our knowledges have an existence as spirit energies and powers. Our knowledge ways will continue – just as the removal of trees does not mean the permanent loss of forest because the seeds will regerminate and reforest the lands, the seeds of Indigenous knowledge will reappear in dreams or during ceremonies.[9]

Law is in the song

The song sings law stories of Kaldowinyeri. Our old people sing the songs over and over again with the birth of each new generation. These law stories lay a path to follow, a path unchanged by time or circumstance. The songs and stories are the original instructions from Kaldowinyeri. The ancestors created the landscape, the natural world we have inherited. They laid down laws for future generations to follow. The law is sung in song and spoken in stories, sung by the ancestors and passed from one generation to the next. Songs are about the life of the ancestors from Kaldowinyeri and are about our relationship to ruwe.[10]

Songs record the history of the land. They are our medicine; they can be healing. Songs can be sung to bring rain, stop flood, change the direction of the wind, or sing a heat wave. Song brings balance and order and prevents chaos. The singing of song ensures continuity of life; the cycle of song provides abundance and harmony. Song expresses the relationship to land, sea and people. It unifies all of life. Our laws are not written. They live in the song, story or the oral traditions of our old people, our paintings, the life ways, the dance and the land. Law is communicated through the storyteller or song holder.

The ancestors are responsible for law and ruwe, a responsibility, which continues to be carried by the contemporary First Nations owners. All First Nations Peoples have a story or song of creation and law, and those songs are often the locally relevant parts of a more extensive story and songs.

First Nations Peoples continue to be under pressure from the muldarbi, from modernity. Ethno-musicologist Cath Ellis recorded the following conversation with an elder during field work:

> We see everybody going to the pack . . . boys, and even girls–they do just what they like. The old people that went through the rules, they know better . . . White fellas interfered in our rules, stopping us from doing our corroborees . . . No songs, no rules.[11]

What happened to the law? It appears to have disappeared and yet the law is all around us as it has always been; it is still being sung, it lives and breathes

in the life force that surrounds us. However, our perceptions of it have changed. Our ability to see and hear songs has changed. The natural world is still singing even though the greater part of humanity has disconnected itself from song.

Very few scientists view First Nations Peoples' knowledge systems to be of value to the 'modern' world or present time beyond what resources can be obtained from them. However, physicist David Peat writes: 'Songs come to us from another world, they have their own existence and power . . . Sound, vibration and song are believed by many to be the creative generative forces with the cosmos.'[12]

The song law is of place, creating and making the holder of song indigenous to place. The song is alive in the land, the law lives in the singer and the singing continues in many forms. The muldarbi forced the act of singing to disappear and in most places across Australia to go underground or be understood only as an exotic form of entertainment. However, our people kept the songs in their minds, hearts, spirits, dreams and visions. The song resides not only in the voice of the singer but in all other forms as well.

While the inherent meaning of songs or stories becomes a part of the Aboriginal space, that same meaning is often universal and speaks to others outside its sung place. The story of the Sun Women tells of the caring for humanity and the need for warmth in everyday life for life to continue. While this story resides in ruwe, its meaning could also be said to carry beyond the boundaries of place.[13] The sun is a part of the greater cosmos and the Sun Woman's power is so great it would burn all to ashes if she surfaced above the ground; she must remain underground where she births the daughter sun. Why does the mother remain underground? Is it because of her potency, a potency, which may still threaten us today, as they dig her from the earth? The Sun Woman tells us that she and her daughter are Sun Dreaming. The daughter brings light and the sun's rays to the earth as a part of her daily cycle, bringing light to the dark earth, and light to all of her relatives on earth.

While ancient Aboriginal stories make connections to contemporary life, Aboriginal storytellers are still often viewed as telling simple fables. Hawaiian academic Trask, writes: 'when they wrote that we were superstitious, believing in the *mana* of nature and people, they meant that the West has long since lost a deep spiritual and cultural relationship to the earth'.[14] I argue, similarly to Trask, that it is their own loss of connection to law and land, which is seen to manifest in the colonialist imaginings of an Aboriginal Australia. In the *Mabo* decision, the Meriam People's Malo-Bomai story was named the Malo law story. The story refers to both land and sea. Reverend David Passi, one of the claimants in this case, explained his relationship to the natural world to the court: 'It's my father's land, it's my grandfather's land, it's my grandmother's land. I'm related to it, which also gives me my identity.'[15]

First Nations Peoples' relationships to ruwe can often involve obligations and rights, ownership and custodianship. These relationships are difficult to explain in the English language; the term 'owner', for example, has different meanings across cultures. Ownership is often not viewed in regard to material goods, but as relating to values: knowledge, business, a relationship, a problem, a dispute, a ceremony. Ownership may not be exclusive to the individual but may be collectively held. And 'ownership' does not define the owned object as a commodity; instead, it defines the concern of a limited group of people who stand in a particular relationship to the owner and whose various responsibilities depend on that relationship. There are both managers and bosses, for example, and each has a different responsibility or right. While there are differences between Torres Strait Islanders and the First Nations of mainland 'Australia', there are also similarities that can be found in the way the laws of ruwe are woven into the natural world. During the Meriam People's land claim they explained that their link to land is two-sided: people both own land *and* belong to it, and it is a dual relation of right and responsibility. The Meriam discussed how they are

> positioned or located within natural cycles, which create the milieu of rights and obligations to land. The pattern of the movement of these cycles provides the metaphoric language of fundamental truths upon which the moral order rests: stars follow their own path across the sky.[16]

The Nunga connection to ruwe is unlike the relationship we find within non-Aboriginal cultures. In christian cultures land has become a commodity, a non-living entity, which has been described in biblical text:

> And God said, Let us make man in our image, after our likeness: and let them have dominion over the fish of the sea, and over the fowl of the air, and over the cattle and over all the earth, and over every creeping thing that creepeth upon the earth.[17]

In contrast to christians, many Nungas revere and hold ruwe to be sacred. The old people had an understanding that land is life, the source of all things. But now for many the possibility of living in a balanced sustainable relationship with the land has been disrupted. At times when Nungas have asserted a reverence for the sacredness of the land and their role and obligation as carers and owners of ruwe, they have been met with the threat of physical violence and incarceration. In *R* v *Walker*,[18] Baizam Nunukul, also known as Dennis Walker, of the Nunukul People, was arrested and charged for assault and discharging a firearm with intent to evade arrest. Dennis Walker was protecting an Aboriginal burial ground from being destroyed by the local council. Walker's long history as an activist provided incentive and strong grounds for him to take self-protection measures against an armed police

officer. His actions were fully supported by the elders, who argued that Walker's right to uphold Bundjalung law in the protection of sacred sites justified his actions. However, Walker was convicted and a subsequent appeal against his conviction was dismissed.[19]

Ruwe and the law

The claimants in the *Mabo* decision belonged to the Meriam People and central to their law of Malo is the law against trespass. *Malo tag mauki, Teter mauki, mauk:* 'Malo keeps his hands and feet off other people's land.' Malo's law was to 'Keep to your own path, do not go on to other people's land . . . Malo walks on tiptoe, silent and careful'. David Passi explained that this is a metaphorical way of saying what every Meriam person knows: if people keep to their own path, their own land, mind their own business, social life will continue.[20] Gobedar Noah explains that the Meriam People can only identify with their own lands, and 'with the word from the authority he can be sure because Stars follow their own course'.[21]

The Nunga way to enter the ruwe of another First Nation follows protocols developed to avoid conflict. Underlying those protocols is a philosophy based on respect and recognition of Nungas's right to co-exist. Kaurna elder Dr Lewis 'Yerloburka' O'Brien said:

> The secret we hit upon was we ran conferences – banba banbalya.[22] Before this we had the Dreaming . . . it makes for peace. It comes with a philosophy that's very profound. That philosophy says, 'love your own country, don't be envious of anyone else, what you have is beautiful.'[23]

This philosophy of loving your own country for its uniqueness and the relationship that ensues prevents competition among neighbouring First Nations Peoples and prevents them moving on to the lands of others. The philosophy of loving the ruwe and of being in relationship to it provided the philosophical foundation of co-existence between peoples and land. The First Nations relationship to ruwe was not recognised, understood or respected by the muldarbi when they first arrived on our shores, so the colonisers lost the opportunity to learn about another way, an ancient way, a way their own ancestors had perhaps known at a time in their own history but from which they had departed. The Nunga relationship to ruwe is intimately knowledgeable in all aspects of the landscape. Boundaries of ruwe are marked by subtle and obvious features: bends in the creek or the river, the rain-shadow, trees, rocks and other things. All of these boundary places were known in song law and are sung to by the custodians and owners.

In the matter of *Yunupingu*,[24] the defendant, a custodian of Yolngu country and law, held lawful obligations to maintain the law. It is proper (law-full) Yolngu behaviour for a stranger to a community to approach the senior

member of the land to seek permission before entering. Taking photographs for commercial purposes without the permission of the senior elder is an offence against Gumatj land and Yolngu law. When Galarrwuy Yunupingu was charged with the assault of a photographer who came on to Yolngu land without permission, the court discussed how under Yolngu law the image of land is valued highly, and it is believed that the reproduction of an image of the land interferes with that law because it diminishes the integrity or the strength of the land. The land includes the ground, the trees, rocks and streams – and the people who identify with the land – in this case, the Gumatj people. But images of the land, which include images of the people who identify with the land and its spirits, are also part of this full conception. So the court heard that a photograph taken of a Gumatj person on Gumatj land, or of a part of the landscape, is an image of the land, but it is also an act of capturing the spirit. The act of taking a photographic image away from the land without permission results in a loss or diminution of the value of the land. The capture of the spirit in the image means that the spirit cannot return to the land.[25] This case illustrates something of the complex relationship to country that First Nations' law carries, and also the level and degree of the many breaches of the law, which have occurred across the history of colonisation. In this instance trespass led to the capturing of the spirit of the land; the mind boggles at the thought of the many transgressions of Aboriginal laws beyond the crime of trespass that have occurred across colonial history.

While the song law is specific to place and creates boundaries between peoples, the boundaries are unlike those that have been constructed by colonialists who laid straight lines across the land so as to mark out their state boundaries across the ruwe. The songs do not travel in straight lines and cut neat boundary areas between different Peoples' territories. Some regions were shared areas between different peoples and some were restricted areas, applying strict rules for obtaining permission to travel across country. For example, when Ngurunderi[26] came close to Tangalun (Kingston South East in South Australia) he was met by our ancestor Parampari who blocked Ngurunderi's journey. He was subsequently killed by the blows from Ngurunderi's *plonji*.[27] It is from events like these that we learn about the protocols for travel across the land of other peoples.

Another of those protocols is to approach our spirit ancestor places with reverence and respect. One example reported in the popular media involves the Karajarri, a coastal desert people, who live south of Broome. John Dudu reported that a failure to properly pay respect to a spirit ancestor resulted in still waters 'rising up . . . like a great wave . . . I saw it. My own eyes.'[28] The Karajarri, like many other Nungas, worry for the country and the spirit ancestors who live in the landscape, the waters and the greater cosmos. Senior boss law man John Dudu worried about the serpent ancestor and what might happen if the spring in which the snake lives went dry. In the event that this did occur, he had been taught the song to bring the spring's water

back. As yet, he has never needed to sing it, but he warns that the threat is there, particularly when strangers come along and things change. 'Our job is to keep everything quiet. If something goes wrong, what's going to happen to us?'[29]

In the face of a continent of evidence, Justice Moynihan found in *Mabo No. 1* 'an enduring relationship to the land' but he was unable to go as far as concluding that this relationship constituted a system of laws.[30] However, his finding was sufficient for six of the seven High Court Justices to declare that a system of rights in land existed and continued to exist in the Murray Islands. High Court Justice Brennan said: 'the findings show that Meriam society was regulated more by custom than law'.[31] Post-*Mabo* there remains a limited understanding of the law-filled Aboriginal relationships to the natural world. While the High Court recognised an Aboriginal relationship to land, that recognition was translated as being at the lowest end of the property rights hierarchy, simply a beneficial right to use the land, and one which is open to extinguishment by the state. The High Court did not consider the sovereignty of Aboriginal law.

The mob

The voice of the individual is one voice among the collective many of First Nations Peoples. The place of Raw Law is to maintain or restore harmony and balance between individuals and communities of First Nations. The law's focus and concern is with the collective rights and obligations of Nungas.[32] Aboriginal law teaches about the interrelationship between all things: the land, people, law, the natural world and the cosmos. The Meriam learn that Malo plants the deeper truth everywhere and 'Malo makes possible that mediation which brings the "other" into the realm of the "we" through the reciprocity of sowing and harvesting'.[33] We also have the frog story: when the frog drinks up all the water the collective community of animals brings the medicine of laughter to prevent the otherwise inevitable death of all things. The frog illustrates the importance of the collective well-being of community over that of individual desire.[34] Nunga philosophical underpinnings of law differ from the 'West's' approach, which centres individual rights and property ownership, while Nunga laws centre the collective being in relationship to, belonging to and being responsible to the lands of our ancestors for future generations.

The United Nations General Assembly's adoption of the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP)[35] raised expectations that the protection of First Nations Peoples' collective rights to survival would be elevated. However, UNDRIP has been criticised for being more concerned with the individual human rights of 'Indigenous people' than it is with the broad rights of First Nations to survive as distinct sovereign and as law-full peoples.[36] While the 2007 declaration is seen by some to be an aspirational document that prescribes minimum standards on the rights of 'Indigenous

Peoples' in international law, those aspirational standards have been diluted. This becomes clear when the document is compared to earlier drafts of the declaration.[37]

From the early 1980s many delegations of Indigenous Peoples worked on the drafting of the declaration. Much effort was devoted towards reducing the peripheral status of First Nations' laws and progressing the centring of an Aboriginal world view on law. The original intention of the Indigenous participants was to empower First Nations' self-determination in relationship to our law and lands. However, instead, under the pressure of UN member states, the UNDRIP focus shifted to a generalist individual human rights approach and away from the concerns of First Nations to secure self-determination.

Apart from the fact that the majority of the world's First Nations Peoples do not have access to the most basic human rights, we are further distinguished by our shared histories of colonialism. First Nations Peoples in Australia have been dispossessed of our physical relationship to country for more than 220 years, and we share colonial histories and similar colonial experiences of dispossession with many others. Our shared experiences raise different kinds of human rights challenges from 'universal' and individual human rights. In particular, it raises the critical concern that First Nations Peoples have a right to survive the policies of states, especially when those policies have an assimilationist agenda.

The *1994 UN Draft Declaration on the Rights of Indigenous Peoples* referred to a number of collective rights, which were initiated and affirmed by First Nations Peoples during the UN Working Group on Indigenous Peoples drafting sessions.[38] The following draft Article 1 resulted from more than a decade of input from Indigenous Peoples.[39]

> Indigenous Peoples have the right to the full and effective enjoyment of all human rights and fundamental freedoms recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law.[40]

However, the draft did not survive the assault of the states and collective rights were weakened in the final 2007 UNDRIP. Some First Nations people claim that the right of peoples to self-determination is recognised in Article 1 of the UN Charter explaining the purpose of the UN: 'To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of Peoples, and to take other appropriate measures to strengthen universal peace.'

However, self-determination for First Nations Peoples has been washed out of the UNDRIP. The journey of First Nations Peoples to position our legal systems equally with nation states, along with a process of ensuring greater respect and equality of rights among nations has now been delayed. Instead,

First Nations have been fenced in, contained within the 'domestic paradigm' of states and their ongoing domestication and denial of First Nations' self-determination.

The final version of the 2007 UNDRIP included Article 1 as follows:

> Indigenous Peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law.[41]

Article 1 will be read down to 'Indigenous Peoples' having human rights and fundamental freedoms as collectives or as individuals, but First Nations Peoples' rights as law-full peoples in international law will be ignored. This is not a new reading but an affirmation of an ongoing reductionist view of international law in relation to the status of First Nations Peoples – that is, 'we have been deemed peoples within the domestic jurisdiction of each of our respective colonizing states and not as peoples who are subjects of international law in our own right as First Nations'.[42] As a result, the UNDRIP positions Indigenous Peoples as domestic subjects of the various colonial states and thereby fails to enable the future development of a framework, which would provide for our full right to self-determination. The concept of collective rights in this context has been used to deny our capacity as peoples with rights in international law and to reduce our status to that of having group and/or community rights, among other 'like' interest groups.[43] In the earlier years of the drafting of the declaration Nungas did not come to the UN to address the question of individual human rights but rather to address the inherent right of peoples to be self-determining. The tension between individual and collective rights is manifest in the 2007 UNDRIP as it remains unclear how collective rights might be attained and recognised by the state.

Law and extinguishment

In the Waargle, the law lives and even though most of the people have lost both the capacity and the will to live in the law, the law is maintained by those few survivors of the flood. The idea that the law could end or be finished does not occur within First Nations' languages or the law itself because the law is cyclical and is always returned to begin again. As the law lives in the land it cannot die, the story or the song grows and transforms with the land itself. Similarly, Moana Jackson of Aotearoa claims the laws of Maori cannot be extinguished or ceded, nor can the authority of the law be given away. Law could not be carried to the territory of others and imposed beyond acknowledged boundaries. In the modern world's wheeling and dealing of First Nations' lands and intellectual property, it is nonetheless noted that there could be no concept of a leadership with a representative capacity to deal away

the authority of Aboriginal law. Jackson makes a similar argument when he states: 'No matter how powerful leaders were, they could not give away the authority, which had been handed down from the ancestors in trust for the future.'[44]

The idea of the extinguishment of First Nations' laws is alien to Indigenous Peoples' knowledge frameworks. The emerging contemporary position on the representative capacity of many First Nations, where individuals vest themselves with the authority to enter into agreements, sits in stark contrast to that of traditional practices whereby representation was done by the collective and involved the consensus of the collective. This protocol is embedded in First Nations' laws. The idea that First Nations could enter agreements, which resulted in the extinguishment of their own legal systems should be viewed critically; the philosophical and jurisprudential frameworks that underpin First Nations laws do not enable the extinguishment of law to occur. The collective of First Nations Peoples would never be in agreement to the cessation of their own legal system.

It is my view that First Nations laws continue to run, regardless of what is said and done through agreement or unilateral action taken by governments or commercial corporations. For example, in Australia Indigenous Land Use Agreements (ILUA) made pursuant to the *Native Title Act 1993* (Cth) provide examples of determinations made by state tribunals, which have authorised agreements entered into by Indigenous individuals notwithstanding that there are sections of the community from which those individuals come who disagree with the agreement entered into. The lawfulness or otherwise of these agreements is determined by the NTA – that is, First Nations' legal paradigms formed to ensure sustainability for future generations and the requirement of community consensus are not considered in any of the ILUA determinations that have been made to date. The Australian legal system remains the sole determiner on issues of law-fullness or otherwise. There is no external or international mechanism available to First Nations Peoples to monitor and intervene in ILUA determinations, which would be deemed unlawful from a First Nations' perspective. Arabunna elder Kevin Buzzacott spoke in 2010 about an ILUA, which was used to gain support for the proposed expansion of the Roxby Downs mine in South Australia:

> We've got Roxby Downs brothers and sisters and they're talking about a big expansion (to Roxby Downs uranium mine) like a big open cut mine. It's going to be something like 17, 18 kilometres round and about one mile [deep] in the ground and that's going to be right in the middle.[45] In the 1980s it was Western Mining Corporation that actually started off this mine. We didn't want it, we protested against it, it's a very sacred place, big stories and now they want to do the expansion and this big open cut mine there. We're worried about that already and they getting the water from the Lake Eyre Basin. They're taking out the water, the

> sacred water from sacred country again and they're using it, then all our uranium stuff and more sacred water being used. So now with the new railway line [from Adelaide to Darwin]. . . they're talking about taking the [uranium] waste all the way up to Muckaty.[46] Then shipping the uranium out into other countries, and along the way they're going to dump off the waste back in the Muckaty area. Aboriginal peoples living close to this big railway line that they've got now and all the families and people here now are really worried about all that. They're really worried about what's going to happen because again it's a very sacred country. I don't know how they do it; they always want to dig and dump stuff and dig up very sacred places. We want to stop this mob before the bulldozers go in . . . because we're born here this old country, our creators created this country for us to look after. Now we're born with the obligations and responsibilities to look after this country. That's what old people say and that's what we've got to do.[47]

Agreements over First Nations Peoples' lands in Australia have often involved a small number of individuals in the sign-off while the principle of free prior and informed consent of the collective[48] is frequently ignored. Dianne Stokes spoke about her opposition to the federal government's proposed nuclear waste dump being located on the lands at Muckaty and the process by which the government purported to have obtained consent; her opposition was due to the lack of proper consent being obtained from the peoples who had the authority to speak for the land in question. They had not consented to the nuclear waste dump development.[49] In the film *Muckaty Voices* Barbara Shaw posed a further challenge to the Commonwealth selection of the site and also to the interpretation of 'free, prior and informed consent' when she referred to Article 29 of the UNDRIP. This reads:

> Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources . . . (including) no storage or disposal of hazardous materials . . . in the lands or territories of indigenous peoples without their free, prior and informed consent.

Dianne Stokes referred to the consent issues that the traditional owners confronted during negotiations to build the nuclear waste storage site:

> So, about the waste dump, there wasn't any proper consent and consultation from the traditional owners back home in Tennant Creek when it started off. The first time, I was really happy to follow these Northern Land Council people and the government people, to get my people to say yes, but the waste dump come to the land. And when I think about it in my heart, I shatter sometimes: I shake inside my heart, because I'm feeling

> it. I know that I would have a bigger problem at the time if I was accepting the waste dump to come to the land. . . . I've seen Lucas Heights,[50] it's got all the drums there all sealed. I went and asked these people at Lucas Heights a question: "Is it open"? "No it's all sealed, it's all tight and won't crash or it won't rust or anything". But I know drums get rusted; drums do get rusted, because I've seen a lot of these drums rusted along the highway with the tar. That was from before I was born, when they were making the roads going to Queensland. I can see that all along there you've got rusted drums. . . . I thought about my grandfather's country, and I say now that I'm not happy with the waste dump coming into the land, because most of my families who fought hard, even my uncle, he was one of them. . . . But now he's gone, because he had too much stress – he was worried about the stuff coming into the land. So he said to me, "I'm going to keep going."[51]

In *Mabo (No. 2)*[52] the High Court of Australia decided that the colonial doctrine of terra nullius – meaning that the land was empty of people, law and governance – as applied to Australia was a fiction that no longer held a place in the common law of Australia. Terra nullius was wrongly applied in relation to Australian property law and Indigenous Peoples – that is, the doctrine of terra nullius no longer prevented the recognition of an Aboriginal title that had been ruled not to exist in the earlier decision of *Milirrpum* v *Nabalco Pty Ltd and the Commonwealth of Australia*.[53] Prior to the *Mabo* decision, terra nullius underpinned Australian law for more than two centuries. Today, this same Australian settler society whose court rejected terra nullius turned and embraced the idea of the extinguishment of Aboriginal title. Extinguishment is the power that parliament has assumed to determine that First Nations Peoples' title to land no longer exists. The power of colonialism has determined other uses for the land. As with terra nullius, extinguishment claims the power to erase First Nations Peoples' connections to the land. So while *Mabo* on one hand was seen to recognise the rights of First Nations to land, on the other hand the court upheld the power of the state to extinguish any recognised Aboriginal title. The effect of terra nullius – its denial of the Indigenous being – is an historical process, which continues today. While many commentators argued that terra nullius was put to rest by *Mabo (No. 2)* in respect of Australian property law when the High Court recognised an Aboriginal title right,[54] it is my view, regardless of the latter very limited form of property law recognition, that the effect of terra nullius remains alive and well in contemporary Australian society. While terra nullius no longer applies to Australian property law as a result of *Mabo*, its impact nevertheless continues to determine the relations between First Nations Peoples and the state. Terra nullius may no longer provide the legal foundation for state genocide, but a failure to recognise Aboriginal sovereignty and the continuance of an unlimited state power with respect to the rights of First Nations Peoples

continues to determine our future. The principle of extinguishment is an example of a contemporary form of state power with the capacity to annihilate First Nations Peoples' subjectivity, ownership, sovereignty and governance of Indigenous lands.

Law and secrecy

Much of First Nations' laws are layered. Some layers of the law are accessible to the public; others are exclusively for 'those who know'. Knowers are mainly elders and senior law custodians. Aspects of the law are veiled in secrecy, and secrecy in a contemporary setting offers protection and maintenance of the law in a way that works towards the sustainability of law and its protection from mistranslation and commodification. First Nations' law is passed on in the oral tradition of storytelling and song, and the maintenance of oral tradition is strengthened by the passing of stories only through the 'right line'. This is so as to not leave the transmission of knowledge open to dispersion, absorption, interpretation and translation into frameworks that are alien to First Nations' law ways. Nonie Sharp writes about the issues arising out of the Meriam bringing their land claim before the public and into the written word. Where First Nations' legal systems 'convey a sense of mystery and danger in wrongdoing', those ways are often subverted when translated into public by-laws, which tend to have the effect of 'inhibiting the creativity and flexibility, which are the hallmarks of the oral tradition'.[55]

Then there are laws where the knowledge is held by senior law women and those laws are passed on to women who hold responsibilities for the ongoing carriage of the law. That knowledge is known as 'mimini's business and is often knowledge held only by women. In the mid 1990s the question of the secret and sacred nature of mimini's law arose in relation to a proposal to build a bridge to Kumarangk.[56] The bridge development was opposed by some miminis because of the damage it would cause to a miminis' law site but the bridge was nevertheless built in 2001. Leading up to the building of the bridge Binalong developers of a tourist development on Kumarangk sought finance from Westpac bank to build a bridge to replace ferry access to the island. The developers entered into contracts with Westpac bank and the state government of South Australia, and as a result of those arrangements the state government effectively became guarantors for the Westpac loan to the developers and thus liable to reimburse Westpac for losses incurred in the event the bridge development did not proceed. The state was thus committed to the development. Planning approval was given in 1990, and authorisation was also given under the *Aboriginal Heritage Act 1988* (SA) to proceed with the marina and the bridge. In 1993 objections were made public by the Lower Murray Aboriginal Heritage Committee (LMAHC) and work on the bridge was stopped. An anthropological report by Draper identified Aboriginal sites and on that basis an application was made to the federal Minister for

Aboriginal Affairs, seeking a declaration under s. 10 of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth). An application was also made to the state minister under s. 24 of the *Aboriginal Heritage Act 1988* (SA). Both applications were not granted.[57]

In 1994 the Aboriginal Legal Rights Movement sought an emergency declaration under s. 9 of the Commonwealth *Heritage Act* to protect sites of significance in the area of the proposed bridge development. The bridge, it was argued, would impact upon the cultural significance of the area. On 3 May 1994 the state minister authorised the destruction of the sites under s. 23 of the *Aboriginal Heritage Act 1988* (SA). Work on the site commenced on 11 May and was stopped on 12 May as a result of the emergency declaration. Following on from this the Commonwealth minister ordered the preparation of a report, which was headed up by Professor Saunders who recommended that a declaration be made. In July 1994 the Minister made a declaration that prohibited acts likely to desecrate the protected area for a period of 25 years.

The developers successfully appealed this decision under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) claiming lack of procedural fairness, including bias, a failure to take relevant considerations into account in the making of decisions (including the evidence of men) and unreasonableness. The developers succeeded on the ground that the ministerial delegation of the obligation of reading some of the evidence to a woman was a breach of his obligation under s. 10 of the Commonwealth *Heritage Act*.[58]

Following from these proceedings, a group of 'dissident women' came forward claiming that the secret women's business was fabricated. The South Australian Government set up a Royal Commission in 1995 to enquire into the authenticity of secret women's business. It indeed found that the 'secret women's business' evidence was fabricated.[59] However, the miminis who initiated the original action to protect the sites refused to appear and be subjected to the state enquiry. The commission relied upon the evidence of white male anthropologists to determine mimini's law in the region of Kumarangk. They maintained that the evidence was fabricated for the purpose of stopping the bridge development, but what would they know? The secret sacred nature of mimini's law made it unlikely that the law of women's business would have been known to any males, let alone white males.[60]

Passing on the law

Ngunytaj Napanangka Mosquito reinforces the importance of learning and sustaining law stories as a means and method of protecting country:

> We want people to learn about our culture. We got a lot of stories . . . secret ones too. Too long people not listening to women. Not listening to Aboriginal people. We women got our own Law and Culture. Different from men. We not stupid. Giving you very important stories about our

> culture. So you people understand. We wanna spread our stories . . . right around. Our children wanna be learning our stories. Keep on Hanging onto our culture. Keep it strong. Listen to what women saying. It very important. We getting old now. We worrying for mining companies. They think we stupid. Treat us with no respect for Culture and Law. Government mob too. We know how to look after our country. It very special to us. You'll see. You'll understand.[61]

The ongoing teaching and learning of First Nations' law is difficult to sustain under the restrictions that colonialism has placed on the transmission of First Nations knowledges of the law. The nature of First Nations' laws and their relationship to country are frequently in conflict with the colonial legal system, and this is particularly evident in the destruction of many significant Aboriginal places imbued with law and culture. This was noted in the matter of *Walker* v *New South Wales*.[62] It is difficult to sustain an Aboriginal knowledge system of law and culture when the dominant colonising military and legal order is founded upon a denial of its existence and an insistence on one law for all.[63] The denial of the sovereignty of First Nations Peoples was not overturned in the *Mabo* decision; it was maintained, even though this same decision was hailed as recognition of 'Aboriginal laws'. The narrowness of the *Mabo* decision is illustrated by the judgment of Justice Brennan in his caution to ensure that no radical departure was to be made from the colonial foundation:

> 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.[64]

Justice Brennan argued that his reading of the law was essential to the 'peace and order of Australian society', but the cost of this 'peace' is the First Nations' catastrophe. Can a violent foundation grow peace and order? When we examine this skeleton, which Brennan J describes, we see colonial violence built upon myths of terra nullius. These myths have not been fully rejected by the High Court and the ghosts of terra nullius continue to influence the majority of the Australian population and keep it ignorant of the First Nations' existence in both body and in law.[65]

In our ongoing responsibility to uphold First Nations' laws we need to decolonise or unlearn white privileged versions of history. Badiou's reading of the poem *The Age* by Osip Mandelstam is an interrogation of the twentieth or 'beast century', referred to as the 'broken vertebrae of the past'. Badiou considered the structures of the twentieth century and asked 'what held it together?', concluding that even before the century had begun its spine had been cracked by butchery and the slaughter of millions, even while the century thought of itself as the 'beginning of a new age, as the infancy of true humanity, a promise'.[66] For First Nations, the twentieth century picked up

from where the previous century had left off – a time of murder, and forced removal from land, laws and cultures. 'True humanity' was promised only to those who settled, stripped themselves of Aboriginality and clothed themselves in 'civility'. Badiou wrote of the century as being 'haunted by the idea of a changing man, and the creation of a 'new man', but in creating a 'new man' or a 'new humanity', it 'always comes down to demanding that the old one be destroyed'.[67] He went on to ask: 'What is to be done about this fact: that science knows how to make a new man? And since there is only one answer: profit will tell us what to do.'[68]

A resurgence of First Nations' laws involves the unlearning of much of the colonial (dis)order we have been damaged by and the unlearning of a terra nullius driven colonial culture. The colonising presence has impacted upon the passing on, and the teaching and learning of law stories and song. The learning of the law was hard enough anyway; how does one perform as a law-full being in the place of genocide and ecocide? The impact of the muldarbi was annihilating; the history of murder and massacre, of the separation and removal of children from families, the isolation of the elderly from the young, and the banning of languages disrupted the ancient ways of teaching the law. Colonial laws such as the Aborigines Acts were introduced across nineteenth-century Australian colonies, and they legitimised the objectification and domestication of First Nations Peoples. Nineteenth-century colonial laws were upheld when the Commonwealth of Australia was formed as a federation of states in 1901. The states followed the colonies' early practice of cultural genocide in maintaining a regime for the removal of young Nunga children from their families for the purpose of assimilation into the dominant colonial culture. These policies impacted on the capacity of the grandmothers and the grandfathers to teach the law to future generations.[69]

Translating the frontier

While learning and maintaining the law of First Nations Peoples across a violent colonial frontier is difficult enough, the process of translating First Nations laws into a colonial court system has its own set of impossibilities. Arabunna elder Kevin Buzzacott brought the question of genocide before the Australian courts and his conversations with the courts illustrate the impossibility of seeking justice within the domestic paradigm on questions such as genocide. This is perhaps similar to the experiences of other peoples who have sought justice before a system, which has attempted to annihilate their being. Why would we expect the perpetrators of genocide to make a determination of culpability for their own acts of genocide? Why would one bother to seek justice within a framework that perpetuates injustice? Perhaps the only answer is because alternative and independent options remain closed to First Nations.

Kevin Buzzacott is one of a number of owners and custodians who have an obligation to care for Lake Eyre and surrounding country in South Australia.

He, in particular, has the responsibility for protecting the natural mound springs in the region, which are supplied by the Great Artesian Basin underground waters. In the early 1990s these springs became vulnerable to the extraction of vast quantities of water by Western Mining Corporation (now BHP Billiton) for the Roxby Downs copper–gold–uranium mine.[70]

Buzzacott has spoken critically on the invasion of Australia, calling it a 'coming to country in the wrong way'. He sees it as an unlawful process in need of reversal. For an unlawful process to be reversed, this would involve the colonising culture coming into country properly and in accordance with First Nations laws. If this coming into country in a proper law-full way were to occur, First Nations and non-Aboriginal Peoples would be better positioned to learn and share in their understanding of Aboriginal laws. However, in the absence of a proper law-full coming into country Kevin Buzzacott took his concerns to court. In an application to the Australian Capital Territory Supreme Court for a declaration on the status of the international crime of genocide as a law of Australia, Kevin Buzzacott spoke of the hardship he experienced as an elder and custodian of law and culture.[71] He revealed to Justice Crispin the problems that custodians of the law experience when Arabunna laws are violated by an invading culture. The case brought face to face Kevin Buzzacott as a carrier of Arabunna law holding obligations to care for country and Justice Crispin, an administrator of the colonial legal system having obligations to maintain the rule of colonial law.

BUZZACOTT: I am Kevin Buzzacott from Lake Eyre, belonging to the Arabunna tribe and I have joined all the other families in this genocide case, [including] the embassy (Aboriginal Tent Embassy). First, your Honour, we bought in our sticks . . .We ask you to come down to the fire[72] – to get you to try to understand more about Aboriginal people and how we link together and how we are bonded to this country, and our laws, our culture . . . – this stick here was one of the three that we talked to you about. . . . This one here represents and symbolises all the old people that fell in the battles. . . . And also – this stick – we have got the predator . . . that upset our world 210 years ago. . . . with its law and policies and stuff. . . . it is my role, from where I am coming from, my authority, my law, the law of this old ancient country and all us old people that fell by the predator; I have to follow that up . . . to make sure that justice is there, the desecrations and the stuff that is going on. . . . Where they used to go out and massacre people, now they do it in sophisticated ways with their legislation and policies. The elections are coming up soon.[73] . . . if people can come, . . . if you could subpoena these so called artificial authorities to come down and sit down with us so we can put our law, our views forward. . . . I have your spirit in me. I can break your spirit. You have been down to my fire. I had the image of you at my fire, our fire, and I do not want to see any bad things happen to you. Like I

said, it is you or me, there is no turning back. My army is the old people, . . . and this stick here . . . I will say it in my law, in our ancient way – I should have the right, it is my right, my natural right, common right, whatever way you want to say it, to get you, the predator, that upset my world. I should have every law and right to take you out . . . but I cannot do that. I do not want to do that. I would rather you summons those pollies [politicians]. . . . This is our country; we have the key for this country. The survival of foreigners, the Europeans and all of them foreigners to this land totally depends on us.

JUSTICE CRISPIN: Mr Buzzacott, I certainly do not want to wish any summons against you. I want to hear everything you have to say. At the same time you are very aware of your own law and your own obligations under your own law and you need to understand that my own law, the law under which I work imposes real limitations on my authority.

BUZZACOTT: Okay.

JUSTICE CRISPIN: In listening to this application I have to act in accordance with legal principles. I do not have any authority to step outside it. And in particular, I do not have any authority to override the common law of Parliament.

BUZZACOTT: This is the whole problem that has to be changed. . . . it is this artificial way, this predator created this system. . . . That is what the whole trouble is. That system that we are living with today . . . it just does not serve. It is all evil, it is so bad. I could not do your job. I would resign. I would go to the media and the world and say, 'Look, I cannot do this job. I cannot help people from suffering and dying and so on out there.' Either change the system or leave the job, announce it and go if you cannot do it, because this system, is not serving the people. Chuck it out and let us make the peaceful one. Let us all get involved, subpoena these fellas and get them down or bring them down for a workshop or a picnic or something else, because we cannot do our job either. And these fellas own our land. You know we are on the footpath. We are living on the street. We have not got resources like these fellas. They are reaping the benefit from the land and they are doing it bad way with the big mining companies and stuff – but anyhow they have got all the say. We have not got nothing. We have got the misery and the suffering and the pain. It just goes on. I do not know how you people could sleep having a job like that.

We have to look at why we were put on earth in the first place. This is our part of the wood. Put the bloody responsibility back where it belongs and let us rewrite the history. Let us clean up youth today – you cannot talk about today unless you clean up yesterday, and then we can make a better future for tomorrow so your kids and my kids or you and me, whatever life we got left, we can make the changes. We can walk together so that our kids can laugh together. I am sure you do not want

> your kids walking the streets around here now. I do not think I could even let my old dog go in our cities and communities with all the evil that is around. Even the abuse that we get at the [Aboriginal Tent] Embassy, where louts are driving past abusing us, we do not know whether they are going to attack us or blow us up. Make a statement brother, test the system out, make it work and clean the deck up now so that our kids can have a future, they can have the right to a future that they deserve. And this whole country, they can look after their country, this whole country, like how they should be. Let us give our little babies a chance. Let us give this whole country a chance. We have got to clean it up, you and me. Let us do it. We cannot even feed our little babies nourishment. We cannot teach them anything the rights and wrong, because we have not got our bloody land back.
>
> The other people have got it. They got sheep and cattle. They prefer sheep and cattle than us. Take their sheep and cattle off. I want to put our kids back. Put the kids back on the land. They are the ones who belong to the land, not the sheep and cattle that ploughed up all the grains and stuff and got rid of our bush tucker and medicines and everything else. All money, money, money. Get rid of the money as well. It is evil. Let us make a move now and show the rest of the world how to go, what the direction is. It is not going to go away either. It is full on. We can pass the buck and say, 'Okay, forget about it, let us go.' It is going to go on. The suffering and the pain, is going to go on, I don't know how many people die a day in Australia or get sick. Thank you.

JUSTICE CRISPIN: Thank you, Mr Buzzacott. You speak well.

The dialogue between Buzzacott and Crispin J illustrates the gap that needs to be traversed before there is any possibility of communication and translation of Aboriginality and Aboriginal law. Justice Crispin refused to determine that there was any crime of genocide known to the laws of the Australian Capital Territory.

Truth translates as justice and can be found in the philosophy of Kevin Buzzacott. The law of ruwe was our truth: we followed the sung tracks of the ancestors. Their laws were our truth; that was what we knew. The tracks of our song law were violated by Captain James Cook and all those who followed him as they crossed them and with their presence attempted to alter and change this sung land. Nevertheless, our truth still sings from beneath the body of the muldarbi.

Notes

1 Eddie Bennell and Anne Thomas, *Aboriginal Legends from the Bibulmun Tribe* (Rigby, 1981), 44–46. This is a published children's story and one version of the Waargle. I prefer to reference published stories over stories that are told from our oral traditions.

It is my view that a story or song is at risk of commodification when it passes into the written and published word and also into the world of intellectual property. I view this position as less risk of harm while also enabling the use of an example of law for the purpose of dispelling the stereotype of Aboriginal 'stories' as being merely myth.

2 Nyungar has the same meaning as Nunga, and is used across the southern parts of Western Australia among the First Nations Peoples.

3 While this story may appear to have parallel meaning with the christian story of the flood, the Nyungar perspective on law and community harmony is different. For further discussion of the tensions of Aboriginality, authenticity and hybridity, see Stephen Muecke, *Ancient and Modern: Time, Culture and Indigenous Philosophy* (University of New South Wales Press, 2004), 173–178.

4 Michel Foucault, The Birth of Biopolitics, lectures at the Collège de France, 1978–1979, Michel Senellart (ed.) (Picador, 2008), 17.

5 *R* v *Ballard or Barrett* [1829] Supreme Court of New South Wales 26, sub nom. *R* v *Dirty Dick* [1828] NSW Sel Cas (Dowling) 2, reported in the *Sydney Gazette*, 23 April 1829. This decision was set aside soon after.

6 *Mabo* v *Queensland* (1992) 107 ALR 1*, Mabo* on the rejection of terra nullius and the ongoing foundation of the settler colonial society.

7 *Mabo* v *Queensland* (1992) 107 ALR 1 (Brennan J) 41.

8 Murrabina means 'ceremony' and where the song for ruwe is sung and danced, in connecting to the ruwe and creating a place of exchange with the ancestors and the natural world.

9 David Peat, *Blackfoot Physics: A Journey into the Native American Universe* (Fourth Estate, 1996), 67–68.

10 Robert Malcolm Ward Dixon and Martin Duwell, *The Honey-Ant Men's Love Song and other Aboriginal Song Poems* (University of Queensland Press, 1990), xiv.

11 Ibid., 2.

12 Peat, above, n. 9, 142–143.

13 Sun Women was recorded by Catherine Berndt, *Land of the Rainbow Snake* (Collins, 1979), 17.

14 Haunani-Kay Trask, *From a Native Daughter: Colonialism and Sovereignty in Hawaii* (Common Courage Press, 1993), 153.

15 Cited in Nonie Sharp, *No Ordinary Judgement* (Aboriginal Studies Press, 1996), 164.

16 Sharp, 9–10.

17 Genesis, *The Holy Bible*, Chapter 1, verses 26 and 28.

18 *R* v *Walker* [1989] 2, Qd R 79.

19 *R* v *Walker* (unreported NSW Court of Criminal Appeal, Gleeson CJ, Allen J and Barr AJ, 20 November 1994).

20 Sharp, above, n. 15, 19–20.

21 Ibid., 75.

22 Banba banbalya is a Kaurna word meaning 'to conference'.

23 Lewis 'Yerloburka' O'Brien, personal communication to the author.

24 *R* v *Yunupingu* (Northern Territory) Magistrates Court, A. Gillies SM, 20 February 1998), 3.

25 *Yunupingu* was one of those rare moments in Australian law where a court found in favour of an Aboriginal perspective on land. The matter of *Yunupingu* is perhaps an exception to the rule of finding against the existence of Aboriginal law.

26 A story recorded by the anthropologist Ronald Murray Berndt, 'Some aspects of Jaralde Culture, South Australia' (1940), 11, *Oceania*, 164, 168–185, the story of Ngurunderi, provides a Jaraldi perspective of his travels, and it is here Berndt supports the construction of common cultural groupings of the different peoples in the region,

including Tanganekald people from whom I am descended. Berndt promotes the idea of Ngurunderi, the human superimposing a new culture and one which is distinct from our prior ngaitji relationship. It is clear from the recording of the encounter between Ngurunderi and our ancestor Perampari that Ngurunderi invaded our place. The question remains: what of the ongoing identity of the Tangane, what place remains for our ancient and first identifies? Are they to be colonised by the greater power of Ngurunderi, and to be lost and forgotten in connection to the land?

27 A fighting club that is also known by the Tanganekald as a *kanaki.*

28 *The Weekend Australian Magazine* (Sydney), October, 10–11, 1998, 42.

29 Ibid., 43.

30 Justice Moynihan was the judge of the Queensland Supreme Court to whom the High Court delegated the power to determine the facts of the *Mabo (No. 2)* case.

31 *Mabo* v *Queensland* (1992) 66 ALJR 408 at 411.

32 Moana Jackson, 'Justice and Political Power: Reasserting Maori Legal Processes', in Kayleen Hazelhurst, (ed.), *Legal Pluralism and the Colonial Legacy* (Avebury, 1995), 248.

33 Sharp, above, n. 15, 163.

34 See the story of the greedy green frog in Chapter 2.

35 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61 sess, 107th plan mtg Sup no 49, UN Doc A/RES/61/295 (13 September 2007).

36 Ward Churchill, 'A Travesty of a Mockery of a Sham: Colonialism as "Self-Determination" in the UN Declaration on the Rights of Indigenous Peoples' (2011) 20 *Griffith Law Review* 521; Sharon Venne, 'The Road to the United Nations and Rights of Indigenous Peoples' (2011) 20 *Griffith Law Review* 557; Irene Watson, 'Aboriginal(ising) International Law and other Centres of Power' (2011) 20 *Griffith Law Review* 619.

37 *Draft Declaration on the Rights of Indigenous Peoples*, UN Doc E/CN4/Sub2/1994/2Add 1 (1994); the following articles were amended and arguably have made meaningless the collective rights of First Nations: Article 1, Article and the original Article 7 which became Article 8 and which deleted any reference to collective rights. The original Article 8, which was deleted, read as follows: 'Indigenous peoples have the collective and individual right to maintain and develop their distinct identities and characteristics, including the right to identify themselves as indigenous and to be recognized as such.' Article 24 in the final document was amended to privilege rights of the individual to healthcare. Article 33 replaced Article 32 and has weakened the possibility of Indigenous citizenship and denied the nationhood of Indigenous Nations.

38 Ibid.

39 Sharon Venne, 'The Road to the United Nations and Rights of Indigenous Peoples' (2011) 20 *Griffith Law Review* 577, provides an account of the UN declaration drafting process.

40 *Draft Declaration on the Rights of Indigenous Peoples*, UN Doc E/CN4.

41 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295.

42 These tensions were dealt with in early Australian colonial case law. I have discussed this more fully in Watson, 'Aboriginal(ising) International Law', above, n. 36, 619–640. See also the United States Supreme Court decision *Cherokee Nation* v *Georgia* 30 US 1 (1831). This case is one of a number of determinations made by Justice Marshall on Native Americans' status in international law. He determined that it was a matter for the domestic jurisdiction of the United States; international treaties were discarded as domestic agreements. This position is contested by First Nations; see Steven Newcomb, 'The UN Declaration on the Rights of Indigenous Peoples and the Paradigm of Domination' (2011) 20 *Griffith Law Review* 3.

43 UNDRIP articles, which refer to collective rights, include Article 6, Indigenous Peoples have the collective right to live in freedom, peace and security as distinct Peoples and to full guarantees against genocide or any other act of violence, including the removal of Indigenous children from their families and communities under any pretext. In addition, they have the individual rights to life, physical and mental integrity, liberty and security of person. Article 7, Indigenous Peoples have the collective and individual right not to be subjected to ethnocide and cultural genocide; Article 8, Indigenous Peoples have the collective and individual right to maintain and develop their distinct identities and characteristics; Article 9, Indigenous Peoples and individuals have the right to belong to an Indigenous community or nation, in accordance with the traditions and customs of the community or nation concerned. No disadvantage of any kind may arise from the exercise of such a right.
44 Jackson, above, n. 32, 260.
45 The mine is located at Roxby Downs approximately 500 km north of Adelaide, South Australia. The proposal was to turn an existing underground copper, gold and uranium mine into the world's biggest open-cut mine.
46 Muckaty is located approximately 120 km north of Tennant Creek in the Northern Territory.
47 Kevin Buzzacott, 'A Wake up Call', 2007 Declaration on the Rights of Indigenous Peoples: Where to From Here? Symposium, David Unaipon College of Indigenous Education and Research, symposium presentation 10 December 2010, the full presentation can be heard at www.unisa.edu.au/ducier/research/symposium/default.asp
48 Free and prior informed consent 'recognizes indigenous peoples' inherent and prior rights to their lands and resources and respects their legitimate authority to require that third parties enter into an equal and respectful relationship with them, based on the principle of informed consent'. See the Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, *Working Group on Indigenous Populations*, twenty-second session, 19–24 July 2004, 5.
49 This has also been criticised by the First Nations Peoples of Muckaty in the film *Muckaty Voices*, produced by Beyond Nuclear Initiative and Enlightening Productions 2010, available at: www.beyondnuclearinitiative.wordpress.com. The film discusses the National Radioactive Management Bill 2010 which, among other measures, proposed to override Australian Commonwealth and state laws, and suspend environmental and Aboriginal heritage protection. It also proposed to exclude the requirement to obtain traditional owners' free prior and informed consent for any sites being nominated for the nuclear waste dump.
50 A nuclear reactor facility in Sydney, New South Wales.
51 Dianne Stokes, 'Muckaty Community and a Nuclear Waste Dump on our Communal Lands', 2007 Declaration on the Rights of Indigenous Peoples: Where to From Here? Symposium, David Unaipon College of Indigenous Education and Research, symposium presentation 10 December 2010, the full presentation can be heard at www.unisa.edu.au/ducier/research/symposium/default.asp. In June 2014 Muckaty was delisted as a potential nuclear waste dump site.
52 *Mabo* v *The State of Queensland* (1992) 107 CLR 1; six of the judges, Brennan J, HcHugh J, Mason CJ, Deane J, Gaudron and Toohey JJ, (Dawson J) dissenting. This decision overruled *Milirrpum* v *Nabalco Pty Ltd and the Commonwealth of Australia* (1971) 17 FLR 141.
53 [1971] 17 FLR 141.
54 The High Court in *Mabo* v *Queensland* (1992) 107 ALR 1,18, 28, per (Brennan J) and 82 (Deane and Gaudron JJ) Toohey J declared the death of terra nullius in relation to the property law of Australia, 141.
55 Sharp, above, n. 15, 170.

56 Kumarangk is the First Nations name for Hindmarsh Island. The island is situated at the mouth of the River Murray which flows into the Southern Ocean in South Australia.
57 Kathy Bowrey, 'Commentary: First Nation Stories, Grandmother's Law: Too Many Stories to Tell', in Heather Douglas, Francesca Bartlett, Trish Luker and Rosemary Hunter (eds), *The Australian Feminist Judgement Project, Righting and Re-writing Law* (Hart Publishing, 2014).
58 *Chapman* v *Tickner* (1995) 55 FCR 316. This decision was upheld on appeal, see *Tickner* v *Chapman* (1995) 57 FCR 451.
59 Iris Stevens, South Australia, Hindmarsh Island Bridge Royal Commission, *Report* (1995). Based on the Royal Commission report, there was further action for damages in the Federal Court against Robert Tickner, Cheryl Saunders and others associated with the Tickner report. These claims were dismissed. See *Chapman* v *Luminis Pty Ltd (No. 4)* (2001) 123 FCR 62; *Chapman* v *Luminis Pty Ltd (No. 5)* [2001] FCA 1106.
60 Irene Watson, 'The Power of the Muldarbi and the Road to its Demise' (1998), 11, *Australian Feminist Law Journal*, 28, 36.
61 Recorded by Jordon Crugnale, *Footprints Across our Land* (Magabala Books, 1995) in the Introduction.
62 *Walker* v *New South Wales* (1994) 182 CLR 45.
63 This was particularly the position until the High Court *Mabo* decision. While this decision provides for the recognition of Aboriginal laws as the basis of any claim for Aboriginal title, it also retains the power inherent within the colonial foundation of Australia to extinguish any such claim of law and title. The 'aboriginal' title recognised is a form of beneficial use and is at the lower end of the hierarchical scale of the Australian property law system. It remains vulnerable to future extinguishment powers of the state.
64 *Mabo (No. 2)* [1992] 107 CLR 1, 30. I explore this more fully in Chapter 4.
65 Irene Watson, 'Sovereign Spaces, Caring for Country and the Homeless Position of Aboriginal Peoples' (2009) 108 *South Atlantic Quarterly* 27.
66 Alain Badiou, *The Century* (Polity Press, 2007), 16–17.
67 Ibid., 8.
68 Ibid., 9.
69 For further discussion of the history of the impact of the Aborigines Acts and child removal policies, see Ronald Wilson, *Bringing them Home: Report On The National Inquiry Into The Separation Of Aboriginal and Torres Strait Islander Children From Their Families* (1997), 273. The report stated the following:

> The Inquiry's process of consultation and research has revealed that the predominant aim of Indigenous child removals was the absorption or assimilation of the children into the wide, non-Indigenous, community so that their unique cultural values and ethnic identities would disappear, giving way to models of Western culture. In other words, the objective was 'the disintegration of the political and social institutions of culture, language, national feelings, religion, and the economical existence of' Indigenous peoples. Removal of children with this objective in mind is genocidal because it aims to destroy the 'cultural unit' which the Convention [on the Prevention and Punishment of the Crime of Genocide] is concerned to preserve.

70 Roxby Downs is located approximately 700 km north of Adelaide in South Australia. Approximately 49 million litres of underground water is extracted daily for mining purposes.
71 [*Nulyarimma*] *In the matter of an application for a writ of mandamus directed to Phillip r. Thompson Ex parte Nulyarimma* (1998) 136 ACTR 9, taken from the transcript of

proceedings, Friday 17 July 1998. I have included this extensive quote to illustrate a dialogue between the two ways of knowing law. In the exchange Buzzacott suggests other possibilities for future law making in Australia.

72 During the hearing Justice Crispin made a site visit to the Canberra Aboriginal Tent Embassy.

73 A reference to the 1999 election in which the Howard Liberal government was re-elected.

Chapter 4

Naked

The coming of the cloth

> *The first stage of resistance involves a throwing off, or a peeling apart of a forced way of behaving. Layers of engineered assimilation begin to come loose in the face of alternatives, Native cultural alternatives. Usually, this process means tremendous psychological tension as a conscious rejection begins with cultural habits first ingrained by a colonial education, a foreign language, and a fearful daily relationship with the dominant, white class. Frantz Fanon identified this process as the birth of a new, revolutionary human being. Others, like the African writer Ngugi W. Thiongo, call it 'decolonizing the mind'.*[1]

My ancestors were naked peoples, and our beginnings in Kaldowinyeri were as naked as the law and the land.[2] From birth my ancestors lived naked and in death their naked bodies were rolled in a woven grass mat, to be later buried. There are no words that I have come across in our First Nations languages[3] which describe nakedness. Prior to the invasion of our territories there was no consciousness of our nakedness; the awareness of nakedness came with the clothed coloniser. Now there are few who physically walk the land naked and remain undressed in this time of modernity.

The coloniser – the bringer of cloth to 'Australia' – dragged us into their world of cloth. And by forcing our ancestors to cover their nakedness, calling it sinful, the colonisers ignored their laws; ironically, the sins they committed – the murder, theft and tyranny they imposed upon First Nations' laws, lands and peoples were what is sinful. As we were forced away from nakedness we were forced away from living raw in the law. Today, most people inhabit a clothed, 'colonised' place, and a place in which the dominant legal system maintains a clothed state of being within its regime of rules and regulations. Colonisation brought an end to Raw Law and nakedness as we knew, lived and felt it. First Nations Peoples living in the continent the colonisers called 'Australia' had no traditional costume to identify and cover ourselves with. We were naked peoples. Nakedness was our identity and culture. And we retain that identity under the cloaks and shrouds of colonialism.

In dominating our First Nations being with its rules and regulations, the colonising culture imposed a system, which violated our laws. Colonisation

was more than an act of dispossession of land; it was a dispossession of law and the end of nakedness. Our nakedness was made illegal; the naked body was subject to layers of domination and ever since we have been forced to cover over our raw and lawful being. Law, land and people alike were clothed by colonialism. We covered our nakedness not initially as a shamed response, but rather as an act of survival in the face of the threat of violence and incarceration (which still occurs today). Early colonists used force (as they still do today) wherever Nungas protested or resisted. Our behaviour was modified through the imposition of christianity and Western moral codes, and our response to the naked body is now largely one of shame – shame of being naked. The idea of European superiority was historically based upon religious or other metaphysical ideas of the 'evolving spirit' or 'progress'. Positioning the supremacy of christianity also fuelled colonial expansion. In an essay of 1532, *De India et De Jure Belli Reflections*, Francisco de Vitoria recognised that while title to land was vested in First Nations Peoples, those lands could be surrendered in a 'just war'.[4] For the christian nations, then, the mission to convert First Nations from 'paganism' could justify continued atrocities and the claiming of our lands and territories.[5]

European 'progress' was contrasted with the non-European and common stereotypes of nativeness, savagery, cruelty, cannibalism, deceitfulness, stupidity, cupidity, immodesty, dirtiness, disease, heathenness, and so on.[6] In the nineteenth century, theories of evolution were co-opted to reinforce the notions of European superiority. Within the absurdities of social Darwinism Nungas were 'so low' that the Europeans rendered us non-existent in the categories of humanity.[7] Robert Williams Jr argues that colonial foundations were built on language and stereotypes that had been used by Western civilisation for thousands of years to 'identify and isolate the savage as an irreconcilable enemy to civilisation'.[8]

Invisible before a white supremacist lens

Early colonial writings bear few references to our nakedness. It was as if we were never there in our naked bodies and in being naked we were made invisible to the coloniser; we were terra nullius bodies. And thus were our connections to our law and lands made invisible and unknown to them, as though we had never existed. From a colonialist standpoint, refusing to see and know us (or not knowing how to see us) they were able to claim ignorance. bell hooks calls it 'white supremacy', the power to make black invisible, erasing all traces of subjectivity.[9] For more than 200 years, ignorance of the colonialist position of a white Western supremacist way of viewing the world has been deployed as an excuse for the crimes of colonialism. The illusion that First Nations Peoples were invisible is a tool of the colonists.

The effects of state protectionist and assimilationist policies instituted in the nineteenth and twentieth centuries remain alive today in Nunga communities across Australia. They are evidenced by high imprisonment rates, deaths in custody, mental illness, domestic violence, substance abuse, chronic health conditions, and poverty – just about every social and economic indicator has Nungas placed at the bottom of colonial power and hierarchy. Early frontier violence, massacres,[10] germ warfare,[11] and the policies of protection and assimilation, were intended to kill and remove us from the land or to absorb any survivors into whiteness.[12] We are now just 2 per cent of the Australian population.

The muldarbi works at making all that is Nunga invisible, and at the same time highlighting illness, domestic violence, substance abuse and poverty as Nunga problems. Writing about the attempt to assimilate women, Luce Irigaray said: 'I search for myself, as if I had been assimilated into maleness. I ought to reconstitute myself on the basis of a dissimilation.'[13] Nungas have been doing this since 1788 – that is, retaining the difference by refinding our Nunga identity reflected back to us from the land, rather than in the growing white surrounds. The Nunga relationship to land has enabled us to survive the muldarbi's challenges to what we are and its attempts to make us vanish. The vanishing of Nungas was reasoned and legitimised by the decision in *Attorney-General of New South Wales* v *Brown*,[14] where we were vanished into terra nullius, where we were nothing before the law – neither slaves nor persons – and where it was confirmed that title to the land of Nungas never had nor ever would have a place in Australian common law.

Can we be defined or constructed externally by the other? Should our murderers and rapists define who we are? Can they define our existence away? They tried: Pettman concluded that our 'Aboriginal exclusion originally based on terra nullius, violence, restricted citizenship and institutionalisation, were strategies to build the nation and state as white'.[15] The colonists did build a white Australian nation, one based on our exclusion, and we were confined by force to government and christian mission stations or the fringes of the country, and excluded from and by the new state. When a Nunga identity did appear, it was contained within representations of the exotic, the primitive,[16] or the dregs of Western society.

The making of invisibility is a universal phenomenon experienced by colonised peoples across the world. Columbus started it in 1492 with the invasion of the Americas. Nearly 500 years later Durham wrote: 'the negation of "Indians" informs every facet of American culture. The energy and vitality for which the New World is famous comes from vampirical activities.'[17]

Shame, the rugged cross and ragged clothing

The old people[18] talk of a time before trousers and after trousers. The bringing of cloth marked a radical change in First Nations Peoples' history. When we

became clothed, what did we become, as we came into the awareness and presence of the coloniser? Did we become more visible, with their reduced embarrassment and our new shame of our nakedness?

The writings of early colonists illustrate their way of knowing and seeing us through a white supremacist lens. The colonist 'knew' us as inferior. Lloyd, a squatter on a South Australian pastoral run, wrote in 1846: 'We saw a number of half-naked dusky savages . . . lounging down the street with spears and waddies in their hands, filthy and slimy and greasy, leaving behind them an odour enough to turn the stomach of the stoutest dog.'[19]

Similarly, Bull, a newly arrived 'free settler'[20] to South Australia, recorded an 1837 meeting between Governor Hindmarsh and a group of First Nations people:[21]

> On the double party reaching the tents they were met by Governor Hindmarsh. There had been some anxiety about their fate. His Excellency expressed himself shocked that Mr. Stuart should have brought the naked black men amongst the tents of the numerous immigrants, and immediately called on Mr. Gilbert, the Government storekeeper, to supply the men with clothing, which being brought forth, some of the sailors, who were ashore from the Buffalo, took the natives in hand to dress and pet, pressing on them pipes and grog, which at the time the blacks declined, preferring sugar and fat pork; but alas! How soon they acquired a taste for the indulgences offered! The dressed-up black men displayed any-thing but comfort or content in their unaccustomed array, which on becoming apparent, the Governor, on advice, was considerate enough to order blankets to be exchanged for the unpopular garments.[22]

From the earliest contact with the settlers First Nations Peoples were forced to cover their naked bodies so as not to offend settler society. Sometimes the settlers supplied blankets and clothing contaminated with the smallpox virus. Their purpose was not only covering the natives' body but also genocide.[23] The disease spread catastrophically among the immune-vulnerable First Nations.

While pressured to cover nakedness, many of our ancestors refused to conform; for this they were frequently incarcerated. In 1851 the German emigrant settler and school teacher Listemann recorded in his journal that the old people were threatened with prison for walking naked. He saw comedy in their attempts to cover nakedness, but I see a situation in which there was no choice. Incarceration and humiliation were two of the inevitable consequences of colonisation:

> They clothe themselves with a mat wrapped around their bodies and around the shoulders wear a sheep skin or a skillfully sewn rug made from opossum skins. In the vicinity of Adelaide, many wear pieces of European

> clothing which often give them a comical appearance. Thus I met a young beauty whose long cotton dress swept the dust for half an ell behind her, and a 'black dandy' seemed to enjoy his appearance in his finery consisting of white shirt, vest, cravat with collar and once-white gloves, just as much as our young gentlemen in their most elegant outfit. There is, by the way, a law that no native may enter the city unclothed; any such intruders are immediately evicted by the constables.[24]

The colonial *Adelaide Chronicle* reported in 1840 that the people of the Murray region were coming into Adelaide to 'ramble about our streets in a state of nudity'.[25] The *Adelaide Examiner* recommended in 1843 that 'some means should be taken to exclude the numbers from the streets, that now wander about in a state of nudity'.[26]

In 1842 in Adelaide Moorehouse, the Protector of Aborigines, recommended the practice of 'locking up the Natives for 24 hours'.[27] Imprisonment was imposed without any formal hearing; for the colonialists it was a simple remedy – the clearing of 'their' streets of naked black bodies.[28]

> The suggestions of locking up the Natives for 24 hours, if they are found wandering about town in a state of nudity, is in my opinion, good and lenient enough. It would tend greatly to check the indecent exposure which Mr. Teichelmann (missionary) mentioned in his letter. If the Natives continue to annoy the shopkeepers as much as they recently have done, I should decidedly recommend the same punishment to be applied; it would shew them really that they must, in common with Europeans, be subjected to laws that ensure good behaviour. I have had the natives assembled and have translated to them the order of the Commissioner of Police.[29]

Subsequently, newly arrived Police Commissioner Finniss suspended the practice of incarceration without trial and instructed that 'naked Aborigines' were to be taken before a magistrate before being imprisoned.[30] The courts, however, showed little tolerance, insisting that Aboriginal workers remain covered with blankets while undertaking physical work. *The South Australian* newspaper reported in 1843 that fines were imposed when several Aboriginal workers were

> brought before the magistrate, for going about naked in the centre of the city of Adelaide. They had been cutting wood or carrying water, and their employers had either requested or permitted them to put off their blankets for convenience of working.[31]

Our old people were fined and imprisoned for being naked, and they were progressively enslaved to the new colonial settler society, while also being

clothed in the invader's law. And we still struggle against these early colonial recollections and colonialist ways of knowing us as the 'naked savages'. Freeing ourselves involves a process of decolonisation – the freeing of our minds, bodies, souls and spirits from a dominant settler colonial image of our mob as savages.

In 1825 Judge Barron Field of the Supreme Court of NSW commented on the old people who appeared before him as being 'Without faculties of reflection, judgement or foresight; they are incapable of civilisation. They are the only natives in the world who cannot feel or know that they are naked and they are not ashamed.'[32]

Perhaps Field J did not realise that there was no shame; the shame lay with him, the observer, commentator and holder of power. Nakedness and the awareness of it came to the old people through the reflection of the other, and the other's shame of nakedness.

Cawthorne, writing in 1844 about the First Nations of the Adelaide Plains, wrote:

> I took a walk amongst them who were in their wurlies, saw a collection of naked boys and girls, men and women, either entirely or half so. They are quite innocent in this respect and the women think nothing of (stalking) bolt upright in perfect nudity. Of course, this is not observed amongst themselves and it is only strangers who notice it.[33]

Confounding the liberal views of Cawthorne, the larger colonial 'reality' was one of 'blackness', 'wildness', and 'backwardness', which, combined with nakedness, fuelled ideas of white superiority as we became 'shamed', erased and exiled to the back blocks of Australia. The christian story of creation recorded in Genesis tells of the 'eyes of them both (Adam and Eve) being opened, and they knew that they were naked'.[34] This announced the beginnings of their clothed history and self-awareness of the naked body.[35]

Enter the church, exit naked

In 1792 William Carey, a Baptist missionary who was also known as the 'father of modern missions', wrote about First Nations being 'poor, barbarous, naked pagans'.[36] The wearing of clothing was fundamental to the early colonial and christian way of being. Early missionaries demanded the body be covered; nakedness was seen as sexually permissive.[37] Clothing was a prerequisite to being a christian. Reverend Taplin, a missionary to the Ngarrindjeri people at Point McLeay Mission in 1873, wrote:

> Our congregations at first were often strangely dressed. Some would be enveloped in the original opossum-skin rug. Some of the men would wear nothing but a double-blanket gathered on a stout string and hung round

> the neck cloakwise, others with nothing but a blue shirt on, others again with a woman's skirt or petticoat, the waist fastened round their necks and one arm out of a hole at the side; as to trousers, they were a luxury not often met with. To our horror and dismay one Sunday a tall savage stalked in and gravely sat down to worship with only a waistcoat and a high-crowned hat as his entire costume. Of course I sent him out quickly.[38]

He had earlier written:

> This horrid rite (ceremonial law) is much calculated to throw them back into barbarism, whatever good instruction they may have received in youth. Whatever sense of cleanliness, or love of European clothes may have been acquired is by this rite completely swept away. This custom must be done away with. . . . I told all the blacks plainly this morning, that they obeyed the devil, and that Jehovah would send them to hell with the devil if they did not cease to obey him.[39]

Taplin's linking of sinful nakedness and traditional rites are obvious. In 1853 Bishop Short, South Australia's first Anglican bishop, had written: 'Many young adult natives, who would have belonged to the most degraded portion of the human family, are now clothed and in their right minds sitting at the feet of Jesus.'[40] When forcing clothing upon our naked bodies the coloniser had intended that the body of our being and law would become invisible, and that our subjectivity as First Nations Peoples would also disappear.

Wiradjuri writer, artist and activist Kevin Gilbert criticised the behaviour of christian missionaries in indoctrinating and modifying the behaviour of Aboriginal people through the separation of children from the old people 'until the youngsters were well past marriageable age and had been so indoctrinated against their "unclothed heathen" brothers that they accepted their new lot in return, perhaps, for eventual salvation'. [41]

Dressing the law in rules and regulations

The colonial legal system comprises layers of 'man-made' rules and regulations, and these rules have come into being, not through the creative process of song but through a process, which is to a large degree reliant on the muldarbi power and the force of arms to maintain it. The Raw Law of the colonists themselves has been covered over for centuries by their own rules and regulations, and is no longer recognisable to them. Their Raw Law has faded from their minds, memory and imaginings.

When Cook and the colonists who followed first invaded the shores of 'Australia', they were dressed in military attire, they applied military rules and regulations and they began the genocidal process of dismantling our

Indigenous being. The military attire was followed by civilian dress and their 'common law' and the colonisers intended that to become common to us all. The British law was deemed the 'real law', the only law. However, it was not common to us; it violated our law. It violated itself also, as the colonisers consistently failed to comply with their own rules and regulations. But despite more than two centuries of the imposed colonial legal system and its violations of Raw Law, the 'law' has lived on.

Our law was 'known' to the coloniser as myth, legend or lore, and was seen in the same way that the old people were in their nakedness, as not really being 'properly' human but rather heathen and barbaric. Likewise, our law was not really law, but a set of customs and myths of primitive peoples. The British legal system by force raped its way into power in this country, and took form as law, based on the weight of its military attire and its ability, through force, to dominate all that was different or which failed to conform in the eyes of those who held power. This is not law. Aboriginal law is rooted in the land of its creation; it is a song. It is a love of law, and its land and its peoples. Muldarbi law and colonialism worked, and still works to erase peoples and their law.

In his judgment in *Mabo* (*No. 2)*, Justice Brennan was careful to ensure that he did not radically depart from the existing rules and regulations when he decided:

> In discharging its duty to declare the common law of Australia, 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 . . . Although this Court is free to depart from English precedent which was earlier followed as stating the common law of this country, it cannot do so where the departure would fracture what I have called the skeleton of principle. The Court is even more reluctant to depart from earlier decisions of its own. The 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.[42]

I maintain that if the High Court and the state were to seek out this 'skeleton of principle' of Brennan's, they would find that no skeleton exists. Instead, they would find layers of rules and regulations that purport to cover a mythical skeleton of legitimacy. Where would Brennan imagine that this skeleton lies? Buried in the lands of Aboriginal peoples? Noel Pearson, confident in the High Court decision, said:

> I am a great believer in the imperative of those charged with developing the common law to redouble our efforts when injustice looms inevitable

> and unavoidable, to ever refine its rules and to strive to locate the justice and balance which frequently only remains to be found. This imperative remains as long as, to paraphrase His Honour Justice Brennan (as he then was) in the *Mabo (No. 2)* decision, the skeleton of the common law, which gives it its internal logic and consistency, is not fractured.[43]

The views of Pearson failed to take into account the white, christian and patriarchal nature of the colonial legal system and to consider the impact of its power differentials on First Nations Peoples' capacity to secure land rights and self-determination. He ignores what is law-full. At the same time Greta Bird argued: 'the legal system is dressed up in the language of objectivity and neutrality, its "skeletal framework" privileges white versions of history and legality'.[44]

There are no songs in the land that tell the story of this skeleton. The story of the skeleton and the laws the British deem are built upon it are known and told through the story of the genocide of Aboriginal peoples. Perhaps they have reflected their own lack of identity upon us, their own invisibility and the muldarbi – terra nullius, and perhaps 'the self is unknowable except by reflection'. Perhaps in this process of unravelling history we have been the mirror, a ghostly image and a haunting of their lost nakedness.

It is possible to stir the imaginings of the colonial settler's return to the christian myth of their lost Eden and to ask the question, 'What does it mean to be human?' Irigaray writes: 'We ought to recover our nudity in the garden and wonder whether and how we can start to construct our human development again, each one and together.'[45] Perhaps if the people of the West were to shed the colonising cloth that covers their bodies they might come to know their own naked reality and dependency on the natural world. This might just trigger an opening for a more relational approach to life, which engages with the critical processes required to decolonise from a mindset that has for so long justified the annihilation of First Nations Peoples. In the return of the naked being would be the return of First Nations Peoples as subjects in law.

Notes

1 Haunani-Kay Trask, *From a Native Daughter: Colonialism and Sovereignty in Hawaii* (Common Courage Press, 1993), 115.
2 I acknowledge that a number of our people did wear cloaks made of kangaroo or possum skin whenever the weather was cold; however, we mainly lived naked.
3 There were hundreds of First Nations languages spoken in this country we now call 'Australia'.
4 Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press, 2008), 25–26. Only christian nations were deemed to have the power to declare war and exercise all the rights of war.
5 Sharon Venne, *Our Elders Understand Our Rights* (Theytus Books, 1999).

6 Robert Williams Jr, *The American Indian in Western Legal Thought* (Oxford University Press, 1992); throughout this work Williams describes the impact of christianity upon the construction of the barbaric native.
7 James Morris Blaut, *The Colonizer's Model of the World: Geographical Diffusionism and Eurocentric History* (Guilford Press, 1993), 50–61.
8 Robert Williams Jr, *Savage Anxieties: The Invention of Western Civilisation* (Palgrave Macmillan, 2012), 210.
9 bell hooks, *Killing Rage, Ending Racism* (Henry Holt & Co, 1995), 35, and 36 for a further discussion of the impact of legal apartheid in the United States and its ability to continue making black Americans invisible.
10 There is substantial Nunga oral history which provides accounts of frontier violence and massacres. Massacres occurred frequently across the colonial frontier and as late as the 1920s (at Uluru). In my own country in the south-east of South Australia, which was invaded in the 1840s, elders spoke of pastoralists deliberately poisoning waterholes as a routine practice.
11 For further discussion, see Noel Butlin, *Our Original Aggression: Aboriginal Population in South East Australia 1788–1850* (Allen & Unwin, 1983), 11–41, 63–70.
12 For further discussion of the absorption into whiteness, see the works of Aileen Moreton-Robinson.
13 Luce Irigaray, *Je, Tu, Nous: Toward a Culture of Difference* (Routledge, 1993), 9.
14 *Attorney-General of New South Wales* v *Brown* (1847) 1. Legge's Reports 312, see commentary on this case by Valerie Kerruish and Jeannine Purdy, 'He "Look" Honest – Big White Thief' (1998) 4 *Law Text Culture* 146, 152.
15 Jan Pettman, *Living in the Margins: Racism Sexism and Feminism in Australia* (Allen & Unwin, 1992), 5.
16 Ibid., 7. Richard Bell argues against the narrow construction of Aboriginality that situates Aboriginal art within a stereotype of the dot painting. See Rex Butler, 'Richard Bell's Psychoanalysis' (2006) 38 *Australian Art Collector* 136.
17 Jimmie Durham, 'Cowboys and . . . Indians' (1990) 12 *Third Text* 510.
18 This term refers to our ancestors. In an indigenous context, 'elder' refers to someone who has grown in knowledge and wisdom in their living of Aboriginal law ways, as opposed to having simply grown old.
19 E. Lloyd, *A Visit to the Antipodes* (Smith, Elder & Co., 1846), 83–84.
20 Bull was an English farmer who received a free passage to South Australia, arriving in 1838. He began as a land and stock agent, and as a manager for absentee landowners. In the 1840s he began farming in the Mount Barker district. He also owned a sheep station near Rapid Bay. The term 'free settler' was applied to those who came to South Australia and had paid for their travel as opposed to convicts who had been brought to the colonies of NSW, Tasmania or Victoria, in shackles. Free settlers had often also pre-purchased First Nations stolen lands while in England from the South Australian Company.
21 The Kaurna People are known as the traditional owners of the Adelaide Plains in South Australia, and their lands were the first site to be occupied as the new 'freely settled' colony. However, the Ramindjeri contest the Kaurna claim of traditional ownership of the Adelaide Plains.
22 John Bull, *Early Experiences of Life in South Australia, Adelaide* (Wigg & Son, 1884), 36.
23 Some evidence of the practice of distributing blankets contaminated with smallpox was recorded in Butlin above n. 11, 63–70, where he references similar practices adopted against Native Americans.
24 Cited in B. Arnold, 'Three New Translations of German Settlers': Accounts of the Australian Aborigines' (1988) 33 *Torrens Valley Historical Journal* 4. G. Listemann was a school teacher; after 1848 he was involved in setting up the 'South Australian

Colonization Society' (originally named the 'Berlin Emigration Society'). Listemann's book *Meine Auswandrung nach Süd-Australien: und Rückkehr zum Vaterlande* (A. W. Hayn, 1851).

25 Cited in Alan Pope, *Resistance and Retaliation, Aboriginal-European Relations in Early Colonial South Australia* (Heritage Action Group, 1989), 44, the original source is a correspondent to *Adelaide Chronicle*, 25 February 1840.

26 *Ibid.; the original source is the* Adelaide Examiner*, editorial 28 January 1843.*

27 Ibid.; Protector of Aborigines letter to Colonial Secretary, 14 March 1842, SA Public Records Office CSO 39/1842.

28 The *Aborigines Protection Act 1886* (WA), created the rule that any 'Aborigines' 'found loitering' or who were not 'decently clothed from neck to knee' should be removed: ss. 43 and 45.

29 Cited in Pope, above, n. 25, 44. The Protector of Aborigines correspondence to Colonial Secretary, 14 March 1842; in September that same year several Aboriginal people were reported charged under this regulation.

30 Robert Clyne, *Colonial Blue: a History of the South Australian Police Force, 1836–1916* (Wakefield Press, 1987), 86.

31 Cited in Pope, above, n. 25, 45; the original report is from the *Southern Australian*, 5 September 1843.

32 Cited in John Harris, *One Blood: 299 Years of Aboriginal Encounter with Christianity* (Albatross Books, 1990), 32.

33 Robert Foster (ed.), *Sketch of the Aborigines of South Australia, References in the Cawthorne Papers* (SA Department of Environment and Planning, 1991), 39.

34 Genesis 3: 1–24, King James translation of the Bible. Blaut, above, n. 7, 43, makes an interesting comment on the possible geographical sites for the Garden of Eden, the supposed place being the Caucasus Mountains, also the site of the supposed origin of the 'Caucasian race'.

35 For further references, see Genesis 9: 18–28.

36 Cited in Harris, above, n. 32, 32. Carey at the time of his writing had never encountered First Nations; his knowledge was based on gossip and heresay.

37 Ibid., 530–533, for a discussion of missionary attitudes to nakedness and sexuality.

38 George Taplin, 'The History of the Mission at Point Macleay' in James Dominick Woods (ed.), *The Native Tribes of South Australia* (Wigg & Son, 1879).

39 George Taplin, *Journal: Five Volumes 1859–79*, as typed from the original by Mrs Beaumont, (Mortlock Library, 7 March 1862), 96.

40 Cited in Harris, above, n. 32, 530–531.

41 Kevin Gilbert, *Because a White Man'll Never Do It* (Angus & Robertson, 1994) 6–7.

42 *Mabo (No. 2)* [1992] 175 CLR 1, 29. Brennan J is not without Aboriginal support. Noel Pearson, known for his prominence during the media debate on the *Mabo (No. 2)* decision and the subsequent *Native Title Act 1993* (Cth), during which he played a leading role in negotiations with the Keating Commonwealth government, has been a staunch crusader for the High Court decision.

43 Noel Pearson, 'Our Concept of Native Title at Common Law', in Galarrwuy Yunupingu (ed.) *Our Land is Our Life* (University of Queensland Press, 1997), 151.

44 Greta Bird, 'Koori Cultural Heritage: Reclaiming the Past' in Greta Bird, Gary Martin and Jennifer Nielsen (eds), *Majah: Indigenous Peoples and the Law* (Federation Press, 1996), 104.

45 Luce Irigaray, 'Sharing Humanity: Towards Peaceful Coexistence in Difference', in Gianni Vattimo and Michael Marder (eds), *Deconstructing Zionism: A Critique of Political Metaphysics* (Bloomsbury, 2014), 170.

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Chapter 5

Who's your mob? How are you related?

> *Because it is a systematic negation of the other person and a furious determination to deny the other person all attributes of humanity, colonialism forces the people it dominates to ask themselves the question constantly: 'In reality, who am I'?*[1]

Who are we? Who am I?

Lionel Fogarty's poem *Imarbara I am – Generation of Existence* names who he is:

I am a living entity, you belong to me. I AM.
I am earth and space
I am a son of the world
I am the religious law
I am the kin to all creatures
I am kin to this creation
The world is my nation
The earth is my mother[2]

In the above poem Fogarty centres his Aboriginal self, and then goes on to situate his colonised being:

I am the birds dat die
I am the snakes dat die
I am the sea creatures to die
Sure man, we am but why must we bang and blast here on this ground?
I'm your native here in captive[3]

So the question arises from this struggle to centre the Aboriginal colonised self: who am I now that I no longer walk the land naked? I am now in this clothed state and yet I remain the same being that I have always been a being of law-fullness. But now I breathe less easily beneath the muldarbi layers. I am born of the land and a time before, here now and moving into. I am the

grandmother's song, sung across the land; I am keeper of the great spirit of peace, a listener of the wind and the old people, the grandmothers and grandfathers who still speak the wisdom of the creation laws. I am a keeper of the song, which comes to me in dreams and voices and winds from the lands and waters and my ngaitji.[4]

We struggle to go beyond survival to live a good life like the ancestors before us, so that one may live again to sing the songs wanting to be sung. But with the worry of the muldarbi state, we survive as the reflection of the mob; self, law and ruwe are violated daily. We have to decolonise, undress ourselves of the rape and plunder, and to refind an identity for our mob and selves that is true to the ancestors. Our laws were broken and continue to be. The law stopped being sung as the path of genocide criss-crossed the land with the movements of the coloniser, as the song holders fell in silence. Our relationship to our land has carried us through two centuries of ignorance, greed, rape and plunder, but this has not been achieved without a price. Acts of violence and breaches of law have caused the hardening of the earth; we work to soften it again through ceremony, language and law. In being Nunga, we struggle to be one in song and ceremony. We have to continue to carry our custodial obligations. For many, the ruwe is badly damaged, and yet in these places, like the places of Tjirbruki,[5] our ancestor leaves his message, a message that still lies in the land, and a landscape that despite being hardened by development is still alive in its spirit and story and open to renewal.

I am a 'traditional' Nunga. This statement flies in the face of the stereotypes of tradition and the traditional. Interestingly, however, the stereotypes have themselves been historically constructed by the state along with the boundaries of 'traditional'. The state has made popular the idea that being 'traditional' is limited to being 'full-blooded' and living in a culture or context, which is unaffected by colonialism. This is a myth in itself. Where globally might we find Indigenous Peoples who are unaffected by colonialism? Why do we assume that tradition and culture only live in remote communities and not in urban areas where there are large numbers of First Nations Peoples? [6]

The idea of tradition encompasses more than being a 'full blooded Aboriginal' living in a 'remote'[7] region of this country. Tradition and culture are practised by First Nations Peoples who also comprise 'mixed blood' people living on and off their traditional lands, also in 'non-remote' areas. The impact of colonisation has disrupted our laws and traditions everywhere. The roles of hunting and gathering are now almost everywhere subverted by a supermarket or shopping-mall culture. But tradition embraces many things beyond the stereotypes of what I am supposed to look, act, hunt and gather, and speak like. Tradition also lies within our spirit and soul life. There the kernel of my being remains 'traditional'. In these places traditional beliefs and practices continue in spite of the constant pressure to change, and to develop and transform our ruwe.

The work of anthropologists is largely responsible for the construction of traditional Aboriginal culture. They have been the 'experts' who provide the state with the measure of what is 'tradition', and who is traditional and the extent to which this badge merits benefits. They measured and compared tradition and created categories: of 'traditional' Aborigines, and then progressively lesser, 'non-traditional', Aborigines, 'rural' Aborigines, 'urban' Aborigines and the rest. They deemed 'traditional' as being more authentic and those further down the list of a lesser quality, not authentic, and finally not really an Aborigine. In their analysis of the 'non-traditional', the aim was to make us like them. Today, critical anthropology suggests the discipline is 'post-colonial' but the reification of 'tradition' and lesser, related binaries still dominate thinking. The 'subjects' of anthropological enquiry remain constructed with reference to separation from the 'speaking land' or the erasure from relationality and ruwe, but this amputation is their own anthropological fabrication. Regardless of the colonial category-makers, I, like my ancestors before me, am still listening; I have never ceased to listen to the country talking to me. Anthropologist Ronald Murray Berndt would have accorded me as falling prey to assimilationist agendas, but not all of us have stopped hearing the land speak and not all of us have adopted a white way of knowing ruwe.[8]

'This is my country, this is me'[9]

As a Nunga I am not contained by my body. We are the law, we are all things in the natural world, and we are our ngaitji and the ruwe. The law lives inside me as I live inside of ruwe and my ngaitji. The law connects us to all things. My identity evolves from ruwe. In general, first meetings with other Nungas involve a protocol, which is to introduce one's self in relation to the country of the grandmothers and grandfathers, to identify where each person comes from, and who your people, kin and family are. It is one of our ways. Our relationship to country determines how we speak to one another and to whom, and how we are in relation to ruwe and the law.

Law is central to our identity as spiritual beings. The maintenance of law comes through the ceremony and the song. When the ceremonies were stopped by the muldarbi regulations prohibiting our ceremonial gatherings, the reflection of who we were was dimmed.[10] We have to look closely into the face of the land to see who we are; ruwe has sustained us through the terror of invasion and colonisation, and it has retained the body of law and culture to which we will all return, in one way or another.

In explaining to non-Indigenous peoples our relationship to ruwe when negotiating for its protection from damage and destruction, we have to use the language of the dominant colonising culture.[11] We attempt to translate our love for ruwe, but the idea has been alien to them for hundreds of years.

This text could have been written in the language of our ruwe and then translated into English; I have not been able to do this, but where I have been able to, I have used the language of the land and the ancestors. We are forced to communicate in the language of the dominant culture and little thought is given to the impact this has had on the maintenance of our own languages and culture. When Wik elder Yunkaporta attended a christian conference in Brisbane to discuss the management of reserves, he found the synod divided along political lines by the issue of whether to agree to the handover of the administration of the Aurukun and Mornington Island missions to the Queensland state government. Yunkaporta sat quietly while church leaders debated the fate of the Wik people, then he walked to the podium and spoke in his traditional Wik dialect for about five minutes. He then said, in English:

> You all have been debating the future of my people as if you understand us, but I wonder if you do. I am speaking now in your language but did you understand when I spoke the words in my language?[12]

The coloniser, in constructing our identity, 'established' that our laws were merely mythical story and our lands were unoccupied. The krinkiri[13] named our land variously 'terra nullius', 'waste', 'crown lands', 'pastoral land', 'freehold' and now 'native title'. We knew the land, its name, its story and its relationship to us, from Kaldowinyeri, from the beginning. The land was intimately known. Ruwe is a part of the totality of the song of the story – always was, always will be. When explaining the Indigenous relationship to the land, Sharon Venne offered the following description:

> When you have a table and it is covered with a cloth, beneath the cloth remains the table. No matter how many layers of cloth you place upon the table it will always remain that same table beneath the covering.[14]

The place of *Barukunga* in South Australia[15] had other names imposed on it by the muldarbi: it was progressively a pastoral lease, then a mining lease, and now a township called Brukunga. But it will always be *Barukunga*, meaning 'the place of hidden fire', where Tjirbruki came to finally rest, although the body of Tjirbruki has been partially destroyed by the mining of iron pyrites for production of super-phosphate used for fertiliser. The 'super' was then spread extensively on the plains of the Ramindjeri and Kaurna Peoples' lands and they have now found that the use of this fertiliser has left traces of poisonous cadmium, and generally a high pH, leaving a toxic residue over lands used for agriculture. The destruction of the body of Tjirbruki brings its own contemporary story to those who mined it. Nevertheless, the spirit of Tjirbruki and his story of law will forever be alive in that place.

Krinkiris may rename and recategorise Aboriginal lands, but the essential nature and spirit of them remains. As Steven Possum of the Karajarri People said:

> These people may own the land but it belongs to me. It will always be ours. We worked on the station but it was still ours. The pastoral leases are just on top. The water and the trees and the animals still belong to us.[16]

Similarly, I remain who I am, beneath the layers of invasion, colonisation and rape. When the layers are peeled away, I am as I have always been, as I was at the first sunrise, a Nunga, a belonging being of the ancestors and ruwe. We never cultivated the land.[17] The relationship was one of being one with the land, an idea alien to those who live 'on', and 'in' but not 'of' the land. Our relationship to land remains irreconcilable to the Western property law system.[18]

Anthropology

In the last 20 years there has been a shift in the dominant paradigm 'about the native' towards Indigenous knowledges and away from anthropology. However, the effort to centre Indigenous knowledges is ongoing and it continues to battle for space within the academy, in schools, in the work-place, centres of healthcare, and in other spaces where we interact with the non-Aboriginal world. Anthropology was used by the muldarbi to gather intelligence on Nungas, information of benefit to the colonising process. The legal system has also drawn on anthropologists as 'experts' to elaborate on the characteristics of the 'uncivilised'.[19] The anthropologists were keen to know about our traditional legal systems, land tenure rules, and social, political and economic organisations. Naturally, they saw and recorded it all from a European point of view, a study of 'us,' the natives.[20] These studies relegated us further to the geographical margins, but also to the margins of theory.[21]

Anthropologists still construct the identities of many Indigenous Peoples from within a colonial paradigm, and in accord with colonial power they gave credit to those informants and customs, which became privileged by their recordings of us.[22] Alongside this the impact of colonialism was not recognised. Evidence of this is found particularly where colonial administrators failed to record massacres, starvation and rape. Perhaps, as Povinelli suggests, this would have got in the way of representing the perfect native unafflicted by colonialism.[23]

Anthropologist Peter Sutton has argued that Aboriginal culture contributes to community violence and dysfunction, but he doesn't consider the violence of colonialism in his analysis of violence in Aboriginal communities.[24]

In June 2007 the Australian government announced that it would lead an intervention into Aboriginal communities in the Northern Territory as a response to the findings of the *Little Children are Sacred* report, which detailed high levels of community violence against Aboriginal children and women.[25] The construct of Aboriginal violence was deemed by Peter Sutton and others as being inherent to Aboriginal culture and unrelated to colonial violence. Without negotiating with Aboriginal communities the government devised its own strategy to intervene in the 'crisis' it perceived in Northern Territory Aboriginal communities and enacted the *Northern Territory National Emergency Response Act* (Cth) *2007*.[26]

Anthropological approaches and their methods are 'known' as being 'scientific' and 'objective'. They are deemed to have the real outsider story on us. The views of the anthropologist are tested and they are therefore 'known' to be more reliable than our stories about ourselves, ones which are too much 'inside the story', not objective and sufficiently distant from the subject being studied to be a reliable source of 'data' or information. Their views prevail over ours; they are employed by colonial institutions that name us, and we are left to work with this, sifting the sand to find the kernel of our lives. Each one of us studied by anthropologists is the carrier of the seed they seek to study: to absorb, understand, compare, analyse, measure for authenticity and satisfy the curious. The truth, however, is that we are immeasurable and they are left reflecting on their own losses and inability to unknow nakedness. Science continues to be taken as the objective measure against which all is 'known'. This is the position that renders my own insider knowledge of the self as too subjective and unreliable as a source of information. And its difference unsettles the illusion of a dominant position that speaks for everyone.[27]

On representation and speaking on behalf of everyone as though there was a universal position to advocate, Indigenous historian Haunani-Kay Trask argues that it is impossible to understand Indigenous Peoples' way of living and connection to the land when these bonds emanate from a First Nations philosophical standpoint and can only be understood from that position. This is particularly true when the West has lost any understanding of the bond between people and land. Attempts to represent Aboriginal peoples from a disconnected position are, in Trask's view, not possible and cannot be written from within a Western paradigm: 'Such a story is merely the West's story of itself.'[28] Trask goes further than this in her condemnation of anthropology to suggest that the relationship is at its core exploitative and that the contact between the parties does not carry with it any responsibility or reciprocity.[29]

In considering the consequences of research about Indigenous Peoples, the anthropologist Eric Michaels posed the question of his peers: 'can we justify placing a bell jar over a culture?' [30] For it is in anthropology's naming of us that anthropologists determine authenticity or otherwise, as they are

empowered and mandated by colonialism. They then argue among themselves as to who has the right way of knowing us. In the ruwe of my ancestors, Catherine and Ronald Berndt and Norman Tindale all claimed to have the authentic picture, and others have later come to lay the same claim.[31] Anthropologists categorise informants according to their perception of authentic 'natives'.[32] David Unaipon, the famous Ngarrindjeri scholar and inventor, was seen as having lost his authenticity by the Berndts when he became too educated and christianised. They commented that Unaipon's writings were assimilationist and too far removed from his 'traditional culture', even though Unaipon recorded many of the stories of his country and those stories were later appropriated by other anthropologists credited as 'discoverers' and 'preservers' of that knowledge.[33] Their comments suggest that in becoming knowledgeable in another culture, Unaipon had 'extinguished' the 'native' culture of his birth. The same test could be applied to an anthropologist – that is, when they have become so steeped in the culture of the 'other', do they also become so removed that they are no longer authentic in their British, Australian or Americanness or overall whiteness? Is it assumed, as it is for us, that they have also extinguished their non-Aboriginal identity entirely? When we journey into the white world, into education or employment, we are deemed assimilated and that our Nunganess is extinguished but when white anthropologists become absorbed in our life, laws, culture and stories, they are scientists, always remaining white and never at risk of losing their 'natural' identity.

Anthropologists continue to construct identities for us, identities that confuse ancient knowledge held in the collective memories of Nungas. The constructed identities become the master texts of who we are, who is 'traditional', who is 'authentic' and 'native' enough, when 'tradition' ceases, and when we should become assimilated by the state.[34] They have assumed the power to create and the power to take identity. They can make and unmake our identities.[35] Anthropologists are like the police; they are empowered to police our culture and laws. Then they become our examiners, grading culture and laws in accordance with their own perceptions of correctness.

Throughout the world First Nations Peoples are in conflict with governments and corporations proposing developments that would damage or destroy the land. Frequently anthropologists and government experts attack us when we speak of the sacredness of the land; we are accused of inventing the idea of sacredness. Anthropologist Jocelyn Linnekin claims that Hawaiians 'invented' 'what they claim is a traditional value of love and caring for the land'. She refers to this value, called *aloha aina or malama aina*, as a 'slogan' rather than a real cultural value used by Hawaiians to stop the United States Air Force bombing of Kaho'olawe. Linnekin refers to arguments in favour of a return to 'Hawaiiness' as Hawaiian nationalism and portrays the history of Hawaiians as mere invention of tradition.[36]

Refuting this position, Trask argues, however, that throughout the period of colonialism Hawaiians have maintained the traditions of caring for country and that Linnekin simply fails to understand 'traditional' values. Trask asserts that the Hawaiian relationship to land has persisted into the present. What changed was land ownership and usage from collective ownership to individual and private use. Trask explains that:

> Hawaiians assert a 'traditional' relationship to the land not for political ends, as Linnekin argues, but because they continue to believe in the tradition of caring for the land. That land use is now contested makes such a belief 'political'.[37]

The Kumarangk-Hindmarsh Island dispute in South Australia illustrated the capacity of Indigenous women to speak in the voices of the ancestors on law and culture, and their obligation to care for country. The Hindmarsh Island dispute was ostensibly about Ngarrindjeri identity. Anthropologist Philip Clarke, an 'expert' on 'Ngarrindjeri' culture gave evidence before the state inquiry and propounded arguments similar to those of Linnekin's on the invention of tradition for political purposes. The matter of Kumarangk will be discussed further in Chapter 6.

In their hunting and gathering of the authentic native, anthropologists construct identities and favour 'informants'. Diane Bell is critical of the Berndts for their methods of gathering 'data' but she commits a similar offence. In her construction of a Ngarrindjeri identity, Bell sets apart some of her informants as knowing more than others, 'because they know things others did not'.[38] Are we to assume that Bell knows who might know all there is to know? How does she know that they know more than others, or whether those others with knowledge have wanted to discuss all the business of women or other issues of culture and tradition with her? Our old people often did not discuss culture with outsiders.[39] The identification of those who 'know' conjures power for their creators.[40] I am not debasing the knowledge of those 'informants' who have been elevated by Bell, but I am disputing the hierarchical position in which they have been placed as favoured knowledge holders – rarefied, like the contemporary exotic, and in a place that others are not able to attain. People who chose not to speak were rendered invisible as a result of the choice they made. Nungas frequently choose not to disclose the sacredness of laws and culture, and indeed this remains a traditional mode of compliance with law and protocol – that is, to retain knowledge among those initiated into the law. Here I am not challenging the work of Bell, which was to record women's business and law in the region of Kumarangk;[41] I simply assert that it is more complex than Bell would have us see.[42] However, to acknowledge this reality would lay bare the pretence of relevant expertise underpinning the anthropological enterprise.

Ngarrindjeri identity was the construction of settler colonial society. 'Culture informants' were gathered to inform and create a picture of the

Ngarrindjeri and, from the colonial texts gathered, it is clear that there were different and conflicting views, particularly between their informants. So why did these anthropologists continue to construct the identity of this region as Ngarrindjeri and why is this framing continued? The culture and laws of the different groups now lumped together as Ngarrindjeri were not homogeneous; there were differences. Those differences were homogenised so we see layers of colonising actions within the colonial project; the colonisation by imperial Britain and the colonisation by missionised identity formations of our ancient First Nations, clothing the native in order to not see and know who we are.

Resistance

While I call myself nunga mimini of the Tanganekald and Meintangk[43] peoples, we still resist the krinkiris' naming of us.[44] We affirm our ancient identities, and decolonise and centre our Tanganekald and Meintangk being; our ancient identities are known to the invading culture as prehistoric. In asserting the Tanganekald and Meintangk identity we present a challenge to the state's possession of our ruwe. The same assertion also challenges the 'Ngarrindjeri' identity, which seeks to occupy and claim and speak for the ruwe of my grandmothers. So who is who, and who is 'real' and who says so?[45] These processes and questions plague First Nations Peoples whose lands have been colonised by waves of colonisers, including other Indigenous Peoples who have been inculcated by colonialism and christianity. The construction of Aboriginality became the domain of the state, and the altering of ancient names and identities has been taken up by other Indigenous Peoples in my own land. For centuries the British invaded and asserted their rule over territories beyond their own using divide-and-rule tactics, creating conflict between First Nations and pitting them against each other. The Ngarrindjeri is a latter-day artefact, which is functioning in collaboration with the state, and with the potential to erode and obliterate our ancient names.[46] These waves of colonising events have occurred on the lands of other First Nations Peoples.

Ngurunderi was one of our creative ancestors who travelled the country, leaving his story and imprint on the land. But before Ngurunderi came to the land there was much prior creative activity. Thukapi the turtle made the Murray River long before the journey of Ngurunderi.[47] Ngurunderi does not appear to have been a dominating god, but rather one of the ancestors, one of our many relatives. He was not all- encompassing, providing the final word on all things like the god we find in other religious texts.[48] Ngurunderi was one of a collective of creative ancestors. And so it is also that a Ngarrindjeri nation does not exist to the exclusion of all others – the Ramindjeri, the Tanganekald, the Yaraldi, and others. But missionaries, even when they knew nothing of our stories and our laws, set up Ngurunderi as the chief creator. They allowed and acknowledged this 'myth' to the exclusion of all the other ancestors and, in that process, the many other names for whom we are that co-existed prior to colonisation were ignored.

Anthropologist Eric Michaels has commented on the potential for contemporary translations to obliterate ancient identities.[49] The effect of cross-cultural translation can be seen in the construction of this Ngarrindjeri identity, which evolved largely through the translations made by early missionaries, Taplin and Meyers.

The problematic of cross-cultural translation of identities is also apparent. For instance, Wururi, our ancestor, birthed our languages. Wururi was a female huntsman-spider who scared people by the angry and dangerous behaviour of lighting fires while the community slept. At her death there was general celebration of her passing and there was feasting on her body. As different peoples arrived – first the Ramindjeri, and then other groups came from different directions – they ate and devoured different parts of Wururi's body, and each began speaking a distinct language.[50] This story was interpreted by the anthropologist Diane Bell as being evidence of the 'whole', the 'whole' being the nation of the Ngarrindjeri.[51] Ngarrindjeri identity is inflated and centred by Bell to become all embracing of Wururi and an overarching entity. But this construction negates another view of Wururi – that is, that the power of Wururi was disseminated at her death to provide for the creation of a diverse range of distinct language groups. The overarching identity promoted by Bell fits well within Western epistemology, and is best understood from a non-Aboriginal standpoint, influenced for centuries by the domination and absorption of smaller groups to establish imperial identities. The larger group identity subsumes all others; it eats up all the others to become one, just as the Ngarrindjeri nation is now trying to consume the identity of the Tanganekald, Yaraldi, Ramindjeri, and others.[52]

Bell reinterprets the project initiated by the missionaries, Meyer and Taplin, and applied since then by other 'experts' of Aboriginal culture and law. Many 'Ngarrindjeri' have now also adopted a Ngarrindjeri identity, largely as a result of their experience of Taplin's Point McLeay Mission.[53] Bell translates the Ngarrindjeri as an overarching body and references a traditional model, the tendi, as a unified system of governance, with formal 'leaders' known as the Rupuli. Bell reworks the Wururi story as both the origin of language and model for the unity between different entities. But in that move Bell installs the Ngarrindjeri nation as an overarching body that encompasses ancient identities, never before known as Ngarrindjeri.[54] What happens to our ancient names when they become morphed into the oneness of Ngarrindjeri?

The missionaries were unable to comprehend nakedness; their experiences were only to communicate with the big male creator they constructed as god. In constructing Ngurunderi as the all-powerful creator, the missionaries were provided with a road map into the 'mind of the naked being'. Ngurunderi become the god of the Ngarrindjeri. Missionary Taplin became engaged with learning the languages – he called what he recorded the Ngarrindjeri language – and his purpose was to translate the Bible into the language of the native.

In this process of translating the Bible into the languages of the 'Ngarrindjeri', the latter came to see themselves positioned in the christian myth and its Garden of Eden. However, Taplin's arrival was like the expulsion from the garden – naked we were sinful, we were demonised, in need of clothing and required to act white just like him.

The impact of christianity is genocidal; the translation of Ngurunderi as god and the use of our law stories as a channel for christian mythology was the beginning of a process, an attempt to demolish Aboriginal cultures and laws. During the mission times some of our stories were proscribed and lost to living memory. Taplin's idea was that once the process of christianity had established itself, the Ngurunderi myth would be replaced with the myth of Jesus. The early reverence for Ngurunderi as a god identity was established through the subversive use of our languages by the muldarbi. And so it was, the place of god in the life of the Ngarrindjeri is the inherited legacy of christian missionary Taplin and his successors. The word 'God' is used to describe the powers in creating landscape, natural world, laws and customs. But the word brings with it a one-dimensional world order. It relegates the feminine to second class, and the natural world and its animal life to third class. It promotes a dominant, male-centred view, and the Ngurunderi story fitted it well. It led to the forgetting of Thukapi the turtle and Kondoli the whale, and it made Prupi a demon. The word 'god' made invisible all other creative processes:

> It begins with Ngurunderi's cave, which is situated under Signal Point (at Goolwa). From the cave he looked across to the [Kumarangk] island. Ngurunderi felt it was his responsibility to look after the sky, the bird life, the waters, because he made the environment and the island. He was the god[55] of the Ngarrindjeri.[56]

Before the missionaries we had no gods. We had no hierarchical order of life that sustained ideas of gods. People and animals like Ngurunderi, Prupi, Tjirbruki, Knowi and Thukapi were the ancestors carrying knowledges from Kaldowinyeri; they carried the knowledge of law and culture, and how to live as one with the natural world. They were teachers and carriers of law, and through their creative actions the stories were sung and the law 'come' to be. I see my 'ruwe' differently from Bell, who also noted that Ngurunderi, in a godlike manner, came and 'laid down the law'.[57] And the same representation is made by the curators of the South Australian Museum exhibit by Hemming, Jones and Clarke, of Ngurunderi as 'the' creation story and the 'text' that has informed our identity, language, culture and laws.[58] These references conjure for me the notion of an imposed law. Law for us is a creative process coming in song, unlike the text imposed on us from somewhere above as the christians would have it.

We held no concept of hierarchy in the way that the West did, creating its god to look down on and over his people; we were equal to all other things in creation. Moana Jackson writes about a similar idea held by the Maoris:

> We did not walk with the whenua to seek some christian dominion over it. Rather, in the poet's words, we came to the land 'barefoot, as befits a trembling lover', and found our place in the interwoven pattern of life on this planet.[59]

State identities

However the state defines us beneath the layers of its colonialism, we are still 'matha wai'[60] of the grandmothers' and grandfathers' ruwe. When the colonialists imposed their names on us, they did not know ours. We spoke many different languages, a fact that the colonists ignored and for more than two hundred years the states they founded by force imposed their own idea of whom we are. They were not blind to our presence, but denied it. At first we legally did not exist under the veil of terra nullius, and when we did exist in a *de jure* fashion, necessarily in their face, the state saw us as other than our selves.

The state called us 'Aborigines', which in Latin means 'from the beginning'. It has been translated to indicate groups that came 'first' in relation to the territory they inhabit – that is, those who possess a significantly longer history of connection with the territory than any other group or people with claims over the same territory.[61] In Australia, however, the word 'Aborigine' carries with it negative stereotypes: it connotes backward, primitive, exotic natives. Legislative definitions of 'Aborigine' have evolved throughout Australian legal history and were changed progressively as a means of control and containment. The definition of 'Aborigine' under the Commonwealth of Australia legislation includes the following three criteria: descent, identification and Aboriginal community acceptance and acknowledgment.[62]

Across colonial history we have also been called by other names, including heathen, native, British subject, Australian citizen, half-caste, detribalised, ethnic-minority and euro-Aboriginal.[63] The early colonial state called those who dressed in clothing and 'behaved civilised' as British subjects, but we were deemed subjects without the rights of British subjects. As deemed British subjects our right to property was ignored, as were our ancient legal systems of governance. In reality, we had no protection against murder, rape or torture, and no real recourse to British justice. No Aboriginal person had rights equal to other British subjects; it was a gesture empty of meaning. This is similar to how Trask describes civil rights talk in the US, a discussion without any substantive meaning for First Nations Peoples. 'Full American citizenship, i.e. full American "rights", thus accelerated de-Hawaiianization, which begun with the theft of our government, lands, and language in the 1890's.'[64]

Likewise, for First Nations in Australia the imposed status of 'British' was meaningless. We were treated more like children or 'wards of the state', while they took control of all our land and resources, and the governance of most aspects of our life.

In 1901, the colonial populace called themselves Australians. They called us Australians too, but we still didn't attain the rights accorded the rest of them. The state still called us 'Aborigines', 'the Aborigines' and 'our Aborigines' (and they still do). It is an endless struggle to hold a Nunga perspective of who we are immersed within a state that imposes its constructed identity upon us.[65] The state retains the power to define and determine who is Aboriginal, and the capacity to define and regulate questions of identity.[66] This is supported by its legal system. Trask also claims that the self-determining power of Aboriginal peoples to define 'Aboriginality' has been taken by the state and placed in the hands of Western-trained scholars, government officials and other technicians. She urges us to examine why it is that self-identification by First Nations is so strenuously resisted by the state.[67] This is because Trask argues that the state prefers other terms to describe us, preferring descriptions of ethnic minorities in the midst of culture revival, or the regeneration of culture over terms such as decolonisation, because these descriptions have no political or legal context or greater meaning than perhaps to regenerate a native forest of its flora and fauna.[68] First Nations Peoples have argued for many years in favour of the possibility of recentring a sovereign land-owning and self-determining identity; however, the state reduces our claims to no more than a simplistic acknowledgement of traditions, culture and customs, and human rights. Land ownership and political power was denied to Aboriginal peoples, and to a large extent it still is. We are allowed to buy our own land back, but otherwise the state, just like a paternal guardian, holds power and control.

Spirituality and the political

The Ngarrindjeri 'tendi' is described by Bell as the 'paramount body of law and social order'.[69] The tendi, as recorded by Taplin was prominent in the sorting out of the business of the Ngarrindjeri. Missionaries, historians and other anthropologists have also referred to the tendi when attempting to draw parallels with Western forms of law and governance. This process of intercultural translation cites the tendi as being hierarchical in form, but in actuality that stands in contradiction to our relationship with everything. The tendi arbitrated aspects of the law but also other aspects of culture and tradition – for example, the business of women and children, and also the songs and the voices of the natural world. To view the tendi as male and hierarchical and in charge of all matters is a subversion of its underlying nature and character.

Taplin and others also said that the 'rupuli'[70] were the lawmen of the tendi.[71] While this is an interpretation of the missionary, for Taplin it has become a model, which is now supported by many of the 'Ngarrindjeri'. However, the business of law is more complex than a male-centred body preoccupied with the policing of law and the political. There is the spiritual realm of the law, and the law involves all of the people as a collective and included women; we all carried obligations to the law. The maintenance of law includes roles for all women and men; all are responsible for ensuring that the business of the law is done 'properly'. The natural world also speaks and has its voice in the business of law and order, as the law emanates from all things.

I have often wondered about the extent of the role Reverend Taplin played in the construction of the Ngarrindjeri tendi. Albert Karloan and Mark Wilson were two important informants for anthropologists Ronald Berndt as well as for Norman Tindale, and they both disputed Taplin's representation of the rupuli as being a head chief, boss of the tendi. Tindale recorded them as saying that the rupuli was a person who could go into a trance and, while in that state, visit distant places.[72] The question of the tendi and its construction as a form of law and government as opposed to a spiritual identity becomes more compelling following a reading of Reuben Walker's[73] journal in which he writes about the rupuli as having an important spiritual role where there were no chiefs, only men stronger than the rest.[74] Further on in his journal he spoke of how he 'called upon (reupillee) (*sic*) for luck in hunting, I would always go through the native custom to ask reupillee to give me luck'.[75] Perhaps the spiritual role of the rupuli threatened the role of the missionary, whereas to strike out the spiritual and reconstruct as a 'head' of government could be used to the advantage of the colonising and christianising mission, assisting them in the subversion of our spiritual, cultural and lawful ways, which were always incomprehensible to them. Reuben Walker also commented that during times of conflict and the need to make peace, the real peacemakers were the older women: 'Old woman had more voice than anything in the camp. They were the ones who had voice . . . they would talk men down. In the end they did as old women wished.'[76]

Walker gives an entirely different view from that recorded by Taplin. The ancestors held a balance in their life ways; the idea of a governing body of men is alien to our ancient law ways. The construction of a patriarchal order is in keeping with the ways of being, under which Taplin had been raised and lived. As the author, much of the record reflects his own understandings, and his knowledge and experience of patriarchal governments. These are a reflection of the cultural and religious preconceptions, which he then imposed on 'his' 'Ngarrindjeri' at the mission station, the christian society at the time, renamed as Point McLeay. It is a record of who Taplin was more than it is a record of who we were or are. Many of Taplin's ideas took form among 'his

Ngarrindjeri' as he attempted to convert their souls to christianity, patriarchy and whiteness.

Bell incorporates Taplin's ideas into her work and thus further legitimises the views of the christian missionary so as to entrench them into becoming our 'reality'. Bell's 'reality' empowers itself in the process of rendering our ideas of our mob invisible, and the experts take control of the playing field. Bell continues to weave from where Taplin left off, in making a construction of the tendi that again fits within the paradigm of popular patriarchal structures.[77]

What Bell has failed to paint into this picture is the reality of colonialism. Through my eyes I see and know a group of people who identify as 'Ngarrindjeri', claiming to be representative of a 'Ngarrindjeri nation'. But I know that there is no overarching political structure of this nature that comes from Kaldowinyeri. The structure was birthed by the colonising processes, and it has taken form and now imposes itself on us. And it is imposed on us by the same Ngarrindjeri who themselves were once the colonised. The processes of colonialism in the end become self-colonising. What is now referred to as the tendi does not agree with the past and honour all the bosses and the carers of ruwe. Instead, it supports a particular group of Ngarrindjeri working within and responding to colonialist agendas. They respond to native title applications and enter native title agreements; the tendi is now a player in the muldarbi game of power, albeit a small one.

The mission experience provided a framework and a home for the new Ngarrindjeri identity. Point McLeay (Raukkan) was the place where the new mission home was built in response to the impact of colonialism and the massive decline in population of the different nations.[78] Decline in population in this region was largely due to the Coorong massacres and the military payback that was levelled at the Tanganekald of the Coorong.[79] The newly emerged one-Ngarrindjeri nation took form in the belly of genocide.

In its coming the muldarbi colonialism imposed its own boundaries and rules, which violated our laws. The old ways became layered under the rules of the muldarbi, and it still goes on. The creation of native title is a recent example of the muldarbi's further efforts to erode and subvert our identity. Native title has opened a new Pandora's box to a flood of non-native title applications and non-native title claims. The *Native Title Act 1993* (Cth) created a native title claims process, based on the common law rules established in the High Court decision *Mabo (No. 2).* The rules in this decision do not allow me to be who I am – a lover of my grandmother's ruwe and custodian for the future generations – nor does it allow me to walk naked in the song law of the ruwe. If I am able to prove that I am sufficiently native – that is, still holding the same law that my grandmother held in 1788, and the ruwe of the law has not been extinguished by other property interests over the land – then I may hold a form of native title.[80] The title would be determined by

the *Native Title Act*. And then there is the problem that many of the native title claims compete for the same ruwe; the muldarbi has brought back divide and rule as a way of annihilating our identity, creating a process that will guarantee conflict among Nungas as they now compete with one another for the same 'rights' to ruwe.[81]

Even where there are no competing native title claims, traditional owners question the legitimacy of the native title process. The then chairman of the Torres Strait Island Coordinating Council, Getano Lui, called the process of handing land back to the islanders on Saibai as a 'farce' and a 'whitewash'. He said:

> we've never lost our land so how can the Government have the audacity to say to us: 'here's your land back'. I mean, as far as we're concerned we've never lost it so therefore we know native title exists irrespective of any pieces of paper that have been handed back to us by the State Government.[82]

Am I the enemy?

They called my grandmothers and grandfathers of the Milmendjeri clan of the Tanganekald 'the enemy'. After the ship *Maria* was wrecked along the Coorong in 1842, members of the Milmendjeri were accused of murdering the survivors. The accused were hanged without trial or proclamation of martial law. From both the South Australian Crown Executive and judicial officers' points of view, there was confusion as to the legal status of the Milmendjeri. Were the Tanganekald British subjects or a First Nations Peoples at war with the invading empire? The Advocate-General offered the following justification for the hangings:

> Circumstances may occur in which for the safety of the colonist, and for the prevention of plunder and bloodshed, it may be necessary to view such tribes, however insignificant their numbers, or however savage and barbarous their manners, as a separate state or nation, not acknowledging, but acting independently of, and in opposition to British interests and authority.[83]

The official explanation of the Advocate-General parallels my own thinking – that is, we are 'a separate state or nation', although there is a difference in the way we arrive at this point. The South Australian Advocate-General constructed the law to justify the genocidal approach the officers of the Crown had taken towards our old people[84] and SA Governor Gawler further legitimised the hangings to the Executive Council:

> The doctrine that they are to be held and dealt with as British subjects, and, under no circumstances, to be tried or punished, except according

> to the ordinary forms of our law cannot be received without modification. It may be true, in its full extent, as regards those tribes with whom we have constant and peaceable intercourse – for whose subsistence we provide – who acquiesce in, and acknowledge a friendly relation with us – and who are making advance towards civilisation. To our intercourse with these, the ordinary forms of our Constitution and laws may be beneficially and effectually applied. The extension to them of the full rights of British subjects may be practicable, and attended with no evil result. But it would be assuming too much to hold that the same maxims and principles must be applied without modification to distant tribes inhabiting a territory beyond the limits of our settlements with whom we have never communicated under friendly circumstances, whose language is equally unknown to us as ours is to them, and who betray in all their intercourse with Europeans, the most savage and brutal hostility – who have never acknowledged subjection to any power, and who, indeed, seem incapable of being subjected to authority or deterred from atrocious crimes, except by military force. Nor can it be doubted that circumstances may occur, in which, for the safety of the colonists, and for the prevention of plunder and bloodshed, it may be necessary to view such tribes, however savage and barbarous their manners, as a separate state or nation, not acknowledging, but acting independently of, and in opposition to, British interests and authority.[85]

So Nungas who fell outside British power and control were viewed as being outside the law, the enemy on the outside, the 'myall blackfellow'. As the uncivilised, we remained outside their laws; their task was to define the terms and methods by which to assimilate us into their colonial legal frameworks.[86]

We were invaded sovereign peoples, and we had no obligation to a patrilineal monarch representative of a dominating god. Our obligations were to the law of ruwe and the responsibility to maintain law in the singing up of country. But against evidence of a violent invasion and genocide, Australia was 'known' to be the result of a peaceful settlement. At settlement, the 'Aborigines' become British subjects. 'Becoming' British was one of the first of the many lies they layered on our black and naked bodies. All the same, from Kaldowinyeri – who we are will be set in the landscape – the law and affirmed in the language, ceremonies and songs.

If we forgo the absurdity of the lie that we had become British subjects for a moment and consider the treatment the ancestors received while deemed British, many questions arise. Why were the common law rights of our ancestors to land ownership and the fundamental human right to life not protected? What responsibility should the Crown carry for crimes of genocide committed against its own subjects – for murder, the theft of land, rape, and the interference with culture and law? Under what authority did the South Australian Advocate-General act when he authorised the hanging of members

of the Milmendjeri? And why, when the Crown later disassociated itself from the action taken by the Advocate-General, was he not charged for murder? These are just a few of the questions that remain unanswered.

Coloured skin

One can be as black as black encased in the skin colour white, or white as white encased in the skin colour black. The colour black connotes not just a perceived physical reality; it encompasses other dimensions – for example, culture, law, obligation, land and relationships to kin. Being black in a white skin can be a matter of the colour of one's heart or one's love for the land or one's kin, and the source of that feeling comes with the spirit and one's connection to Kaldowinyeri and our black history.

Imposed colonial views of Aboriginality have worked towards death, invisibility and our final absorption into a clothed whiteness of being. In its attempts to extinguish Nungas, the muldarbi created categories of colour. We were named and managed by the Aborigines Acts of each Australian state in categories of 'mixed race' and 'full blood'.[87] The acts administered our separation from our old people and families, and the language of our songs and law. Nunganess become known to the muldarbi in degrees of blood, and quotas, such as 'full blood', 'half-caste', 'quarter- caste' (or 'quadroon') and one-eighth or 'octoroon'.[88] State governments later changed the rules when categories of race became unfashionable and considered racist. However, the divisions remain and are renewed. To the construction of who we are, in addition to colour, they have now included concepts of culture: 'traditional' and 'non-traditional', 'tribal' and 'detribalized'.[89]

The following resolution was passed in Canberra in 1937 by delegates attending their first national meeting of state and Commonwealth Aboriginal administrators (previously known as 'Aboriginal Protectors'): 'the destiny of the natives of Aboriginal origin, but not of the full blood, lies in their ultimate absorption by the people of the Commonwealth, and it therefore recommends that all efforts be directed to this end'.[90]

When our people didn't all die on the frontier or at mission concentration camps, the muldarbi developed ways of whitening us. By the 1930s it was clear that Nungas had survived the attempt at general extermination, and our survival became the impetus for a push for absorption into white Australia. Nonetheless, the following excerpt from a parliamentary debate on the amendments to the *South Australian Aborigines Act* illustrates that genocide was still the intention:

> It is considered by those having knowledge of the subject that many of these people of mixed aboriginal blood should be gradually assimilated into the white population. Clause 14 is, therefore, framed so that every opportunity may be taken to provide that, where an aborigine is of the

> standard of intelligence as to justify such a course, he should be placed outside the scope of the Aborigines Act and encouraged to take his place as an ordinary member of the community.[91]

The muldarbi, white racism, imposes its idea of who is 'real'. A 'real' aborigine is 'full blooded' and 'traditional'. But tradition and blood cannot be explained in the vacuum of colonialism, as though who I am is unaffected by more than two centuries of the muldarbi's presence and who I am also carries the seed from Kaldowinyeri.

Appropriating identity

> The settlers must consume us. There is no one to challenge their ownership of us except ourselves, which of course cannot be allowed. . . . The settler feels that they must consume us. They feel that they have an historic right to us, and often they are us.[92]

With the popularising of Indigenous Peoples' ways, we are now experiencing a new face of the muldarbi as it appropriates our culture and laws to legitimise its own unlawful identity. The appropriation and commodification of First Nations Peoples' ruwe, natural resources, and knowledges is genocide-like in its effect.[93] What the West names as resources and regards as a tradable commodity is the body of the First Nations. Indigenous Peoples' intellectual property is unprotected. Within the international and domestic laws of states, for example, our songs and stories are vulnerable to appropriation, as they protect individual rights to property and corporate rights to property, but not collective rights and responsibilities. Stories of Indigenous Peoples can be copied and the 'property' is vulnerable to use by anyone anywhere.[94] The value of Indigenous knowledges is also known by scientists and exploited by corporations; this is while many United Nations member states have reached broad agreements on industrial property and trademarks, but none of these agreements are within reach of Indigenous Peoples to protect against their appropriation.[95]

Seemingly innocent examples of appropriation can be found in the display of law and cultural designs for commercial purposes[96] and tourism: the 2000 Olympic Games in Sydney appropriated images of First Nations Peoples so as to sell the games along with promoting the false image of a 'reconciled' Australia. Other forms of appropriation occur with the theft of Indigenous knowledge of the medicinal properties of plants, and the taking of hair and blood samples from First Nations Peoples.[97] Appropriation of the Indigenous body and world is like a second wave of colonialism, known as bio-colonialism,[98] resulting in Indigenous Peoples becoming a focus of the international intellectual property regime. The World Intellectual Property Organisation (WIPO), the UN agency responsible for the global management

and recognition of intellectual property, has identified traditional Indigenous knowledges as a 'type' of knowledge of its own.[99] However, WIPO does not recognise the standing of Indigenous Peoples, which leaves our participation at a level of mere observer status. The jurisdiction of the WIPO has been challenged by First Nations Peoples, declaring instead that

> we are the owners of our territories and resources that we hold collectively; that our rights are not as 'stakeholders', NGO's, observers, special interest groups, a group, a population or a community; Indigenous Peoples through our own sovereignty and legal systems protect our resources; and we are nations and affirm our right to self-determination.[100]

Through appropriation, our culture becomes a commodity; even our genetic identity becomes a commodity. We are consumed by the mass culture and its consumption of us means its members begin to feel that they have become us; sometimes they feel they are more us than we are.[101] Native American academic Ward Churchill writes about the phenomenon of white men playing at being wild men, taking as one of their models 'Indians' in the United States, in a play to recapture 'the meaning of maleness'.[102] For Churchill, this phenomenon raises concerns about the appropriation, misinterpretation and trivialisation of First Nations spirituality.[103] However, for those who really want to live like us, it's no picnic to live every day within a culture dominated by a white supremacist society. It is a kind of sickness that prompts cultural appropriators to want to be Indigenous and to cannibalise us, while ignoring their role within a colonial settler society and its history of centuries of attempted annihilation of First Nations across the world. In the midst of this we are left to educate the non-Indigenous about their own madness and history of colonialism.[104] We must work to decentre a muldarbi colonialism, which insists on controlling the manufacture of 'knowledge' along with sanitising execrable global colonial histories.

At this point, non-Indigenous readers might be thinking, 'but this is not all of us, what about all the times I asked the question: "What can I do to help?"' Over the years, and as I have been working through my own internal decolonising processes, I have answered:

> To help yourself, in your own relationship to your naked and true self. To refind your own myths and sites of creation wherever they may be in truth, your place, your own Indigenous origins on planet Earth and to find a way of not being the coloniser which you have become.

I thought for a long time about answering in this way – the internal dialogue ran like this:

> Shouldn't I be giving them a road map on how to get there, so they don't trip out on individuality and spend a life-time navel gazing, while Nungas

> live and die in the belly of genocide? Shouldn't I be demanding that they help us? Isn't it dangerous to leave them at it alone? In coming to understand who they are, shouldn't they have some form of guidance? What if they continue to procrastinate and do nothing? Does this position leave an opening for them to continue to do nothing about the trauma of the Nunga world that they live alongside of?

These are questions for white people to answer. It is for them to consider why the world has been divided into Indigenous and non-Indigenous identities, and why it is that the Indigenous world is dying as the non-Indigenous world feeds on it. I see that until the non-Indigenous world stops its feeding frenzy, like Gurukmun the frog, the non-Indigenous will come to us as they have always done, treating us as the victim in need of christianisation and civilisation.

The problem is finding a way to communicate these ideas to white people, most of whom since the advent of colonialism have not listened to us or even heard the screams of genocide. And where they have heard the screams, they hardly know what to do. I spent some time during the early 1990s working in Geneva on the *Draft Declaration on the Rights of Indigenous Peoples.* On one occasion I was accommodated in a squat by a small group of students who were active in the struggle against genocide in South America and were interested in the Australian position. The question invariably arose, 'What can I do?' I remembered a mountain of great beauty and spirituality, which I had visited nearby in Switzerland. It was being mined from the inside and was covered by hordes of tourists. I remember how sad I had felt and wondered where the Indigenous people, the Nungas of this place, had gone; no one was talking to this place; it was ruwe, which had no more song. So in answer to their question, I asked:

> Why don't you find a way to be with your ruwe and talk to it, bless it, love it and become the law? Until you know your own Indigenous self you cannot help me, to love my ruwe if you have not the capacity to sing and love your own place of ruwe.

I don't know any other way to answer questions like that. To provide a road map to help Indigenous peoples out from the belly of genocide is one thing, but are the colonialists able to comprehend their plight when for centuries they have known us as the 'Indigenous victim' and they don't know how to begin to see the extent of their own losses? Their losses are deeper than ours, and although our losses grow by the hour and are physical losses, losses of life and removal from our ruwe, the West (and others) are still to come to know the extent of them. They are losing the spirit and connection to the natural world, but they have yet to acknowledge that they have lost anything.

I don't intend to let the non-Indigenous off the hook of doing nothing about the genocide of the Indigenous and the ecocide of our territories, because they must act. Our death will be followed by theirs; they cannot live in a world where the song is no longer sung. The old people who are still singing are singing for you also; without the song there is only death. Churchill has argued that all places and spaces are now colonised and that 'for Europe to become "Europe" at all – it first had to colonize *itself*'.[105]

The myth of post-colonialism

First Nations lands are occupied by the state; we live immersed in its culture, and over 300 million Indigenous Peoples globally still live a colonised existence. It is a myth that colonialism ended and self-determination flowed for colonised peoples. In 1960 the UN General Assembly adopted the *Declaration on the Granting of Independence to Colonial Countries and Peoples*.[106] It declared that 'the subjection of peoples to alien subjugation and domination and exploitation constitutes a denial of fundamental human rights'. However, the granting of independence applied only to colonies, which were geographically separate from the colonial state – for example, Britain from Kenya. The 'territorial integrity' of the colonising state is protected by paragraphs 6 and 7 of UN resolution 1514,[107] so that Indigenous Peoples whose lands are within the colonising state have no recourse to the granting of independence from colonialism. The release of many geographically separate territories prompted an argument that colonialism had ended. It enabled the rhetoric of 'post-colonialism' to dominate many academic institutions. The idea peddled at the end of the last century by a number of UN member states was that the ongoing affliction of Indigenous Peoples by the colonial project should not be referred to as genocide. In Australia vague, meaningless terms are used as in *Mabo (No. 2)*: Brennan J referred to the impact of colonialism on Indigenous Peoples' capacity to claim land as being 'washed away by a tide of history'.[108]

The *UN Declaration on the Granting of Independence to Colonial Countries and Peoples* expresses the conflict over who holds sovereignty: peoples or states. It also contradicts its purpose, that of ridding the world of the crime of colonialism by, for example, paragraph 6, which guarantees that colonialism will not end, in that the resolution protects the 'territorial integrity' of states, while denying First Nations' claims to territories occupied by the colonial state.

In the shaping of our identity as First Nations Peoples, Nungas face the Australian state. It holds a membership at the United Nations along with many other countries that, like Australia, have created their identities out of the spoils of colonialism. Within the UN these states act together as though their act of togetherness somehow legitimises the conspiracy and the reluctance to end colonialism and genocide. Nevertheless, we ask the Australian state:

by what lawful process have you come into being? Who are you really? In its responding arguments, the state refers reverently to what it knows as 'international law' as though this 'international law' will conjure a magic rebuttal, which will absolve lawlessness and blame for the centuries of evil that has been wreaked upon First Nations.

For the British, under international law, sovereignty to Australia could have been acquired through conquest, cession or settlement. In *Mabo (No. 2)* a broad reading of terra nullius was rejected as the founding principle for settlement. The High Court decided that Aboriginal title survived colonisation and rejected terra nullius to the extent that it had displaced the recognition of Aboriginal title. However, terra nullius remained alive in law as the founding principle of settlement and the annihilation of Indigenous sovereignty. To say that terra nullius was fully rejected is misleading and leaves questions unanswered: does the continued application of terra nullius make the settlement of Australia legal and what part of terra nullius was rejected in *Mabo (No. 2)?* It would seem that a full rejection of terra nullius would exclude the possibility of 'settlement', leaving the colonising power with the options of conquest or cession, but both of these require international treaties with First Nations Peoples to legitimise the state's claim to sovereignty. But there are no treaties or agreements – there is a gaping silence. Initially, this was filled with violence backed by military force; that is what went with the origins of the Australian state.[109] Moreover, as we examine the skeletal frame of the Australian state we are joined by many of the rest of the world's First Nations Peoples whose lives and lands, like ours, are consumed by the ongoing malaise of colonialism.

Anthony Martin Fernando's arrival in Switzerland in 1921 led to him calling for an international mandate over Aboriginal reserve lands in Australia. He wrote that he was on an international mission to facilitate a response to the devastation caused by colonialism. Fernando was one of our earliest First Nations advocates to appeal for international intervention.[110] From these early developments of international law, First Nations Peoples have asserted their sovereignty. The Maori religious leader Ratana and Chief Deskaheh (Speaker) of the Six Nations Confederacy led one of the earliest delegations to petition the League of Nations in the 1920s, but these efforts were opposed. Chief Deskaheh's words were eloquent, but they were to fall on the deaf ears of the colonial powers:[111]

> If this must go on to the bitter end we would rather that you come with your guns and poison gases and get rid of us that way. Do it openly and above-board. Do away with the pretence that you have the right to subjugate us to your will.[112]

The League of Nations opposed First Nations' membership, arguing that the small size of Indigenous nations would present difficulties. However, the

law of nations had itself grown out of relations between 2,000 small city states of the Roman Empire, and later on the UN admitted San Marino, a tiny enclave state within Italy, as a full member. Throughout the evolving history of international law First Nations have been 'there', as we are still today, but our voices are deliberately ignored. First Nations made similar representations to the founding conference of the United Nations in San Francisco in 1945 but the foundation of the UN, like that of the League of Nations, was in part based on the rejection of First Nations Peoples as unworthy of recognition, as being 'backward peoples'.[113]

Self-determination

Indigenous Peoples have adopted and used the language of self-determination[114] to express who we are in the world, and the path or process along which we should proceed in respecting and recognising our law and life ways as First Nations. In re-establishing that path or process we look back to our ancestors and consider whether the track we have chosen is the one which will do justice to our ancestors and descendants. We look to the children of the present and those who are still coming, and consider whether our choices will bring justice to them, that they will know who they are, and also know the ancestor, the custodian of the earth and our mother within themselves.

In the time before Captain Cook, we were living in the law; it was the basis of our political and social structure. We were free to determine our economic, social, religious and cultural development. The term 'self-determination' describes a standard, which is known in international law and which comes closest to empowering the lifestyle which our ancestors enjoyed living. But the life they lived was different from how life is lived now, and the things they practised were more than the contemporary principles of self-determination allow, more than is defined by the politics of international law and the relations between the states and the international UN system.[115] Our ancestors were free from the power and interference of international relations and lived in the law of song; the song law laid out how different peoples related to each other.

Self-determination is vested with the people. It is a collective right of a people held against the state and other governments.[116] Falk argues that if self-determination was vested in states, it would then be held by an 'artificial and derivative political reality as compared to people'.[117] Euro-centrism, global politics, the decolonisation movement and the increasing paranoia of states to protect 'their' territorial integrity affect the meaning of self-determination and the contexts in which it is 'allowed' to take form. Crawford argues that the way in which the principle of self-determination has been applied over the past 30 years throughout the decolonisation process has been in a context of decolonising territories rather than peoples.[118] Indigenous Peoples' claims to self-determination are viewed by the colonialists as a

challenge to the 'territorial integrity' of existing states and a potential threat to world peace.[119] This thinking occurs as though peace was a known and lived reality, whereas it is in fragments for the many peoples who live within these states in a constant state of siege, where peace is neither known nor experienced. Since the advent of colonialism, Indigenous Peoples have known little more than conflict and the plundering of 'our' territorial integrity.

What might the advent of self-determination mean for the Nunga peoples of Australia? It could mean a return to independence and a challenge to the ongoing controls of the state, or self-governance within the 'domestic paradigm of the state'. It could mean constitutional law recognition, the protection of culture and the protection against breaches of human rights. It could mean a return to the ancestors and a singing up of country. Other than the option to sing up the country and independence, all other options fall within the continuing control of the colonial state and are forms of internal self-determination.[120]

At the 1992 UN WGIP meeting, its chairperson Erica Daes stated that in its reference to the rights of Indigenous Peoples, 'self-determination . . . was used in its internal character, that is short of any implications which might encourage the formation of independent states'.[121] However, the International Court of Justice, in respect of the Western Sahara advisory opinion affirmed that the territories of local tribes, which fell into the hands of colonising powers in the nineteenth century, were not at that time legally terra nullius.[122] It was also affirmed that self-determination was a right that could be invoked by its holders to claim separate statehood and sovereign independence.[123]

The UN in its current form is unlikely to endorse 'Indigenous Peoples' as having the unqualified right to self-determination because of the perceived threat to the 'territorial integrity' of the states that is posed by Indigenous Peoples. During a talk on self-determination to a meeting of interns at the United Nations in Geneva in July 1992, Professor Rosalyn Higgins[124] expressed the view that state boundaries had to be maintained for reasons of world peace.[125] In the effort to maintain their boundaries, regardless of the injustices to the humanity of First Nations Peoples, states have given approval to a limited right to self-determination, exercised within the jurisdiction and construct of the dominant state. This form of self-determination is subservient to the rules of the state. This is not self-determination at all. If this remains the last word from the UN, then all it has done in respect of Indigenous Peoples is to legitimise the continuing colonial relationship.

UNDRIP – from the beginning

The challenge that Indigenous Peoples presented for the UN and its member states was to provide recognition of First Nations Peoples while at the same time retaining the power arrangements and the control that colonial states held over the lands and resources of Indigenous Peoples. What was called

for was an act of pragmatism – that is, one that would appear as if First Nations were empowered, while at the same time leaving the colonial project intact and the colonial states still holding on to power over our territories and lives.[126]

A number of UN studies[127] and conferences[128] recommended that action be taken to prevent the ongoing genocide of First Nations Peoples. The call to action was formulated in the UN Working Group on Indigenous Populations (WGIP), which was established in 1982. The UN WGIP became the main international forum used by Indigenous Peoples until it was wound up in 2006.[129] In terms of UN status, the WGIP sat at the bottom of the UN hierarchy.[130] Its mandate was to review developments pertaining to the promotion and protection of human rights and fundamental freedoms of Indigenous Peoples, and give special attention to the evolution of standards concerning the rights of Indigenous populations, taking account of both the similarities and the differences in the situation and aspirations of Indigenous Peoples throughout the world.[131] The WGIP rules of procedure[132] allowed for oral and written interventions from all Indigenous participants. This was in contrast to the usual UN requirement that limited participation to intergovernmental agencies and accredited NGOs, but the WGIP also allowed interventions of states.[133] In 1994 the evolution of standards was passed from the WGIP and on to the Commission on Human Rights Working Group on Indigenous Peoples. At this stage the states became more vocal about the content of the declaration, and their interventions increased as the draft UNDRIP made its way towards the General Assembly.

As mentioned above, one of the mandates of the WGIP was to give attention to the evolution of standards concerning the rights of Indigenous 'populations'. From the beginning of the WGIP, First Nations Peoples had been participating in the drafting of a *UN Declaration on the Rights of Indigenous Peoples*, as an attempt to negotiate minimum standards or 'rights' for their protection against further incursions into our territories and against the genocidal practices of states and commercial corporations.[134] Within this process, little time was taken to reflect on what it meant to establish 'rights' for Indigenous Peoples, for many First Nations seeking UN support were fully occupied with the struggle against genocide. When it comes to rights talk, you either have rights or you don't. Referring to Hawaiian rights within the American context, Trask commented that a rights discourse contained by the coloniser is meaningless. Similarly, it is problematic for Nungas.

> Ideologically, "rights" talk is part of the larger, greatly obscured historical reality of American colonialism . . . by entering legalistic discussions wholly internal to the American system, Natives participate in their own mental colonization. Once Indigenous Peoples begin to use terms like language 'rights' and burial 'rights', they are moving away from their cultural universe, from the understanding that language and burial places

> come out of our ancestral association with our lands of origin. These Indigenous, Native practices are not 'rights' which are given as the largesse of colonial governments. These practices are, instead, part of who we are, where we live, and how we feel. . . . When Hawaiians begin to think otherwise, that is, to think in terms of 'rights,' the identification as 'Americans' is not far off.[135]

While 'Indigenous rights' are constructed and contained by the colonisers, Indigenous Peoples will never have the freedom to be who we are, First Nations. Within Australia, Indigenous ways are tolerated when they are of commercial or intellectual property value, and can be commodified for a tourist industry in search of the primitive and the exotic. We have a 'right' to maintain a lifestyle that is of commercial value, but our traditional and spiritual lifeways are frequently demeaned and patronised, and we are coerced into mainstream spiritual beliefs and ways of being. Indigenous philosophy and perspectives should be centred when we are negotiating in the language of 'rights'; otherwise, the dialogue is meaningless and valueless.[136]

The definition of Indigenous since the time of Columbus has been dominated by colonial follies. The WGIP in drafting the *UN Declaration on the Rights of Indigenous Peoples* experienced difficulties in gaining consensus on the definition of Indigenous Peoples. However, Miguel Martínez[137] argued that the lack of a formal definition of Indigenous Peoples should not be a deterrence, especially because there was no formal definition of peoples when the UN adopted the *Declaration on the Granting of Independence to Colonial Countries and Peoples* of 1960 and the *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities* of 1992.[138] In the 1980s, Martínez Cobo[139] formulated a working definition of 'Indigenous peoples':

> Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.[140]

Cobo was reluctant to conclude with a definition of 'Indigenous populations'. He saw that it was a right of the Indigenous groups themselves to define who was Indigenous, but he did offer the following as a starting point:[141]

> On an individual basis, an Indigenous person is one who belongs to these Indigenous populations through self-identification as Indigenous (group consciousness) and is recognised and accepted by these populations as one of its members (acceptance by the group).[142]

The most important clause in the UNDRIP refers to the right to self-determination. Part 1, Article 3 provides:[143] 'Indigenous Peoples have the right of self-determination. By virtue of this right, they freely determine their political status and freely pursue their economic, social and cultural development.'[144]

However, a number of other articles in the declaration limit the possibilities of Article 3 on self-determination ever being realised. The colonial muldarbi again creates the illusion of recognition, giving with one hand and taking with the other.[145]

The WGIP came under pressure from the UN General Assembly to complete the declaration. This call for completion was made during the UN-proclaimed International Year of the World's Indigenous Peoples.[146] In closed meetings during August 1993, the Working Group completed the draft. At the WGIP 1994 session, Indigenous participants were not invited to amend the draft but were rather 'allowed' to make brief comments. The states participating in the WGIP drafting of the declaration had always noted their objection to the inclusion of a right to self-determination in the document. At its February–March meeting in 1995, the UNCHR passed a resolution to establish its own intercessional working group on the *Draft Declaration on the Rights of Indigenous Peoples* to continue its drafting.[147] At the second session of the UNCHR Intercessional Working Group meeting held between 21 October and 1 November 1996, the majority of Indigenous Peoples attending walked away in protest.[148] With so many First Nations walking away from the process, the question of the participation and representation of Indigenous Peoples' critical perspectives and philosophy should have emerged more fully at this point.[149] At the 1996 meeting, prior to the Indigenous walk-out, Indigenous Peoples made submissions stating that the current draft of the declaration was a document, which set out 'minimum standards' for the protection of Indigenous Peoples and required urgent adoption by the General Assembly. They stated that these minimum standards were essential for the survival of Indigenous Peoples and that a further derogation from these standards would not only render the declaration meaningless but would hasten the looming genocide facing Indigenous Peoples. At the UNCHR Intercessional Working Group meeting in November 1998, some member states expressed opposition to the inclusion of the right to self-determination in the *Declaration on the Rights of Indigenous Peoples* (I discuss UNDRIP further in Chapter 6). The United States preferred the terms 'self-empowerment' or 'self-management', terms that have no meaning in international law. It is hard not to be cynical about UN

processes and, as Jimmie Durham wrote, 'Instead of Human Rights we have the more specialized and esoteric "rights of Indigenous People"',[150] an insight that remains applicable today.

Peoples not populations

Tanganekald means 'the people of the land'. The colonisers, however, began to refer to us and other Indigenous Peoples within their invaded annexed territories as 'Indigenous populations' – that is, not peoples or nations in their own right, but a component population of their colony. We became a statistic that is kept by the coloniser.[151]

Recognising this general grievance of First Nations worldwide, and addressing the *Vienna UN Human Rights Conference* in 1993, the chairperson of the WGIP, Erica Daes, appealed to the conference to adopt the term 'peoples'.[152] However, it did not. Instead, the *Vienna Declaration and Programme of Action*, which referred to Indigenous Peoples as 'persons belonging to national or ethnic, religious and linguistic minorities', was adopted. Thus, our status as objects of colonial regimes remained unchallenged. From the beginning, in UN studies and reports on the situation of First Nations, we have been defined in terms of 'Indigenous populations'.[153] However, during its existence, the WGIP reference to 'Indigenous populations' was subverted by First Nations asserting a right to call themselves 'peoples' and not 'populations'. As a result, the WGIP became more commonly known as the UN Working Group on the Rights of Indigenous Peoples and not 'populations', but the original name was never officially amended from 'populations' to 'peoples'.

The word 'peoples' invokes the recognition of rights mentioned in UN treaties: 'All peoples have the right of self-determination.'[154] So who are we? The dominant view would label Indigenous Peoples as ethnic minorities.[155] Richard Falk argues that 'Indigenous Peoples . . . have not even participated in the "self" that is being accorded the right to determine its destiny.'[156] The *International Labour Organisation Convention 169* expressly refers to 'Indigenous and tribal peoples', but Article 1 (3) of that convention states: 'The use of the term 'peoples' in this Convention shall not be construed as having any implications as regards the rights which may attach to the term under international law.'[157] The above is to make clear the limitations that have been placed on 'peoples' or self-determination as applied to First Nations.

Who are your people?

This question is common to Nunga protocol: 'Who are your people?' Who your family are and where your traditional country lies is central to the identity of who we are as Nungas. Nungas generally reject the need for definition on the grounds that only our First Nations have the right to determine their own

members. How a group sees itself is vital to its survival; the naming of the group has the power to 'define the conditions under which the group will live'.[158] Naming has an impact on the future destiny of the group. By way of example, it has been said the term 'tribal' is demeaning, relegating us to a permanent state of primitivism, but many Indigenous Peoples are still referred to as tribes and they often adopt the term. But 'tribe' is mostly relegated to a place of primitiveness; to be of a 'tribe' is to be a primitive living in barbarous conditions. Alternatively, Indigenous perspectives would see membership of a tribe as living in balance with the natural world and highly evolved, a life-way of our old people and those of us who still follow those ways into modernity.

Moreover, the word 'people' has been defined as:

> A body of persons composing a community, tribe, race, or nation: –Folk. Sometimes viewed as a unity, sometimes as a collective. . . . The persons belonging to a place or occupying a particular concourse, congregation, company, or class. Those to whom any one belongs: the members of one's tribe, clan, family, community, association, church, etc collectively. The common people, the commonality . . . The whole body of enfranchised or qualified citizens, considered as the source of power; especially in a democratic state, the electorate . . . Men or women indefinitely; men and women; persons, folk.[159]

In most Indigenous languages the word used to describe the identity of the collective group translates to mean 'people'[160] of a specific region, with our own language, culture and laws. In asserting our name as First Nations 'Peoples' we are stating who we are now, but we are also positioning our place in the future and our survival as Indigenous Peoples.

As First Nations we are different from most nation states that sit in the UN, and while the concept 'nation' has the potential to be politically empowering, the power of translation is held by the colonising state. When we speak of the Australian nation we understand it as a state, recognised by the United Nations. But when the term 'nation' is applied to Nungas, it is confined and limited in its meaning by the powers of the colonising state. We are often termed a 'nation within a nation' and while we refer to ourselves as First Nations Peoples from a United Nations and state perspective, their meaning is determined by the same muldarbi that determines the application of self-determination to Indigenous Peoples. The translation of the Indigenous nation remains largely captive to the colonial project.[161]

The nation states continue to justify First Nations' preclusion from an international identity by using racist colonial myths of backwardness, as we are excluded because of states' power and greed, and the fear that the recognition of Indigenous Peoples' rights to self-determination will erode

their territorial integrity. Richard Falk argued that the statist character of international law controls the international agenda in all ways, and that such control is internalised into the procedural framework of the international political system.[162] The exclusion of Indigenous Peoples from having any international personality is maintained through the use of mythological geographical barriers that limit the principles of self-determination. When Indigenous Peoples affirm and assert Indigenous sovereignty and resist the policies of genocide and ethnocide and the continued plunder of our territories, we are viewed as childlike, irrational and not fully comprehending of the principles of international law, politics and international relations. This view is both historical and with us today, and illustrates a ceaseless and continuing global colonialism.

We continue to challenge the idea that somewhere we have 'lost' our international juridical status as nations and peoples. First Nations' status as sovereign and independent is not a position to be acceded to, but one which seeks a reaffirmation of what we have always been. Aboriginal peoples are not created out of international law; we have come to international law as pre-existing, already formed and arrived entities. We are subjects in international law in our own right.

Notes

1 Frantz Fanon, *The Wretched of the Earth* (Harmondsworth, Penguin, 1966), 203.
2 Lionel Fogarty, *New and Selected Poems* (Hyland House, 1995), 7.
3 Ibid.
4 White 'expert' anthropologist Philip Clarke, in giving evidence before the Royal Commission into Hindmarsh Island, spoke of knowledge coming in dreams. (See South Australia, The Hindmarsh Island Bridge Royal Commission: Transcript of Proceedings (1996), 318.) This is even though he also gave evidence against the possibility of there being sacred women's stories in the Goolwa region.
5 Much of the city of Adelaide and the suburban spread are built over the ruwe of Tjirbruki, which is also spelt Tjilbruki.
6 Rowland Atkinson, Elizabeth Taylor and Maggie Walter, 'Burying Indigeneity: The Spatial Construction of Reality and Aboriginal Australia' (2010) 19 *Social and Legal Studies* 311, 317–318 for a recent critique on the spread of Aboriginal peoples across Australia. Jan Pettman, *Living in the Margins: Racism Sexism and Feminism in Australia* (Allen & Unwin, 1989), 88, 24, in reference to 'urban' Aboriginal women adopting the identity of traditional, discusses the impact of colonisation in the shaping of what counts as tradition.
7 Perhaps we should ask remote for whom? First Nations Peoples are centred on ruwe. 'Remote' is often applied by city dwellers who view place that is more than 100 km from the city centre as a remote location.
8 Ronald Berndt and Catherine Berndt, *The Speaking Land, Myth and Story in Aboriginal Australia* (Penguin, 1989), 426–427.
9 A quotation taken from a senior Anmatyerre woman, who passed away in 1996. In respect of law and culture, her name is no longer spoken and is replaced now with the name Kwementyai (meaning 'no name') Kngawarreye. She was one of many who revealed to the world what we call law and others call 'art'.

10 Other colonising governments similarly outlawed ceremonial law practices of Indigenous Peoples. The Sundance ceremony in the United States was outlawed but continued to be practised under cover. In 1884 the Canadian government made it illegal for the First Nations to potlatch – that is, as I understand it, to pass on ownership and custodial obligations to territory in their traditional way through gifting ceremonies.
11 From early colonial times the speaking of language was prohibited. Children were forced to speak in English and were separated from family to ensure that language was not passed on.
12 *The Sydney Morning Herald*, 6 November 1998.
13 Krinkiri has come to mean a white-skinned person. When our old people first saw white people they thought they were spirit ancestors returning. When our old people passed (died) their bodies were smoked and when their outer skin peeled the skin underneath had a light colour. We now use that same word to describe white people.
14 Personal communication to the author, July 1996.
15 The final resting place of the ancestor Tjirbruki is near the township of Brukunga in the Adelaide Hills.
16 *The Australian Weekend Magazine* (Sydney), 10–11 October 1998, 44.
17 In the same way Europe took to cultivation, instead we managed the land with fire-stick farming methods.
18 See Stewart Motha, 'Encountering the Epistemic Limit of the Recognition of 'Difference' (1998) 7 *Griffith Law Review* 79, 82–83, who argues that the High Court in *Mabo (No. 2*) failed to recognise difference and instead retained sameness, in their construction of native title so as to fit within a Western property paradigm. See also *Mabo (No. 2)* 175 CLR 1, 51(Brennan J).
19 Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press, 2008), 63.
20 James Blaut, *The Colonizer's Model of the World: Geographical Diffusionism and Eurocentric History* (Guilford Press, 1993), 23.
21 Anghie, above, n. 19, 109.
22 Peter Fitzpatrick, 'Traditionalism and Traditional Law' (1984) 28 *Journal of African Law* 20, 21.
23 Elizabeth Povinelli, *The Cunning of Recognition, Indigenous Alterities and the Making of Australian Multiculturalism* (Duke University Press, 2002), 75–76.
24 Peter Sutton, 'The Politics of Suffering: Indigenous Policy in Australia since the 1970s' (2001) 11 *Anthropological Forum* 125.
25 Rex Wild and Patricia Anderson, *Ampe Akelyernemane Meke Mekarle "Little Children are Sacred": Summary Report of the Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse* (2007).
26 See Irene Watson, 'In the Northern Territory Intervention, What is Saved or Rescued and at What Cost?' (2009) 15 *Cultural Studies Review* 45–60, for a discussion on the intervention as a contemporary re-enactment of invasion that was based on ideas of native savagery.
27 Catharine MacKinnon, *Towards a Feminist Theory of the State* (Harvard University Press, 1989), xvi.
28 Haunani-Kay Trask, *From a Native Daughter: Colonialism and Sovereignty in Hawaii* (Common Courage Press, 1993), 157.
29 Ibid., 166.
30 Eric Michaels, *Bad Aboriginal Art, Tradition, Media, and Technological Horizons* (Allen & Unwin, 1994), 130.
31 Philip Clarke and Philip Jones were called as experts to provide evidence to the Royal Commission into Hindmarsh Island on the Aboriginal culture of the Lower Murray and Coorong regions.

32 Diane Bell, *Ngarrindjeri Wurruwarrin: A World that Is, Was, and Will Be* (Spinifex Press, 1998), 126.
33 Unaipon recorded the story of the Seven Sisters and their travel to the Lower Murray Lakes, and many of his stories were taken and recorded by others. Charles Mountford, *Dawn of Time* (Littlehampton Book Services, 1989), 52, records an account of the Seven Sisters at the lakes; the source there is most likely Unaipon.
34 The idea of extinguishment embedded in native title jurisprudence is implicit in constructs of authentic Indigenous identity, particularly when those identities are constructed by the state. We saw this approach taken in the *Yorta Yorta* decision. In *Members of the Yorta Yorta Aboriginal Community* v *The State of Victoria* [1998] FCA 1606, Olney J affirmed Brennan J's words in *Mabo* that the 'tide of history' has the power to 'wash away' native title. On appeal, the High Court majority rejected the claims of the Yorta Yorta Aboriginal community on the grounds that native title had been 'extinguished'. The judges claimed that 'the society which had once observed traditional laws and customs had ceased to do so and, by ceasing to do so, no longer constituted the society out of which the traditional laws and customs sprang'. And also that 'the forebears of the claimants had ceased to occupy their lands in accordance with traditional laws and customs and that there was no evidence that they continued to acknowledge and observe those laws and customs', 95, 96 (Gleeson CJ, Gummow and Hayne JJ).
35 Karen Engle, *The Elusive Promise of Indigenous Development Rights, Culture, Strategy* (Duke University Press, 2010), 12, discusses the writings of anthropology and their often overly stereotyped stories of culture, and where often the law requires more of these stereotypical versions of local knowledges.
36 Jocelyn Linnekin, 'Defining Traditions: Variations on the Hawaiian Identity' (1983), 10, *American Ethnologist*, 241, 249; haole means 'foreigner'.
37 Trask, above, n. 28, 167, and 168–169 for a discussion of the term 'invention of tradition' as used by anthropologists.
38 Bell, above, n. 32, 455.
39 Ibid., 455.
40 Ibid., 468. Here I am not disputing the authority of the families named to 'know', but I am contesting the way in which Bell assumes the power to name those who know.
41 Kumarangk is known as Hindmarsh Island.
42 Bell, above, n. 32, 550.
43 Irene Watson, *Looking at You Looking at Me* (self-published, 2000), provides an extensive account of the history of colonisation in this region. See also Norman Tindale, (1934–1937), 2, *Journals of the Researches in the South East of South Australia*, 41–42; one source of this information was my great-grandmother, Amy Gibson.
44 'Me' includes my genealogical line of ancestors and their collective connection back to country, so when I say 'me' I include my mother, grandmothers, uncles, grandfathers, and the history of naming they have endured from the time of the invasion of our ancestral territories.
45 The place of my ancestors has been described as being within the territory of the Ngarrindjeri native title claimed area. I have critiqued the matter of conflicting identities and the phenomena of pitting Aboriginal Peoples against each other under the influence of the early christian missionaries and the alliances Aboriginal individuals had with them; see Watson, *Looking at You, Looking at Me*, above, n. 43 for further discussion.
46 The Ngarrindjeri native title claim has been contested by a Ramindjeri application that questions both the court and the Ngarrindjeri claimants' assertion of jurisdiction over lands that have been ruwe to the Ramindjeri, Tanganekald and Yaraldi, among

others. These are ancient identities that are being contested, and Tindale once said that 'old names never die'; see Norman Tindale, *Aboriginal Tribes of Australia* (ANU Press, 1974), 157. For further discussion, see Bell, above, n. 32, 420.

47 Ibid., Bell, 561, 558.

48 For a discussion on the relationship between colonialism, christianity and patriarchy, and its effect on Raw Law, see Irene Watson, 'First Nation Stories, Grandmother's Law: Too Many Stories to Tell', in Heather Douglas, Francesca Bartlett, Trish Luker and Rosemary Hunter (eds), *The Australian Feminist Judgments Project: Righting and Re-writing Law* (Hart Publishing, 2014).

49 For a discussion of how ancient identities become obliterated and reconstructed, see Michaels, above, n. 30, 175.

50 Cited in Bell above, n. 32, 137–138, and recorded by Tindale, *Aboriginal Tribes of Australia*, above, n. 46, 117.

51 Bell, above, n. 32, 136–144.

52 I present the story of the Ngarrindjeri as an example of larger phenomena which can be identified as a universal approach to the absorption of First Nations Peoples' identities by states.

53 Point McLeay Mission was founded in 1859 by the Aborigines' Friends Association and for a number of years was led by Rev. Taplin until his death in 1879. In 1916 the South Australian government managed the Aboriginal reserve. In the 1970s the reserve was managed by an Aboriginal Council that remained dependent on both state and Commonwealth government funding. The reserve was renamed Raukkan in 1982.

54 Bell, above, n. 32, 137.

55 Rev. Taplin promoted the idea of Ngurunderi as god; see George Taplin, *Journal: Five Volumes* (1859–1879), 25 June 1859 and 22 November 1859.

56 Cited in Bell, above, n. 32, 578, as told by Veronica Brodie.

57 Bell, above, n. 32, 138.

58 Steven Hemming, Philip Jones and Philip Clarke, *Ngurunderi: An Aboriginal Dreaming* (South Australian Museum,1989), 4.

59 Moana Jackson, 'Land Loss and the Treaty of Waitangi' in Witi Ihimaera (ed.), *Te Ao Marama: Regaining Aotearoa: Maori Writers Speak Out*, Vol. 2 (Reed Books, 1994), 71.

60 Matha Wai means bosses of our own ruwe and ways of the land.

61 James Crawford, 'The Aborigine in Comparative Law' (1987) 2 *Law and Anthropology* 5, 7.

62 Aboriginal is defined by the *Commonwealth in the Aboriginal and Torres Strait Islander Heritage Protection Act 1984*, s. 3 (1) as 'a member of the Aboriginal race of Australia' and including 'A descendant of the indigenous inhabitants of the Torres Strait Islands'.

63 'Euro-Aboriginal' is a description used by Senator Lightfoot during a debate on the *Native Title Amendment Bill 1997* (Cth); see Commonwealth, Parliamentary Debates, Senate, 25 November 1997, 9433 (Ross Lightfoot).

64 Trask, above, n. 28, 112, 113–114; see also John Chesterman and Brian Galligan, *Citizens Without Rights: Aborigines and Australian Citizenship* (Cambridge Press, 1997), 41–42.

65 See Pettman, above, n. 6, 20 for a discussion of how the state controls who is included and excluded from Aboriginality; for an analysis of state control and also the use of torture in the process, see Chris Cunneen, 'Detention, Torture, Terror and the Australian State: Aboriginal People, Criminal Justice and Neocolonialism', in Greta Bird, Gary Martin and Jennifer Nielsen (eds), *Majah: Indigenous Peoples and the Law* (Federation Press, 1996), 13.

66 *Shaw* v *Wolf* (1998), 83 FCR 113; for a discussion of the merging of race hate and its power to define Aboriginality, see Margaret Simons, 'Bolt in Court: Freedom of Speech v the Prohibition of Race Hate' *Crickey* 23 September 2010.
67 Trask, above, n. 28, 54.
68 Ibid., 115; see also Margaret Davies, 'The Proper: Discourses of Purity' (1998) 9 *Law and Critique* 147, 155; Karen Engle, *The Elusive Promise of Indigenous Development, Rights, Culture, Strategy* (Duke University Press, 2010).
69 Bell, above, n. 32, 58 from informant Sarah Milera.
70 A rupuli was a person who held the mob together, and to translate it as simply a political leader negates the different frameworks we lived under. A rupuli could never be compared to a head of 'state' or a political leader. The role of rupuli was much more than that; in addition connectedness and relationships to the natural world we held together by the rupuli.
71 Also claimed by Sarah Milera to Bell, above, n. 32, 396.
72 Tindale, *Journals of the Researches in the South East* of *South Australia*, December 1935, above, n. 41, 271.
73 Reuben Walker was the child of a Ramindjeri mother. He was reared by the Lewarinjarni who were related by marriage to the Ramindjeri; he wrote of the Lewarinjarni dying out in the 1860s. Reuben Walker, 'The Rueben Walker Manuscript' in Norman Tindale (1934–1937), *Journals of Researches in the South East of South Australia*, 185–186, 191. He was schooled for a short time at Point McLeay Mission before leaving to live at a camping place known as *Dang* by the Finnis River with his grandparents and the Ruemerungupus of Kumarangk (Hindmarsh Island).
74 Ibid., 151.
75 Ibid., 202.
76 Ibid., 151–152.
77 Bell, above, n. 32, 405.
78 Yaraldi nation, Tanganekald nation, Ramindjeri nation, to cite a few.
79 S. D. Lendrum 'The Coorong Massacre: Martial Law and the Aborigines at First Settlement' (1977) 6 *Adelaide Law Review* 26.
80 Povinelli, above, n. 23, 55, discusses the ongoing accusation of lost culture and becoming just another ethnic group.
81 *Walker* v *State of South Australia* (No. 2) [2013] FCA 700; in this case the applicant, Karno Walker, disputes the jurisdiction of native title over the lands of the Ramindjeri People; it was argued that the Ramindjeri, Tanganekald and Yaraldi among others are not subject to the laws of the Commonwealth of Australia. For a review of the effects of native title registration, see the Wongatha (Western Australia) native title claim, which illustrates the conflict between competing native title claimant groups, and was reported by *ABC Media Report* on 4 March 1999. The Ngaanyatjarra Council, which represents 11 communities in the goldfields and Central Desert, said the decision of the Native Title Tribunal to register a claim over 220,000 square kilometres in the north-eastern goldfields was deplorable. The registered claim of the Wongatha is the first in Western Australia to pass the new, tougher registration test of the *Native Title Amendment Act 1998* (Cth). The claimants, as a result of their registered claim, had the 'right' to negotiate over land use. However, the competing claimants represented by the chairman of the Ngaanyatjarra Council, Robin Smythe, said the traditional owners who live there and three other groups with native title claims over the area have not been consulted.
82 Reported by *ABC News Link*, 'Torres Strait Native Title a Whitewash', 6 April 1999.
83 Minutes of Council, 15 September 1840; Register, 19 September 1840; SAA. 193, cited in Lendrum, above, n. 79, 30.

84 Governor Gawler, Governor of South Australia requested an opinion from Cooper J of the Supreme Court 'on the amenability of the Aborigines to European law if they were captured'. The judge replied that he felt it

> impossible to try according to the forms of English law people of a wild and savage tribe whose country, although within the limits of the Province of South Australia, has never been occupied by Settlers, who have never submitted themselves to our dominion, and between whom and the Colonists, there has been no social intercourse

cited in Alex Castles, *An Australian Legal History* (Law Book Company, 1982) 524–525. It is clear from the Coorong hangings that the colonial officials were unsure of the status of Nungas – 'subject' or 'enemy'? Batman's treaty is another example of early settler thinking, about the status of Nungas. When Batman attempted to negotiate a treaty with the Kooris in Victoria, the Crown issued warnings to all other settlers of the penalties it would impose, if further negotiations with the First Nations Peoples were entered into.

85 *The South Australian Register*, 19 September 1840; cited in Henry Reynolds, *Aboriginal Sovereignty: Three Nations One Australia* (Allen & Unwin, 1996), 121.

86 Anghie, above, n. 19, 66.

87 These categories are found in the *Aboriginals Protection and Restriction of the Sale of Opium Act 1897* (Qld) ss. 3, 4, 9, 31; *Aborigines Act 1905* (WA), ss. 2, 3, 12, 60; *Northern Territory Aboriginals Act 1910* (SA) ss. 2, 3, 16, 49; *Aborigines Act 1911* (SA), ss. 3, 4, 17, 38. See Pettman, above, n. 6, 7 for a further discussion.

88 The colonisers in controlling our naming continue to change their definitions to suit their own political agendas. The *Aborigines Act of 1934–39* (SA) broadened the definition to include 'all persons descended from the original inhabitants of Australia, whether of full-blood or less than full-blood'. Under the previous act, an 'Aborigine' had been defined 'as any aboriginal native of Australia, any half-caste who lives with an Aboriginal native as wife or husband, or who habitually consorts with aboriginal natives. Or any half-caste child whose age does not apparently exceed 18 years'. Ward Churchill, *Since Predator Came: Notes from the Struggle for American Indian Liberation* (Aigis Publishing, 1995), 31 writes about the use of a eugenics code by the United States government in the *General Allotment Act*, used to define who was and wasn't Indian.

89 See Jennifer Nielsen, 'Images of the "Aboriginal": Echoes from the Past' (1998) 11 *Australian Feminist Law Journal* 105, for changing tests on 'Aboriginality', tests which have moved away from being based solely on 'bloodline', to proving bloodline, self-identification and recognition by the Nunga community.

90 Cited in Quentin Beresford and Paul Omaju, *Our State of Mind: Racial Planning and the Stolen Generations* (Fremantle Arts Centre Press, 1998), 30.

91 South Australian Parliamentary Debates, 8 August 1939, 467, cited in Robert Foster, *Aboriginal Policy and its Administration in South Australia, 1900–1962: A Report for the Native Title Unit* (Australian Institute of Aboriginal and Torres Strait Islander Studies, 1997), 38.

92 Jimmie Durham, 'Cowboys and . . . Indians' (1990) 12 *Third Text* 5, 11, 15.

93 See also Michaels, above, n. 30, 40 for a similar analysis.

94 Cited in Sharon Venne, *Our Elders Understand Our Rights* (Theytus Books, 1998), 133; Darrell Posey, 'Effecting International Change' (1991) 15 *Cultural Survival Quarterly* 29.

95 Ibid.

96 See also Kathy Bowrey and Jane Anderson, 'The Politics of Global Information Sharing: Whose Cultural Agendas Are Being Advanced?' (2009) 18 *Social and Legal Studies* 479. Bowrey and Anderson consider that the reification of spirituality and

culture might have a dark side in the exclusion of Indigenous Peoples from the economy should they want to participate and expand economic opportunities for self and community. These tensions have led to the assumption that 'Indigenous' is not a fit for modern Western copyright law.

97 The Vampire Project, as it is known to Indigenous Peoples, officially known as the Human Genome Diversity Project, collected blood samples from a number of First Nations Peoples for scientific purposes. One such case involved the collection of blood and hair samples from the Hagahai of the Madang Province of Papua New Guinea; the project took out a US patent on the components of the genes of one of the Hagahai people; see Aroah Mead, 'Genealogy, Sacredness, and the Commodities Market' (1996) 20 *Cultural Survival Quarterly* 46, 46–49. See also Debra Harry, 'Biocolonialism and Indigenous Knowledge in United Nations Discourse' (2011) 20 *Griffith Law Review* 702.

98 See Debra Harry, ibid., and also Laurelynn Whitt, 'Biocolonialism, and the Commodification of Knowledge' (1998) 7 *Science as Culture* 33 for a discussion on biocolonialism. Article 8 (j) of the *Convention on Biological Diversity* 1992 ATS 32 / 1760 UNTS 79 / 31 ILM 818 (29 December 1993) is one impotent attempt at protection of Indigenous knowledge, protection which is subject to state laws. Harry, above, n. 97 argues for the recognition of the right to self-determination as nations and peoples as a means of protecting indigenous knowledge and for its removal from the Western intellectual property regime.

99 Bowrey and Anderson, above, n. 96, 490.

100 Statement on Behalf of the Indigenous Peoples present at the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (WIPO-IGC on GRTKF), meeting held on 16 February 2012; this statement was followed by the majority of Indigenous Peoples walking away from the meeting. The statement did not make its way into the official WIPO records.

101 For a discussion of cultural appropriation, see Larissa Behrendt, 'In your Dreams: Cultural Appropriation, Popular Culture and Colonialism' (1998) 4 *Law Text and Culture* 263. Also see Povinelli, above, n. 23, where Povinelli maps the political cunning and calculus of cultural recognition in settler modernity.

102 Ward Churchill, *Indians Are Us? Culture and Genocide in Native North America* (Between the Lines, 1994), 214–215.

103 Cited in ibid., 215–216.

104 Blaut, above, n. 20 concludes that the West is suffering from a sickness so deep it is beyond their own field of vision.

105 Ibid., 234.

106 *United Nations Declaration on the Granting of Independence to Colonial Countries and Peoples*, UNGA Res 1514 (XV), 15 UN GAOR, Supp (No. 16) 66, UN Doc A/4684 (14 December 1960).

107 Ibid., paras 6 and 7 are an obstacle to Indigenous Peoples' ending colonialism. Para 6 states: 'Any attempt at the partial or total disruption of the national unity and the territorial integrity of the country is incompatible with the purposes and principles of the *Charter of the United Nations*.' Para 7 states:

> All States shall observe faithfully and strictly the provisions of the Charter of the United Nations, the Universal Declaration of Human Rights and the present Declaration on the basis of equality, non-interference in the internal affairs of all States, and respect for the sovereign rights of all peoples.

108 *Mabo (No. 2)* [1992] 175 CLR 1, 69 (Brennan J).

109 See Irene Watson, 'Has Mabo Turned the Tide for Justice?' (1993) 12 *Social Alternatives* 5, 5–8 for an early discussion on the decision in *Mabo (No. 2)* and its aftermath.

110 Fiona Paisley, *The Lone Protestor: A. M. Fernando in Australia and Europe* (Aboriginal Studies Press, 2012).

111 Douglas Sanders, 'Remembering Deskaheh: Indigenous Peoples and International Law', in Irwin Cotler and F. Pearl Eliadis (eds), *International Human Rights Law: Theory and Practice* (1992), 424–485, for the history of Indigenous attempts to be heard internationally.

112 Cited in Russell Barsh and James Youngblood Henderson, 'Aboriginal Rights Treaty Rights and Human Rights Tribes Constitutional Renewal' (1982) 17 *Journal of Canadian Studies* 55. Isabelle Schulte-Tenckhoff, 'Re-assessing the Paradigm of Domestication: The Problematic of Indigenous Treaties' (1998) 4 *Review of Constitutional Studies* 239, 246–247 argues the

> assumption that 'backward' peoples could not lay claim to sovereignty is also a relatively recent one. In the second half of the nineteenth century a positivist and eurocentric view denying non-European peoples an international legal personality arose; this made international recognition of such peoples dependent upon their 'civilization' under the guidance of European powers.

113 Schulte-Tenckhoff, above, n. 112, 246–247. George Pavlich, 'Political Logic, Colonial Law and the Land of the Long White Cloud' (1998) 9 *Law and Critique* 175, 185 argues 'So long as the discourse declares indigenous law and control absent, arbitrary, or evil, it becomes possible to bid for the exclusive legitimacy of a colonial legal "order".'

114 Self-determination is referred to in Art. 1, para 2 of the Charter of the United Nations and also in the 1960 General Assembly Resolution 1514, above, n. 106, XV, proclaiming a right of self-determination of all peoples. In 1966, self-determination was inserted into Art. 1 of the *International Covenant on Civil and Political Rights* GA Res 2200A (16 December 1966, entered into force 23 March 1976). Four years later self-determination appeared in the Friendly Relations Declaration. The 1984 World Council of Indigenous Peoples Declaration stated, 'All Indigenous Nations have the right to self-determination. By virtue of this right they may freely determine their political status and freely pursue their economic social religious and cultural development.'

115 There are two prevailing views about the character of the right to 'self-determination'; one is that it is a legal right that gives rise to concomitant legal claims and obligations, and two, it is a political principle. The Yugoslavia Arbitration Commission found that the term 'self-determination' was an evolving principle, and the rights and obligations that flowed from the term remained unclear: Opinion No. 2, 11 January 1992, 31 ILM [1992] 1497, 1498.

116 James Crawford, 'Some Conclusions' in James Crawford (ed.), *The Rights of Peoples* (Clarendon, 1988), 164, is one characteristic noted in his analysis of the right to self-determination.

117 Richard Falk, 'The Rights of Peoples (In Particular Indigenous Peoples)' in James Crawford (ed.), *The Rights of Peoples* (Oxford University Press, 1988), 25.

118 Crawford, above, n. 61, 17.

119 For a further discussion, see Falk, above, n. 117, 18. Here he argues that self-determination for peoples must be reconciled in practice with the existing geographical delimitation of territorial boundaries of sovereign states.

120 Before it was dismantled by the Australian Commonwealth government in 2004, the Aboriginal and Torres Strait Islander Commission (ATSIC) was promoted as a model of self-determination. ATSIC was a statutory body created by the *Aboriginal and Torres Strait Islander Commission Act 1989* (Cth), but the chairperson of ATSIC was nominated and appointed by the federal Minister of Aboriginal Affairs, while other members were elected from imposed colonial regional zones across Australia.

ATSIC received non-governmental organisation (NGO) status within the UN in 1994, but its application was opposed by many Nunga peoples because ATSIC was a governmental body and not competent to act as an NGO. Nevertheless, the UN awarded this status to ATSIC. In 1999 ATSIC's chairperson promoted this body as being competent to enter into negotiations for a treaty with the Australian government on behalf of the 'Aboriginal nation'. However, the lack of independence from government was criticised by First Nations, who are plural not singular. There is no single 'Aboriginal nation' within Australia but there are hundreds. Similar concerns regarding representative capacity were also levelled at the National Aboriginal Congress, incorporated as a company in 2010, and likely to be dismantled in 2014 due to funding cuts made by the Australian Commonwealth government. The congress has been criticised because of its low membership numbers (fewer than 7,500) and lack of representative capacity. The First Nations population is about 700,000 but only 809 congress members voted in their recent election. Boe Spearim, 'With Congress on the Chopping Block Opportunity Beckons' (2014), 3, *Brisbane Blacks* 8.

121 UN Doc. E/CN.4/Sub.2/93. Para.80.

122 [1975] ICJ Rep 39, 40.

123 Ibid., 12, 31–33. The High Court in *Mabo* in rejecting the application of terra nullius to Australia considered *Western Sahara*, and their advisory opinion that a state could no longer deploy terra nullius to legitimise colonial foundation. Terra nullius was by this time considered a racist and colonial relic of the past. Following this decision Indigenous Peoples began to lobby the UN member states to support an application to obtain an advisory opinion from the International Court of Justice on the application of terra nullius to Australia.

124 Prior to her appointment as a judge to the International Court of Justice.

125 I was present at this meeting, and the comments were also cited in Sanders, above, n. 111, 80–81.

126 It has been a long journey taken by First Nations to gain recognition and there have been a number of UN developments along the way that Indigenous Peoples have considered to empower our position –for example, the *Convention on the Prevention and Punishment of the Crime of Genocide* of GA Res 260 (III) (9 December 1948), and the *Universal Declaration of Human Rights* UN GA 217 A (III) (10 December 1948) – and the following human rights instruments: the *Declaration on the Granting of Independence to Colonial Countries and Peoples* (14 December 1960), above, n. 106, the *International Convention on the Elimination of all Forms of Racial Discrimination* GA Res 2106 (XX) Annex, 20 UN GAOR Supp (No. 14) UN Doc A/6014 (1966), 660 UNTS 195 (21 December, entered into force 4 January 1969) and the two international covenants on human rights the *International Covenant on Civil and Political Rights* (16 December 1966, entered into force 23 March 1976), above n. 114 and the *International Covenant on Economic, Social and Cultural Rights* GA Res 2200A (XXI), 21 UN GAOR Supp (No. 16) UN Doc A/6316 (16 December 1966, entry into force 3 January 1976). However, none of these conventions have provided First Nations with a remedy against genocide or land dispossession. See also Mary Ellen Turpel, 'Indigenous People's Rights of Political Participation and Self-Determination' (1992) 25 *Cornell International Law Journal* 579, on the ILO Convention.

127 In 1971 a study on racial discrimination grew from the proclaimed UN Decade to Combat Racial Discrimination. This initiative was followed by the UN Economic and Social Council (ECOSOC) authorising a study by the Sub-Commission on the Prevention of Discrimination and Protection of Minorities. The Sub-Commission appointed José Martínez Cobo who completed the report, *The Study of the Problem against Indigenous Populations.* This study was supported in 1971 by the UN General

Assembly Resolution 1580 (1). See José Martínez Cobo, *Study of the Problem against Indigenous Populations*, UN Doc E/CN 4 Sub2/1986/7 (the 'Cobo Report').

128 In 1977 the UN Non-Governmental Organisations' (NGO) Conference on Discrimination against Indigenous Peoples of the Americas was held in Geneva. The conference called for the right of Indigenous Peoples and nations to have authority over their own affairs. In 1978, the World Conference to Combat Racism and Racial Discrimination endorsed the right of Indigenous Peoples to maintain their traditional social and cultural identities and called for the recognition of Indigenous land rights. Then the 1981 NGO Conference on Indigenous Peoples and the Land called for the establishment of a permanent working group on Indigenous populations, and in the following year the UN Working Group on Indigenous Populations (WGIP) was formed. See also Russell Barsh, 'Current Developments: Indigenous Peoples: An Emerging Object of International Law' (1986) 80 *American Journal of International Law* 369.

129 The WGIP first sat in the UN at Geneva during August 1982. It met annually just prior to the sitting of the Sub-Commission. The WGIP was established by ECOSOC Resolution 1982/34 (7 May 1982).

130 The WGIP was situated below the Sub-Commission on the Prevention of Discrimination and Protection of Minorities, and next up the ladder was the Commission on Human Rights, and then the Economic and Social Council, and finally the General Assembly.

131 *Economic and Social Council Resolutions* 1982/34 (7 May 1982). In 1985 the Sub-Commission on the Prevention of Discrimination and Protection of Minorities adopted a resolution that endorsed the Working Group's standard-setting activities to produce a *Draft Declaration on Indigenous Rights.*

132 The rules were established under the chairmanship of Asbjorn Eide.

133 While the WGIP allowed the participation of Indigenous Peoples, we had no voting power and no right to observe the final deliberations of the members of the working group. For example, Indigenous Peoples had no say or vote in the 1993 decision made by the members of the WGIP that it was time for the Draft Declaration to move from the WGIP on to the Sub-Commission.

134 A declaration is not binding on a state. It is only binding on a state if it is a statement of principles which have already become norms of 'customary' international law or are norms of 'conventional' international law which are binding on the state in question because the state has signed a particular treaty.

135 Trask, above, n. 28, 112–113.

136 See the Canadian decision in *R* v *Sparrow* [1990] 1 SCR 1075, 1112 where it was said 'It is . . . crucial to be sensitive to the Aboriginal perspective itself on the meaning of the rights at stake'.

137 Martínez was the UN Special Rapporteur for the *Study of Treaties, Agreements and Constructive* Arrangements *between States and Indigenous P*eoples; a member and Chair of the UN WGIP and also the First Chairman of the Advisory Committee to the UN Human Rights Council.

138 See Miguel Alfonso Martínez, *Second Progress Report*, Special UN Rapporteur, for the *Study on Treaties, Agreements and other Constructive Arrangements between States and Indigenous Populations*, 47th session, Item 14, Sub-Commission on Prevention of Discrimination and Protection of Minorities, E/CN4/Sub2/1995/27, 31 July 1995, 10.

139 The Special Rapporteur of the Sub-Commission for the Prevention of Discrimination and Protection of Minorities.

140 José Martínez Cobo, *Study of the Problem against Indigenous Populations*, Vol. 5, Conclusions, Proposals and Recommendations, UN Doc E/CN 4/Sub 2/1986/7 Add 4, para 379. Cobo discusses the process he adopted in coming to a definition of Indigenous Peoples:

> Indigenous Peoples must be recognised according to their own perceptions and conception of themselves in relation to other groups co-existing with them in the fabric of the same society;
>
> There must be no attempt to define them according to the perception of others through the values of foreign societies or of the dominant sections in such societies;
>
> The right of Indigenous Peoples to define what and who is Indigenous, and the correlative, the right to determine what and who is not, must be recognized;
>
> The power of Indigenous Peoples to determine who are their members must not be interfered with by the state concerned, through legislation, regulations or any other means; artificial, arbitrary or manipulatory definitions must be rejected. The special position of Indigenous Peoples within the society of nation-states existing today derives from their historical rights to their lands and from their right to be different and to be considered as different.

141 Alternative views are that while the lack of an agreed definition has the advantage of promoting local control and self-definition, the disadvantage is the power that it leaves for individual states to determine indigeneity in their terms; see Dianne Otto, 'A Question of Law or Politics? Indigenous Claims to Sovereignty in Australia' (1995) 21 *Syracuse Journal of International Law and Commerce* 65 82.

142 The Cobo Report, above, n. 127, 50, 51.

143 This article was first drafted and appeared in the UN Doc E/CN 4/Sub 2/1994/2Add 1 and survived to the final *United Nations Declaration on the Rights of Indigenous Peoples.*

144 Article 3 is reinforced by preambular paragraph 14:

> Acknowledging that the Charter of the United Nations, the *International Covenant on Economic, Social and Cultural Rights* and the *International Covenant on Civil and Political Rights* GA Res 2200A 21 UN GAOR Supp (No. 16) a UN Doc A/6316 (16 December 1966, entered into force 3 January 1976) affirm the fundamental importance of the right of self-determination of all peoples, by virtue of which they freely determine their political status and freely pursue their economic, social and cultural development.

145 In the 1994 *Draft Declaration on the Rights of Indigenous Peoples* UN Doc E/CN 4/Sub 2/1994/2Add 1, there were moves then to characterise or limit self-determination. Article 31 provided a shopping list of alternatives which weakened Article 3:

> Indigenous Peoples, as a specific form of exercising their rights to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, including culture, religion, education, information, media, health, housing, employment, social welfare, economic activities, land and resource management, environment and entry by non-members, as well as ways and means for financing these autonomous functions.

If a people have the right to self-determination then they have it, not unless the intention was to limit that right.

146 It is interesting to note that the preparation of other UN declarations had taken much longer than the 12 years the UNDRIP took to complete.

147 UNCHR Resolution 1995/32 (3 March 1995).

148 Mick Dodson, Australian Aboriginal Social Justice Commissioner, and also representing the Central Land Council, Indigenous Woman's Aboriginal Corporation, National Aboriginal and Islander Legal Services Secretariat, and the New South Wales Aboriginal Land Council remained in attendance at the meeting with the

participating member states. See the Aboriginal Statement on the *Draft Declaration on the Rights of Indigenous Peoples*, to the UNCHR Intercessional Working Group on the *Draft Declaration*, at the second session 21 October – 1 November 1996, 25 October 1996. The *Draft Report of the Second Session of the Working Group* established in accordance with the Working Group on Human Rights, E/CN4/WG15/CRP7 (1 November 1996) can be accessed through the Center for World Indigenous Studies website.

149 I quit the drafting process in 1994 when the WGIP prevented input from First Nations.

150 Durham, above, n. 92, 13.

151 In our languages the names Tanganekald, Ramindjeri, Kaurna and Narrunga mean the people of a distinct geographical territory, speaking a distinct language, with a distinct law and culture.

152 Erica Daes, speaking at the Vienna UN Human Rights Conference, 18 June 1993.

153 See for further discussion Crawford, above n. 61, 11.

154 In the preamble to the *Charter of the United Nations*, Article 1 (1).

155 See James Anaya, 'The capacity of International Law to Advance Ethnic or Nationality Rights Claims' (1990) 75 *Iowa Law Review* 837, who describes Indigenous Peoples' rights in terms of ethnic or nationality rights claims, and the *Universal Declaration on Human Rights* 1948, which does not recognise the collective rights of peoples or minority groups. Individual rights to religious, linguistic or cultural activities are recognised, but not group rights. The *UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities* does not recognise any collective rights either. It is only in Art. 27 of the *International Covenant on Civil and Political Rights* (16 December 1966, entered into force 23 March 1976), above, n. 114, that there is any reference to group rights. However, this article refers to the civil and political rights of an individual member of a collective, not the collective's collective rights. Anghie, above, n. 19, 206, suggests that this endorses the assimilation of minorities into the universal state, rather than providing for the collective rights of the collective.

156 Falk, above, n. 117, 27.

157 The term 'Indigenous people' can also be found in reference to the rights of Indigenous children in Article 30 of the *United Nations Convention on the Rights of the Child* GA Res 44/25 (opened for signature 20 November 1989, entered into force 2 September 1990). There is an emphasis on Indigenous Peoples' expertise in Article 21 adopted by the Rio de Janeiro UN Conference on Environment and Development. See also Benedict Kingsbury, '"Indigenous Peoples" in International Law: A Constructivist Approach to an International Controversy' (1995) 92 *American Journal of International Law* 414 for a discussion of 'peoples' in international law.

158 Churchill, *Indians Are Us?* above, n. 102, 293–295. See also Otto, above, n. 141, 82.

159 *Oxford English Dictionary* (Oxford University Press, 2014).

160 Treating Nungas as members of a minority population group would be to fail to recognise our claims which are essentially *collective* in character. Minority population rights have been seen to result from the exercise of individual rights to freedom of association.

161 Schulte-Tenckhoff, above, n. 112, 239.

162 Falk, above, n. 117, 17–21.

Chapter 6

Dressed to kill

Jangga meenya bomunggur . . . the smell of the white man is killing us.[1]

First Nations laws have sustained Nungas since time immemorial. The presence of hundreds of First Nations at the time of Cook's landing is evidence of Aboriginal laws embracing diversity and difference. Cook violated the laws of the Eora[2] People when he and his crew stepped ashore in 1770 and these violations have never stopped: 'he came into country the wrong way'[3] and when he landed it was a violent beginning. Surrounded by Cook's crew, the Eora People were murdered by the blast, from bombs secretly laid, so that before the Eora were able to initiate a welcoming ceremony the law was violated, as was the possibility of peace.[4]

The failure of Cook to enter the law and the ceremony of the land has been followed by millions of others not indigenous to this country. The genocide that came with the invasion of 'Australia' might have been avoided if Cook and all who followed entered into the laws and ceremonies of the land. Across the world colonisation of First Nations Peoples has had a similar genocidal effect.[5] At the same time, the spread of the coloniser across our ruwe is remembered through the oral histories of our old people:

> First time Kartiya (Europeans) bin come in bush, in desert, my mother still young. She have me inside. They bin have ceremony-all the mothers, having ceremony for son. One old man, my grandpa, he bin come back from hunting. He bin see Kartiya with women, and big mob stockman (Aboriginal). He bin get real angry. He worry for them women. Stockmen they bin say to my grandpa, 'Hey, old man, don't throw boomerang. This Kartiya is no good, he too cheeky'. My grandpa he bin say to Kartiya, 'What you after? This is my wife. Leave em!' 'No!' that Kartiya bin say. Then my grandpa throw boomerang at that Kartiya. Kartiya bin get em rifle and bin kill my grandpa. From there that Kartiya keep going, look around for more people. Go find another people, another place. Find another ceremony. They bin get up look. 'Hallo, who come?' Some

> women they bin run to hill, keep watching, 'What's that? Might be devil there.' My mothers they bin run to hill. That Kartiya he bin take people away, take 'em away for good.[6]

The post-invasion history of Australia is also a story of genocide: the extermination of First Nations Peoples, languages, cultures and laws. Survivors of genocidal massacres were rounded up and removed from their ruwe and relocated hundreds of kilometres away from their traditional country and spirit ancestors. They were detained in concentration camps, officially and more popularly known as reserves or christian missions, left to await death or absorption into whiteness. The living conditions in these institutions were inhumane; their captors failed to provide adequate food and water supplies, and diseases were easily spread through their blankets infected with smallpox.[7] The conditions were deliberately calculated to bring about our destruction.

Indigenous Peoples were herded like sheep, 'and sometimes made to walk hundreds of miles chained together'[8] to these concentration camps. Early colonial policies revealed an 'exterminatory direction' regarding natural resources and land, and this, combined with Aboriginal resistance, fuelled the genocidal treatment of First Nations Peoples.[9] The following statement illustrates the genocidal intent of the South Australian Parliament:

> reserves would be constantly increasing in value, and when the last of the aborigines had died they would become a valuable heirloom to the colony . . . proceeds of the rents should be devoted to the support of the aborigines themselves and in course of time, when the race had died out the funds might be made equivalent to the departmental expense of the Government.[10]

The colonial state and its police forces dispersed the Nungas who continued to regroup and gather in the ceremony of ruwe. The colonial practice of relocating Nungas to country hundreds of kilometres away from our traditional ruwe and also the separation of families was a strategy used to break down the law and connection to country. The ancestors were moved to country that was of less or no cultural significance to the songs they carried.

Genocide denied

Ideas of an empty land were used by the West to justify invasion. In filling a perceived empty place they argued that there was no violation of First Nations' sovereignty. While their actions and policies drew blood and drastically reduced the Nunga population, we became their truth and in their eyes invisible. They created their own colonising myths of emptiness, through massive depopulation due to frontier violence and deliberately introduced diseases, causing the deaths of thousands of First Nations Peoples. The

colonisation of First Nations perhaps involved our earliest evidence of the use of biological warfare, as geographer and anthropologist James Blaut argued: 'The Americans were not conquered: they were infected.'[11] The same thing happened in Australia.[12]

The founding fathers' doctrine of discovery and terra nullius underlay the myth of invisibility. Nungas and our laws were deemed invisible to their eyes; only our ruwe was visible for their discovery. Native American law academic Robert Williams Jr argues that the impact of the conqueror's laws has had the same impact as conquest by force or arms, and that these laws had come to appear as necessary rather than as 'deliberate acts of genocide'.[13]

In general, there is a denial that genocide ever occurred against First Nations Peoples of Australia and also against most other colonised Indigenous Peoples. In one instance that occurred in Canada, the denial of the Indigenous claim of genocide was supported by the court when it issued orders to prevent the use of the word genocide to describe the destructive acts of Daishowa Corporation on the lands of the Lubicon Cree, even though those acts would impact on the future survival of the group.[14]

With regard to North America, Ward Churchill argues that denial remains the norm, as debate continues on whether or not genocide is an 'appropriate' term to describe the physical eradication of some 98 per cent of the continent's (US) native population between 1500 and 1900.[15]

The colonial frontier and its foundation, assimilation and the forced removal of Nunga children are examples of genocide that continue. Nunga children were removed from their families and communities under the Aborigines Acts until the mid-1960s, and while this legislation is now repealed, Nunga children are still removed from their families through processes of criminalisation or state welfare policies. Many of these acts have been denied by the state as being acts of genocide and instead the removal of children has been held out as being in the 'best interests of the child'.

Genocide:[16] international origins

Imperial Britain came bearing genocide upon the First Nations of 'Australia' and in the beginning genocide was overt, the killing fields were open; genocidists were rewarded and viewed as heroic. Now the practice is covert, invisible. The word 'genocide' is deemed to apply to a limited context, and the measure of that context has been set by the mass murders committed by Nazi Germany.[17] When genocide is referred to by Indigenous Peoples as being our experience, our voices are ignored, patronised and marginalised as being the voices of simple people who don't understand law and its meaning, in particular in relation to the crime of genocide.

The word genocide was first used by the Polish jurist Raphael Lemkin in 1944, and at that time it had a much broader meaning in both temporal scope and in terms of the techniques employed than it does today. Although the

word itself was constructed by combining the Greek *genos* ('race' or 'tribe') and the Latin *cide* ('killing'), according to Lemkin, it describes a process considerably more multifaceted and sophisticated than mass murder.[18] Its aim is to destroy a particular group and its essential identity and foundations, including its political and social institutions. It aims to destroy the culture, language, identity, religion and the economic existence of a group, and the personal security, liberty, health, dignity and the lives of individuals belonging to such groups. Genocide aims to destroy the group as an entity, and it directs itself against individuals in their capacity as members of the group.[19]

Lemkin identified two phases of genocide: one is the deliberate destruction of the national pattern of the oppressed group, and the other is the imposition of the national pattern of the oppressor.[20] However, a more narrow view of Lemkin's concept of genocide was adopted and incorporated into the *International Convention on the Prevention and Punishment of the Crime of Genocide*.[21] Article 11 of the convention describes the following acts against a 'national, ethnical, racial, or religious group', as a commission of the crime genocide:

(a) Killing members of the group.
(b) Causing serious bodily or mental harm to members of the group.
(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part.
(d) Imposing measures intended to prevent births within the group.
(e) Forcibly transferring children of the group to another group.

Article 11 of the convention makes the following acts punishable:

(a) Genocide
(b) Conspiracy to commit genocide
(c) Direct and public incitement to commit genocide
(d) Attempt to commit genocide
(e) Complicity in genocide.

First Nations of Australia have suffered from the crimes listed above under Article 11 of the *Genocide Convention*.

Genocide: not in Australia

Genocide is no longer overt; it still occurs in more subtle and covert forms, and forms that do not conform to the 'Holocaust' definition and context constructed for genocide. The extinguishment of native title is another example of a covert form of genocide, so covert that it is dressed up as a form of recognition.

The crime of genocide is recognised by customary international law as a violation of the law of nations; it is a universal crime of universal jurisdiction. The Australian government ratified the *International Convention on the Prevention and Punishment of the Crime of Genocide* on 8 July 1949, through the *Genocide Convention Act 1949* (Cth). However, the High Court in *Teoh* decided that, even if the Australian government is a party to an international convention that is not sufficient to give rise to rights and obligations under Australian law.[22] In an earlier decision, in *Koowarta* v *Bjelke-Petersen*,[23] the High Court decided that ratification of an international treaty alone was not sufficient to bring international law into the domestic jurisdiction of the Australian common law and that further legislation was required. However, an Advisory Opinion of the International Court of Justice described the principles underlying the *Genocide Convention* as 'principles, which are recognised by civilised nations as binding on States, even without any conventional obligation'.[24] The court considered the *Genocide Convention* as a special treaty, which required a more liberal interpretation than would other treaties because its objects are fundamentally humanitarian. The Australian law rejected this position.

In *Mabo (No. 2)* Brennan J commented on the influence of international standards on Nunga's common law rights to property:

> Whatever the justification advanced in earlier days for refusing to recognise the rights and interests in land of the indigenous inhabitants of settled colonies, an unjust and discriminatory doctrine of that kind can no longer be accepted. The expectations of the international community accord in this respect with the contemporary values of the Australian people. The opening up of the *Optional Protocol to the International Covenant on Civil and Political Rights* brings to bear on the common law the powerful influence of the Covenant and the international standards it imports. The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights . . . However, recognition by our common law of the rights and interests in land of the indigenous inhabitants of a settled colony would be precluded if the recognition were to fracture a skeletal principle of our legal system.[25]

While Justice Brennan's comments were encouraging, there was a rider – that is, the mythical skeletal principle precludes recognition of First Nations as peoples in international law. It is clear also from the judgment that any recognition of the crime of genocide committed against Nungas would fracture the skeletal principle. This discussion would call into question the court's jurisdiction and the foundation and legitimacy of Australian laws.[26]

The claims of genocide brought by Aboriginal peoples are likely to be denied; the courts would consider them non-justiciable.

In *Re Thompson, Ex parte Nulyarimma and Ors*, members of the Aboriginal Tent Embassy in Canberra and representatives of a number of diverse First Nations made an application to the registrar of the Australian Capital Territory (ACT) Magistrates Court for warrants to be issued for the arrest of the Prime Minister of Australia, John Howard, and other federal parliamentarians. They claimed they were complicit in acts of genocide by enacting the amendments to the *Native Title Act 1993* (Cth). It was argued that the amendments would perpetuate the ongoing cycle of genocide. The registrar refused the application because there was no crime of genocide known to the common law. A further application was made to the ACT Supreme Court, to direct the registrar as to whether or not there was a crime of genocide known to the common law.[27]

At the appeal Arabunna elder Kevin Buzzacott presented evidence to Crispin J about his obligations to protect Arabunna law and country of Lake Eyre in the north of South Australia. He spoke on the serious nature of these obligations and the conflict between laws: 'we are on the brink of war with your system of laws, a system of laws, which continues to oppress and bring death to our families and communities'.[28] Crispin J decided that even though the evidence before him showed there was genocide committed against Nungas, there was no crime of genocide known to the laws of the ACT.[29]

> For present purposes, it is unnecessary for me to determine whether the particular conduct to which he referred would have been sufficient to sustain charges of genocide if such an offence formed part of the domestic law of Australia there is ample evidence to satisfy me that acts of genocide were committed during the colonisation of Australia.[30]

Kevin Buzzacott argued that the *Native Title Act 1993* (Cth) and its 1998 amendments violated his capacity to care for country as it was genocidal in its effect. The *Native Title Act 1993* establishes a process for the extinguishment of native title and also for the negotiation of native title agreements, many of which are in violation of Aboriginal laws and obligations.[31]

The ACT genocide case heard extensive evidence of the trauma and serious mental harm caused to Nunga communities throughout Australia as a result of dispossession and damage to our ruwe. Our relationship to land is central to life; the severance of this relationship is in itself an act of genocide. The effect of the *Native Title Act 1993* and its amendments has been to impose conditions of physical or underlying psychological harm upon First Nations Peoples. The intent of the genocidists is to make life unbearable so that peoples will 'voluntarily' disassociate themselves from the land and their nations in order to avoid the consequence of membership, bringing about the nations' dissolution. In Australia the intergenerational effects of genocide are ignored and in general there is a denial of responsibility for what occurred in the past.

There are contradictions, however: in general, the descendants of a robber are not guilty of his or her theft but they are also not entitled to live off that same theft. The monies are to be returned. While it was previous settler generations who stole First Nations' lands, those descendants continue to live off the income of our stolen lands. 'The present-day privilege of white Australians has been built upon the guilty acts of their predecessors.'[32]

There does exist a connection between the crimes committed in the past and the occupation of Australia today. It is in the way that Australia lives off the wealth of our ruwe, as First Nations continue to barely survive the invasion. There is an imperative for all levels of the judiciary and government to put a stop to genocide; their omission or failure to act invokes the words of Justice Jackson of the Nuremberg Tribunal – that is, the obligation falls on ordinary citizens, as it did with German citizens, to prevent the crime of genocide occurring. This obligation also falls on the citizens of Australia, as the genocide continues in the face of most Australian citizens. Not to take action, because the state doesn't view itself to be the subject of genuine legal constraints and because the state is itself constituted by the law, is a 'potentially dangerous idea'.[33]

Citizens and the courts have a responsibility not to blindly uphold the authority of those holding power, but instead to utilise the jurisdiction of the common law to ensure that human rights standards are maintained and not abused. These ideals are far removed from the current reality of Nungas. Following evidence presented from First Nations Peoples across Australia,[34] Crispin J delivered a judgment that retained the muldarbi we have always known:

> On the contrary, the proper exercise of the democratic function within a multicultural society may frequently involve striking a balance which will involve causing distress to members of particular ethnic groups in order to protect the interests of others. In any event having considered all of the arguments advanced by the applicants and intervenors I have been unable to find any evidence of acts that would give rise to an arguable case against any of the proposed defendants.[35]

Like Australia, other colonial jurisdictions have the same reluctance to deal with the First Nations and the question of genocide.

Deliberate destruction: in the name of protection, segregation and recognition

Genocide in Australia has been maintained and supported by colonial and contemporary legislation enacted by the states. The muldarbi intention was to bring about our destruction as distinct peoples and our absorption into an overall 'whiteness of being'. Survivors of invasion were rounded up and

confined to 'crown lands', called 'Aboriginal reserves'. They were institutions used to contain the declining Aboriginal population. The Aborigines Acts[36] controlled most aspects of Aboriginal life. Nungas were to become institutionalised wards of the state. The Aborigines Acts provided for the appointment of Protectors of Aborigines;[37] they were the administrators of the Aborigines Acts, administering a system of rules enacted by the states for the 'protection' of Aborigines. The Aboriginal Protector had total control over the lives of Nungas;[38] we were known as 'protected persons' rather than citizens of our own nations. We were not even acknowledged as citizens of the new colonies (not that we would have wanted to be) even though we were deemed 'British subjects'.[39] The Protector became the legal guardian of all First Nations children until the age of 21 years. All movement of people on to and off reserves was controlled, as were our movements across traditional ruwe, which was becoming increasingly invaded by pastoralists and farmers. The colonies established reserves and the Nungas placed in these institutions provided enclaves of slave labour for the local pastoral and agricultural industries. At a time when slavery was no longer practised within the boundaries of 'law', the Aborigines Acts provided a cheap labour force under the control of the Aboriginal Protectors. For their work families received bare survival rations. Confined to 'Aboriginal reserves', Nungas were removed sometimes thousands of kilometres away from their traditional lands. The colonial administration planned our death or alternatively our total absorption into mainstream Australian culture.

The colonists attempted to construct all aspects of our being, even the construction of our death, where they engaged our old people in the digging of their own graves. These graves were frequently filled with empty coffins as the bodies had already been snatched by those who traded in human body parts to sell or display in European museums or wealthy private collections.[40] These collections continue to perform as sites of colonial control over access and representation of First Nations cultures.[41]

As towns and settlements expanded, more Aboriginal reserves were set aside, outside the town boundaries. The survivors of the initial impact of the invasion were removed to reserves away from the eyes of early settlers, to be rendered invisible.

A policy of segregation involved more than the separation of white from black, as mentioned previously; it also divided 'half-castes' from 'pure blood' or 'full blood', 'Aboriginal natives'. The segregation policy was genocidal, intending the absorption of 'half-castes' into white society. Segregation is based on the idea of the superiority of the dominant culture, and aimed at keeping groups separate, unmixed and ranked in a hierarchical position in accord with their colour and lightness of skin.[42]

The survivors of the genocidal policies of the coloniser lived to retell their stories. Colonists in their shame glossed over the darkest aspects of colonial history and tell a different story. Indigenous peoples are rarely mentioned in

colonial histories and, if referred to, are noted as a dying and disappearing race. The state kept few records of the massacres – the deliberate poisoning of rationed foods and waterholes, and the spread of disease. The archival records available provide a sanitised version of history; a reading between the lines is necessary to understand the fullness of this story of invasion and genocide.

The earlier surveillance of Lieutenant Sturt along the River Murray had recorded a 'significant Aboriginal population in the area'. However, by 1838 the effects of smallpox were obvious:

> I observed many of them as if pitted by the Small Pox, so that it would appear the disease which was raging with such a fearful effect upon them when I was on the Banks of the Darling in 1828 and of the Hume in 1829, had been universal. It must have committed dreadful havoc amongst them, since on this journey I did not see hundreds to the thousands I saw on my former expeditions.[43]

The voices that have emerged from the confines of the Aborigines Acts tell stories of the intergenerational effects of colonial policies, declining populations on reserves, confinement under a permit system and barely surviving on a rationed diet controlled by the Protector and Reserve Mission Managers. They tell stories of lives lived 'encapsulated' and the passing away from the collective memory of First Nations of our oral histories, stories and songs. Furthermore, there were stories of how traditional systems were systematically closed down through threats and punishment: from first contact with the coloniser we learnt that their rules about 'us' were muldarbi ones, some more overt than others. Their rules were designed to destroy our life as distinct peoples; their rules made a clearing for their new colonial order, and their intended assimilation and absorption of the survivors into their colonising whiteness of being.

Imposition of the national pattern of the state: assimilation and final absorption into whiteness

Assimilation policies intended to destroy surviving First Nations laws, cultures and societies through our final absorption into what was intended to become one homogeneous society. The less powerful group was forced to discard its culture and beliefs, as a condition of acceptance by the dominant group.[44]

Within Australia the movement towards an assimilationist policy began in the late 1930s and it remained the official Australian government policy until the beginning of the 1970s. The Australian government as late as 1961 at its Native Welfare Conference discussed their policy of assimilation as being about the 'Aborigines and part-Aborigines' attaining the same manner of living as other Australians and living 'as members of a single Australian community enjoying the same rights and privileges, accepting the same

responsibilities, observing the same customs and influenced by the same beliefs, as other Australians'.[45]

The permit system or 'exemption' from the *Aborigines Act* provided one model for the South African apartheid system.[46] Permits were used to facilitate the 'breeding out' of the 'Aboriginal race'; the exemption system was designed to assimilate Nungas into white Australia, separating us from families and communities. The movement of a Nunga away from a detention centre was permitted in accordance with the consideration of a quantum of 'white' and 'black' blood, and 'perceived intelligence'. The certificate of exemption under the provisions of the *South Australian Aborigines Act 1934–1939* was in part worded as follows:

> by reason of his character and standard of intelligence and development, should, subject as hereinafter provided, be exempted from the provisions of the *Aborigines Act, 1934–1939*, does hereby declare that, during the time this declaration remains in force, the said [person] shall cease to be an aborigine for the purpose of the said Act.[47]

Exemption from the provisions of the *Aborigines Act* did not imply freedom from the Act; the Aborigines Protection Board could revoke the exemption at any time. Certificates of exemption were issued by the Protector without notice being given to individuals and without their consent.[48] Exemption procedures were also used as a punitive measure, to expel individuals from Aboriginal reserves and also to restrict contact with family. The following letter from the secretary of the Aborigines Protection Board reveals how exemptions were used to facilitate assimilation and dispossession:

> I have to advise that you have been expelled from all Aboriginal Institutions and Reserves in South Australia, consequently you will not be permitted to live at Point McLeay or any other Reserve for Aborigines. Moreover the Board will probably exempt you and your Wife from the provisions of the Aborigines Act. If this course is adopted you will not be permitted to live with or have any relations with the Aborigines of South Australia. My advice to you is to make your home in Victoria and make the best of the situation in which you have placed yourself by your past misconduct.[49]

Exemptions were promoted by the colonisers as extending citizen rights; they argued that Nungas would be offered freedom from the Act and access to government benefits and the right to consume alcohol.[50] However, the exemption permits were also used as a punitive measure to expel Nungas from reserves and, once expelled, restrict further contact with family. Families or individuals wanting to return home to the mission were forced to apply for

a permit. Frequently, permit requests were refused. The process was effective in dismantling the Nunga relationship to ruwe and kin.

The exemption permit in Australia had the same objective as the permit system carried by black South Africans. Both regimes aimed to maintain a white supremacist culture; while the South African government maintained a white supremacist regime through the separation of black and white, the Australian assimilation policy maintained white supremacy through the practice of separation and also the absorption of black into white. In Canada the policy of assimilation was applied with the same genocidal intent: 'I want to get rid of the Indian problems. Our objective is to continue until there is not a single Indian in Canada that has not been absorbed into the body politic and there is no Indian question.'[51]

While some of the states' Aborigines Acts were repealed in the 1960s,[52] and were replaced, for example, by the *Aboriginal Affairs Act 1962* (SA),[53] this revised legislation remained assimilationist in both intent and purpose. When the South Australian Bill was introduced, the Minister of Works, G. Pearson, made the following comment: 'the Bill abolishes all restriction and restraints on Aboriginals as citizens, except for some primitive full-blood people in certain areas to be defined'.[54]

Historian Robert Foster argued that the exemption system still had a function as it became more narrowly focused on 'full-bloods'.[55] The impact of these earlier colonial laws has persisted. Assimilation was no longer public policy but had remained in force in the form of 'main-streaming'.[56] Main-streaming is where Nungas are absorbed into mainstream Australian society and culture because there is no other choice for those who have no land base, language or culture. This is because the foundations of life have been stripped and stolen. Dispossessed, we have been set up to become dependent entirely on a state that has historically set out to annihilate our First Nations being. What quality of life might we expect?

Assimilation and the forced removal of children

The removal of Nunga children from their families and their detention in state institutions was deemed lawful by the High Court in *Kruger*.[57] The forcible removal of children from one group to another is a crime of genocide.[58] The removal of very young children and infants from their families, traditional lands, culture and language severed relationships. The intention was to destroy the family and each individual's capacity to grow up within their First Nation. Mr Neville of Western Australia in 1937 stated before a Commonwealth conference of Protectors that it was 'our intention to establish sufficient settlements to undertake the training and education of these children so that they may become absorbed into the general community'.[59]

Wadjularbinna Nulyarimma was one of the prosecutors in the Tent Embassy genocide case[60] and was removed in the 1930s from Doomadgee in

the Gulf country. She recorded her story of a childhood, where play was a privilege for the child who worked as a slave:

> You put the missionaries' shoes at their feet when they're ready to put their feet in them. You carried bath-water for them up and down a flight of stairs – and if it was too hot you got clipped over the ears.

Children were fed a bare diet of rations, left to grow hungry or to steal food scraps that were 'left . . . for the pigs'.[61] Once placed in state institutions Nunga children at best survived an alien environment, one that was detached from all aspects of Aboriginal law and culture. Children were trained in Western traditions to perform as a cheap labour force. At worst, they were fed starvation rations, while being physically and sexually abused. It is difficult to understand the thinking behind the High Court in *Kruger*; the cruel and forcible removal of young babies and children from their homes was interpreted as a benevolent welfare policy, deemed to be 'in the best interests of the child'. Valerie Kerruish called *Kruger* 'perplexing' and 'wrong'.[62]

In *Kruger*, five Aboriginal plaintiffs were, as children, forcibly removed from their homes in the Northern Territory, and the sixth plaintiff had had her child taken from her. The plaintiffs sought a declaration that the *Aboriginals Ordinance 1918* (NT), authorising the removal of children, was constitutionally invalid, and that damages be awarded for false imprisonment and deprivation of liberty. Pursuant to the *Aboriginals Ordinance*, the Chief Protector became the 'legal guardian of every Aboriginal and every half-caste child',[63] with discretion to undertake the care, custody and control of Aboriginal children.[64] The power held by the Protector included the power to remove children from their homes.[65]

In *Kruger*, the High Court majority endorsed the constitutional validity of the Ordinance.[66] The plaintiffs' claim of genocide was denied by all of the judges. In his judgment, Dawson J considered that there was no specific intent but rather that the powers conferred on the Protector were to be exercised in the 'best interests of the child'.[67] The High Court decided not to determine the question of genocide. It was 'unnecessary to consider' the constitutional law issue of whether or not the ordinance was within the power of the legislature to authorise genocide.[68] So what are we to conclude from *Kruger?* Is Parliament allowed to commission crimes of genocide? Kerruish argued there is no clear answer, and what the law says about genocide remains dangerously undecided.[69]

The contemporary face of genocide is within the power that the state exercises over First Nations children taken from families and communities by the Australian criminal justice system and state welfare policies. The removal of Nunga children, as in the past, is still viewed as being 'in the best interests of the child'. Nunga children are detained by the juvenile justice system at levels highly disproportionate to non-indigenous children; a First Nations

child in Australia is 28 times more likely to be detained than a non-Indigenous child.[70] A review of the statistics shows that the situation is not improving and indicates a problem of crisis proportion.

Cultural genocide

Ruwe is the core of our culture and traditions, and our forced removal and separation from ruwe was a removal from our cultural foundation; it was an act of cultural genocide. The stripping from us of our culture, law and traditions along with the imposition on us of an alien law, language and culture are acts, which lead to the destruction of First Nations as peoples.

In his report to the United Nations, Cobo argued that cases in which states deliberately discriminate against people for their refusal to abandon their culture, customs and traditions could be deemed 'ethnocide' or 'cultural genocide'. Cobo sees the crime of genocide operating against the rights and dignity of a people. 'It is a people's cultural heritage that is the expression of that people and that is the true bond of the people's unity.'[71] To destroy our culture is to destroy our future as a culturally distinct people.

Genocide also resides in the destruction of the natural world. The ripping and tearing of the body of the ruwe is akin to the ripping and tearing of our own bodies, our mother and all of our relations. The processes of colonialism have tried to subjugate, condition and silence our responses. Many no longer express their feelings in the traditional way; their feelings instead lie buried in prisons, in altered mind states, or simply simmering deep in trauma and depression:

> In the early 1960s, I saw bulldozers rip through our Gumatj country in north-east Arnhem Land. I watched my father stand in front of them to stop them clearing sacred trees and saw him chase away the drivers with an axe. I watched him cry when our sacred water hole was bulldozed. It was one of our Dreamings and a source of our water.[72]

Damage to our ruwe is reflected in our cultural integrity as peoples. It is:

> tantamount to ecocide which, with the consequent ethnocide, may ultimately result in a form of genocide. Preventing a group from preserving its traditional forms of life and bringing about the destruction of its culture based on those forms of life and the disappearance of the group as such, are serious violations of the basic rights and fundamental freedoms of the populations in question.[73]

Genocide in another form is found in the efforts of the coloniser to destroy our languages. From 1788 the identity and languages of my people have been in the process of being buried, in the same way that the sacred burial grounds

of my ancestors were turned into the local council rubbish dump.[74] We were beginning to forget who we were; our languages were no longer spoken. Throughout our colonial history the state has deliberately implemented polices to suppress the speaking of First Nations' languages. The old people were punished for speaking languages other than English and the children removed from their languages. The deliberate killing of our languages is 'linguistic genocide'. Our languages have 'disappeared' at the rate of one and a half per year; out of more than 200 in 1788, approximately 20 languages are still being passed on to children as their first language, and those speaking them are approximately 10 per cent of all Nungas.[75]

When the United Nations did preparatory work for what later became the *International Convention for the Prevention and Punishment of the Crime of Genocide*, linguistic and cultural genocide were discussed along with physical genocide, and were seen as serious crimes against humanity. However, when the draft convention of 1948 was voted on, Article 3, which had covered linguistic genocide, was excluded. What remains from that initial discussion is a definition of linguistic genocide: 'prohibiting the use of the language of the group in daily intercourse or in schools, or the printing and circulation of publications in the language of the group'.[76] This was certainly happening in Australia in 1948. The prohibition on the speaking of our languages was endemic across Australia. In the contemporary context there is support for language programmes or court translation services but it is intermittent. Frequently, Nungas will appear in court and have a matter finalised without the assistance of an interpreter. And in 1998 the Northern Territory government, responsible for a region in which the greatest percentage of Nunga languages spoken as first languages exists, decided to phase out financial support for bilingual education in Aboriginal schools.[77]

Behaviour that could constitute the crime of genocide includes the systematic imposition of conditions of physical or psychological harm forced upon a targeted group. Examples of this behaviour are the creation of physical conditions of impoverishment and trauma that cause people to separate themselves from their group and try to become or live like someone else. Another is the destruction of the physical environment in such a way as to remove the basis for the continuing viability of the existence of the group – for example, the impossibility of existing in proximity to a toxic mine or toxic waste dump.

Nungas' relationship to ruwe is now increasingly replaced by a shopping mall and social media existence. To remove people from the ruwe is to inherently precipitate group dissolution. When the ruwe is drained of its waters and starts to dry up, the rushes used for weaving our baskets, the containers of our life, can no longer grow. The animals we are dependent on for food no longer flourish and people have to move away and disperse. Environmental degradation works towards the dissolution of the group. Our continuing viability culturally, socially and economically is linked directly to

the land, even when the land is taken for a development, which damages it. First Nations continue to hold the song and the law over it. We continue to talk back to state interpretations of law and culture, and constructions of Aboriginality, which subordinate our status. Our status is, on one hand, continually debased, but on the other, cultivated by modern colonialists who work to 'harvest' our cultures for commercial exploitation.[78] Commodification of our culture is big money, but many of us work to maintain a cultural terrain for our kinship relations in places removed from the crowds, which would flock to be entertained for a taste of exotica.

Kumarangk: a case study in cultural genocide

In October 1989 the state government of South Australia approved the building of a bridge from mainland Goolwa to Kumarangk (more commonly known as Hindmarsh Island);[79] it was opposed by a group of Ngarrindjeri miminis because the bridge would damage the culture and spirituality of women's business in the region. A Royal Commission was established to determine the truth or otherwise of the women's position.[80] While the state asserted that truth was its goal, the Royal Commission inquiry was held by the colonial state into the First Nations Peoples it had subjugated and held power over since 1836. It was an inquiry into lives that had been controlled under the Aborigines Acts, forced to assimilate and denied the capacity as First Nations to name our laws and culture. This was power the colonial state had assumed and held from the point of its invasion. The inquiry was a first; never before had an Australian government held an investigation into the religious and spiritual beliefs of First Nations, or any group for that matter. The process itself violated First Nations' laws and culture. The Royal Commission was an attempt to translate and understand the nature of our laws and culture within an alien, oppressive and hostile framework. The state patronised us by trying to legitimise and dress the court in our protocols and traditions; in his opening statement the Counsel Assisting the Commission gave an acknowledgement to country.[81] The commission acknowledged the Kaurna as the traditional owners of the Adelaide plains and then went on to assert its power to annihilate the cultural integrity of women's law.

The Royal Commission proceeded to investigate whether 'secret sacred women's business was fabricated'[82] in respect of the bridge site. The miminis asserting the truth of women's business made a submission, which stated that they would not seek representation before the Royal Commission, because they did not recognise the authority and jurisdiction of the commission to discuss matters of Aboriginal culture and law.[83]

The process of explaining our truth is different from the way evidence is taken in a Western legal context. Evidence of our laws and culture is in the way we live, in the thoughts and dreams we keep both public and secret, in the songs, which are sung and those also, which still linger at the edge of our

memories. Haunani Kay Trask, in response to the constant interrogation that besets Indigenous peoples when having to explain our knowledge systems simply asserts: 'The evidence is in the sayings of my people.'[84] The evidence is in the songs. But colonial assaults and violence against Indigenous ways of knowing is a universal practice. For example, one non-Indigenous 'expert' on the history of Hawaii argued that there was no real evidence of Hawaiian opposition to the annexation of Hawaii by the US. Trask again simply argued that the evidence is in her people's lament and the wailing.[85]

At the opening of the Hindmarsh Island Royal Commission it was made clear by counsel for the Commonwealth that the commission could not compel Nungas to disclose secret spiritual beliefs in ways that would infringe the *Racial Discrimination Act 1975* (Cth) by limiting or impairing the enjoyment of human rights.[86] While the inquiry did not force, by way of subpoena, the proponent women to give evidence, it did very little to provide a safe environment for the women to tell their stories.[87] Meanwhile, it continued its hearings with men and uninitiated women, all of whom held no knowledge of women's laws.[88] The nature of the restricted women's business was revealed by Doreen Kartinyeri to anthropologist Deane Fergie and Professor Cheryl Saunders, consultant adviser to Minister Tickner, on the condition that it must be protected from men and uninitiated women. To comply with Kartinyeri's condition, Saunders sealed the record of the restricted women's business in an envelope. Counsel for a group of dissident women who had opposed the assertion of restricted women's business pushed to have the contents of the envelope made public to the inquiry, arguing that the commission would be frustrated without the presentation of that information.[89] The element of secrecy drives those with power nuts. It places knowledge out of their reach. And they have to have it, regardless of the cost to the keepers of that knowledge. The West peddles its own myth of openness and freedom from secrecy, the idea being that all knowledge is freely available. However, as we know, there are many areas in Western knowledge where access for many is prohibited: areas of 'expertise' in the legal profession, medicine, engineering and sciences, national security, not to mention warfare. Nungas hold together a system in which law is layered, parts are for public knowledge and other parts are veiled in secrecy. Nonie Sharp has written about law, secrecy and the Meriam people, and warns about the dangers that arise out of writing down the laws and the challenge of laws becoming supplanted by a system of public by-laws.[90]

With the holders of restricted women's knowledge refusing to reveal it, the commission relied on 'expert' anthropological evidence that denied the existence of the women's business.[91] The established anthropological orthodoxy, constructed from the ethnographic literature of the last century, was that Nunga miminis were excluded from any role other than child rearing and food gathering. Anthropology mirrored back its own idea of women, one subjugated to a male gerontocracy. Women were invisible in the world of

European anthropologists. Anthropological imaging of Aboriginal women was more to do with a reflection of anthropologists' own lives and sense of racial and cultural superiority; we were represented as the lowest order of humanity; we are the disposable sex commodity, ranking lower than the pet dog in their classificatory system.[92]

Throughout the inquiry, the commissioner privileged the knowledge of white 'experts' over that of Aboriginal ways of knowing our own history and culture. In the following evidence historian Clarke stated:

> [Doreen Kartinyeri], saw a relationship between a word that she knew as a Ngarrindjeri word for 'pregnant' and Taplin's word for 'Hindmarsh Island'. I cautioned her from making a hasty conclusion about that by saying that you know from my experience, only a linguist could tell whether there was likely to be any relationship between the two words.[93]

Kumarangk means the 'points' and kummari means 'to become pregnant'. The 'expert' takes our power to name who we are for himself, relegating our knowledges to the margins. Further evidence from Clarke referred to oral history as a 'cultural artefact' and a 'narrative' which, while able to inform people about the past, was not a replacement for Aboriginal history.[94] This is an interesting concept because, as Clarke told the commission, oral history tells us about the speaker and it does so in the same way that anthropology tells us about the observer-recorder who tells their story of what is observed. Both speaker and recorder are telling a story. The difference is that oral history is a telling of the history of the teller, whereas the anthropologist as the outsider is telling and recording a history, which is not their own but is in the teller's field of vision, of events observed or heard refracted through their own. Clarke hadn't thought this through fully and, if he had, he later denied or contradicted his earlier views. In the Yorta Yorta native title application to the Federal Court, Olney J expressed a similar prejudice about the importance of white recorded versions of history when he privileged the colonial record of settler Curr over the Aboriginal oral history evidence presented to the court.[95]

Throughout the Royal Commission in respect of Kumarangk, evidence of Aboriginal knowledge was criticised for its authenticity and much was made of the fact that only one person – Doreen Kartinyeri – had the story of restricted women's business. Yet under cross-examination Clarke agreed that other stories of the same region were held by one or two persons and was knowledge, which was not commonly known.[96] Clarke also disputed the evidence of the existence of the Seven Sisters in the Lower Murray region. He later admitted under cross-examination that while he knew nothing of the core of the secret-sacred women's business, the Seven Sisters 'mythology' could have been imported from the Western desert region in recent years. His inference was that it was a recent invention in the Goolwa region.[97]

The commission ignored conflicting evidence extracted from the literature of the Berndts.[98]

The experts become empowered to speak and represent how it is that they see and know us, and in representations of us as the other, they often see themselves as being so 'inside' the camp that they become the objects of their own studies. Clarke expanded his range of expertise by almost becoming us, an insider:

> There is one of several factors that would influence my perception of what is going on. The fact that I personally have access through my marriage to an Aboriginal woman of that group, I have access to an insider's interpretation of that culture is something else that I can take account of. I'm not saying that I incorporate those views as objective anthropological data, but I would incorporate those views as cultural artefacts which are worthy of being part of the raw data that I would utilise to come up with a model of what is happening.[99]

During cross-examination, the possibility was put to Clarke that the recording of restricted women's business could never have been done and the fact it was perhaps not recorded should not invalidate it. In reply Clarke said:

> It wouldn't in a region where there is not much history or anthropology that has been done. In a very heavily worked area like the Lower Murray, I would say that that is extremely unlikely.[100] Where I differ from the other people who support the women's business on Hindmarsh Island is the fact that, whether it was secret-sacred women's business – and secret-sacred women's business would go against the ethnography from the Lower Murray which affords men's business and women's business on equal footing and, therefore, so much interconnection, that it can't really be separated out.[101]

But how did he so confidently know that there are no secret-sacred places? The expert giving evidence to the inquiry set the boundaries of what was within the realm of knowing, but if secret-sacred women's business was sited outside the krinkiri realm of knowing, as a white male he would have no knowledge of it. But in a white courtroom the expert has the power to translate the place he occupies; through being an 'unknowing white male' he can impose it as a universal for all. This is really muldarbi power.

Throughout the inquiry there was little mention of the impact of colonialism upon First Nations' life, or life lived in the belly of muldarbi genocide. The experts discussed restricted women's business as though Cook had never invaded our shores, as though 'South Australia' had always existed and never been annexed. In his evidence, Phillip Jones spoke about the river barrages,

which were built (in an area that is close to where the bridge was built) in the 1930s, suggesting that there was no impact upon our culture as a result of them being built, and neither was there any resistance.[102] But in the 1930s Nungas merely survived, living under the total control of the *Aborigines Act*; it was a struggle to keep families together, let alone prevent the destruction of ruwe. A number of Aboriginal people had expressed their great sadness over the building of the barrages and attempted to explain why they should not be built, but this evidence did not come before the commission.[103] As to the idea of anthropologists recording and supporting Aboriginal resistance to the barrages in the 1930s, the reality was that there was no effective support to prevent any colonial violence from occurring against Nungas or the ruwe.

The Royal Commission's conclusion that 'secret-sacred women's business' was a fabrication[104] was elaborated on by Commissioner Iris Stevens as she summed up, applying Western logic and the white experts' knowledges of the cultural and spiritual ruwe of our peoples:

> Unless an analogy of the bridge as a form of contraception is accepted, Dr. Fergie's attempt to comprehend and translate what she was told by Doreen Kartinyeri, with comments from a few others, does not explain why the cosmos and the Ngarrindjeri women would be rendered sterile by the construction of the bridge. The beliefs said to constitute the 'women's business' and Dr. Fergie's elaboration of it, that is the cultural significance of the area according to Ngarrindjeri tradition and the threat of injury or desecration said to be posed by the construction of the bridge, are not supported by any form of logic, or by what was already known of Ngarrindjeri culture.[105]

The commissioner presided over and interpreted the core of our spirituality from a place of Eurocentric beliefs and in opposition to our Nunga ways of knowing. The commissioner failed to consider the wholeness of our culture and its inclusion of law, language, land, spirit, sacredness, gathering and weaving, song and dance and failed to understand that our culture is living and is alive in the ruwe. Logic has no relationship or connection to the knowing of ngaitjis and the spiritual relationship we have to ruwe. Logic cannot measure the significance of our ngaitji relations and way of being. Ngaitji relations are unknown in Western philosophy and perhaps this is why Iris Stevens was unable to understand how the damage caused to the ruwe through the building of a bridge might harm women. The fact that women's business was not known to all should not be the basis of a conclusion that it does not exist.

Commissioner Stevens revealed the extent to which she had privileged the opinion of 'white male experts' on the culture and traditions of miminis when she reported: 'A female figure in the landscape is nowhere described in any

configuration in the extensive literature relating to the area. It directly contradicts the well known Ngurrunderi legend based rather on a male figure in the same landscape.'[106]

What Iris Stevens had not understood is that there are many stories that weave throughout the landscape. The Ngurrunderi story is just one that became dominant as the story early settlers could best relate to and incorporate into a christian framework. The epic proportion of Ngurrunderi rendered 'him' god-like – an idea they understood. But many Indigenous song lines criss-cross the ruwe of the southern country. The situation is not as Clarke would have had us believe, which is that extensive song lines and secret sacred women's business were limited to the central desert region of Australia. There is not just one male line imprinted in the landscape, there are many, and the body and song of women are also ever-present in the ruwe. Recording the maleness in the landscape is the coloniser's way of knowing, a way of knowing, which kept them ignorant of the female ruwe. Commissioner Iris Stevens accentuated the extent to which Indigenous knowledges and philosophy were excluded in the writing of her final report.[107] This problem has been experienced by Indigenous Peoples universally. Vine Deloria Jnr wrote about the privileging of experts over the views of First Nations in North America:

> the realities of Indian belief and existence have become so misunderstood and distorted at this point that when a real Indian stands up and speaks the truth at any given moment he or she is not only unlikely to be believed, but will probably be publicly contradicted and 'corrected' by the citation of some non-Indian and totally inaccurate 'expert'.[108]

Commissioner Iris Stevens reached her conclusion that from its inception secret-sacred women's business was a fabrication[109] without any discussion about the impact of colonialism. She sought no evidence to assist her in understanding the conflict between the proponent and the dissident women, nor evidence of women's business from other areas outside the Western desert region. The commissioner's findings were drawn from a narrow field of investigation and knowledge. Our relationships to land were considered and dealt with as being about the 'environment' – as though culture could be separated from the land. Aboriginal ways of knowing were excluded from the commission's investigations into our spirituality.

We continue to be dispossessed by muldarbi theories. In the past the doctrine of terra nullius secured the stolen territory for the colonists; today, theories based on the power of their muldarbi to construct our identities and the terrain in which we are 'allowed' to survive perpetuate their security of tenure. The colonialist epistemology retains a security of place and power for their way of knowing the First Nation Peoples and all things about our ways of being in the world. In seeking and establishing the truth of 'fabrication'

the Commission extended their own master text on the 'native'. As my mother said at the time, 'now we have all become "liars"'.[110]

Genocide: it has other names

Survival against the forces of genocide is a struggle that white people in this country have little or no comprehension of. First Nations Peoples' lives are often filled with trauma. The natural world is also in trauma. We see our reflection in the land; our health is dependent upon the health of ruwe. But genocide is relentless. The form it takes is more covert than when we were openly massacred or driven from our lands in chains, murdered and starved to death, and the state has adopted less conspicuous ways of reducing our population, but it rolls on unabated.

Aboriginal title – extinguishment

Another body the muldarbi genocide occupies is the power the state has retained to extinguish our connections to country. Nungas who are unable to prove, in the face of colonialism, dispossession and genocide, an unbroken and original relationship of continuity with their ruwe, a ruwe free of any common law or statutory title, are construed to be peoples extinguished of any 'native title rights'. Some First Nations Peoples have been able to jump the hurdle of proof to establish that they are native title holders, or in the words of Brennan J:

> Where a clan or group has continued to acknowledge the laws and (so far as practicable) to observe the customs based on 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. The common law can, by reference to the traditional laws and customs of an indigenous people, identify and protect the native rights and interests to which they give rise. However, 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. A native title which has ceased with the abandoning of laws and customs based on tradition cannot be revised for contemporary recognition.[111]

But Indigenous Peoples who do manage to establish Aboriginal title still remain vulnerable to extinguishment. Extinguishment is deemed by the courts to have occurred where the 'Crown has validly alienated land by granting an interest that is wholly or partially inconsistent with a continuing right to enjoy native title, native title is extinguished to the extent of the inconsistency'.[112] The vulnerability of native title lies in its recognition as

'merely a personal right unsupported by any prior actual or presumed Crown grant of any estate or interest in the land' and where it is 'susceptible of being extinguished by an unqualified grant by the Crown of an estate in fee or of some lesser estate'.[114] Expressed like this, 'extinguishment' disguises the fact of a violent colonial foundation and of how the 'Crown' walked in under cover of gunfire, disguising invasion as a peaceful settlement. In the High Court *Wik* decision Brennan CJ confirmed the vulnerability of native title to extinguishment. 'Native title is liable to be extinguished by laws enacted by, or with the authority of, the legislature or by the act of the executive in exercise of powers conferred upon it.'[114]

Prior to *Mabo,* terra nullius legitimised genocide, while post-*Mabo* genocide continues to run unchallenged and unmonitored as the principle of extinguishment has become essential to the jurisprudence of native title. It is my view that the rule of extinguishment will impact the lives of First Nations Peoples in a similar way to terra nullius in the past. The established native title industry is celebrated as it dresses itself in the cloak of the recognition of Indigenous Peoples' rights to property.

But few actually obtain native title recognition and most of them occupy land of marginal interest to white business. The application for native title by the Yorta Yorta people in the verdant Murray Valley was denied. Olney J decided the Yorta Yorta were unable to prove a continuing connection between themselves and their ancestors, and instead patronised their efforts: 'to revive the lost culture of their ancestors'. Instead, he determined that their culture was no longer 'capable of revival'.[115]

To restore our physical relationship to the land we are compelled to go before 'native title' jurisdictions to prove the extent to which our native connections to ruwe have survived genocide. Aboriginal laws do not enable us to extinguish our connection to country. Our connection to country is sung into us and we are imbued with a relationship that is not about ownership and use but is about caring for the country and the maintenance of reciprocal relationships to ruwe. Aboriginal law has no rule for extinguishing those relationships; there exists only law for extending them to all who come to a relationship with ruwe. However, those ways of knowing are eclipsed by the power of the state. Olney J, in *Yorta Yorta*, affirmed the power of the state and the impossibility of Indigenous Peoples' capacity to practise culture in the contemporary context.[116] He said that the tide of history had 'washed away' Yorta Yorta capacity to control access to their traditional lands.[117] Effectively, he meant that we have to buy our own country back.

It is clear that Olney J, too, had paid little heed to the effects of colonialism, and what with smallpox, poisoning, massacres, rape, torture and relentless hatred of the native it has been impossible to remain as we were in 1788. It is hard to insist that the murderer pointing a gun at your head respects your laws and humanity. *Mabo (No. 2)* endorsed the genocidal policy of extinguishment and the Australian federal government, far from recognising

First Nations' land rights, entrenched this policy in the *Native Title Act 1993* (Cth).[118]

The enactment of the *Native Title Act 1993* (Cth) ensured that the struggle to affirm inherent First Nations status became more difficult, post-*Mabo (No. 2)*. When terra nullius was identified as the muldarbi, an idea about changing the Australian law and finding ways of pulling us from the belly of genocide went around. But with only the partial rejection of terra nullius we were left with a mere illusion of change. And as the effects of extinguishment have replaced the fraud of terra nullius, we have discovered that change is equally genocidal in its impact. Our struggle to survive genocide is now more complex than ever because we have to critique 'native title' and its muldarbi character and myths of recognition. We are working against the tide of history and a dominant culture still under the impression that something good has happened, when the muldarbi has merely changed its cover and its name. Fuelling this imagined shift and recognition was a campaign waged in the Australian media and supported by the Australian Mining Industry Council. The campaign was aimed at confusing the meaning of the *Mabo (No. 2)* decision. Instead of revealing the limitations of native title jurisprudence, the media reports mythologised and pumped up the capacity of native title and with that the common belief that Mabo had set a precedent for Nungas to claim the entire Australian continent.[119] Almost overnight Australian citizens began to fear that they would lose their home and backyard to native title claims.

Recognition: genocide in disguise

The High Court decision in *Mabo* was celebrated as an initiative in reconciliation,[120] for its rejection of terra nullius with regard to the Australian law of real property but it was, however, a false beginning. The court did not reject the terra nullius doctrine entirely, as this would have led to an interrogation of the legitimacy of the British invasion and occupation of that which they came to name 'Australia'. Instead, the court settled for a narrow rejection of terra nullius to ensure that colonial foundation remained intact. The High Court decided that the British Crown's acquisition of sovereignty over the Australian colony was an 'act of state', one that could not be challenged in any Australian court.[121] In reaching this conclusion it legitimised over again the theft of our territories and the denial of our ongoing sovereignty while at the same time excusing the rape and plunder of peoples and ruwe as an inevitable matter of course in the 'washing of history'.

Wiradjuri[122] barrister Paul Coe compared the thinking behind the High Court decision to the state of Germany during the tyrannical rule of the Nazi party. The same justification – an 'act of state'– was used by the Nazis when called to account for the attempted genocide of the Jewish peoples. But an 'act of state' does not justify or legitimise genocide, mass murder or using

war to acquire territory.[123] The High Court in *Mabo (No. 2)* had merely closeted terra nullius and taken the 'act of state' doctrine off the hanger to legitimise colonial foundation. The effects and consequences of terra nullius continue to have an impact, in the violations of Aboriginal laws, ecological destruction of our lands and waters, dispossession of our territories and the colonisation of our being.

The celebration of *Mabo (No. 2)* remains a farce, which lulls the Australian psyche into a fantasy myth that there has been an act of recognition of Indigenous Peoples' rights to land. Let us not forget whose interests the courts of the colonial entity were developed to serve; they are constructs of the coloniser, making the rules of the rulers, and they are interpreted by the rulers through a white-supremacist euro-centric lens.[124]

The colonial project was largely haphazard and made up the rules as it went along.[125] Anghie writes: 'The jurisprudence concerning the issue of how sovereignty was acquired over non-European peoples was controversial and unsettled because . . . states took very different views on this matter depending on their own interests.'[126] Anghie suggests that legal positivism had buried connections between society and sovereignty, thus masking exclusion of non-European peoples based on cultural differences:

> Recognition doctrine is implicitly based on the assumption of the existence of a properly constituted sovereign. Only those principles which are created and accepted by sovereigns constitute law, only those entities which are granted legal personality by the sovereign exists within the legal universe. Once established, the sovereign becomes the prism, the gaze, which reconstitutes the legal universe. What this view of recognition doctrine conceals, however, is the complex process by which the sovereign is constituted in the first place.[127]

Deaths in custody

The Australian federal government established the Royal Commission into Aboriginal Deaths in Custody in 1987[128] (RCIADIC) to investigate the high rate of deaths of Indigenous Peoples occurring in the custody of the police, or prison and juvenile authorities. At the time the establishment of the commission was announced:

> an individual Aborigine in Western Australia was not only twenty seven times more likely to ultimately die in prison than a non-Aboriginal Western Australian, but was also three times more likely to die in prison than a black South African. [129]

At the conclusion of the inquiry, not one of the 99 deaths investigated was found by the commissioners to be 'the product of deliberate brutality or

violence by police or prison officers'.[130] Nungas referred to the commission as a whitewash of the genocide that still occurs in this country. For example, the inquiry into the death of John Pat of Roebourne in Western Australia found that no one was liable. It has been argued that the final report into his death omitted important evidence, including that of Aboriginal people of Roebourne who had been rioting following the arrest of an Aboriginal woman. The rioting continued until her release from custody. Purdy suggests that the riot indicated that the Indigenous people of Roebourne held police responsible for the death of John Pat. Further excluded evidence included a statement from his mother; counsel for the police objected to a comment in the statement and were successful in having the evidence excluded:

> That is, the comment was to be deleted precisely because it indicated that Mavis Pat thought she knew what had happened to her son. The Commissioner ordered that the comment be deleted, and if I were to tell you what Mavis Pat said, I would risk a fine of up to $2,000 or 12 months imprisonment (*Royal Commissions Act 1973*, ss 6D(3), (4).[131]

Stolen generations

The RCIADIC inquiry into the death of Malcolm Smith presided over by Commissioner Wooten referred to the removal of Aboriginal children under the assimilation policy as amounting to genocide,[132] and yet this important admission changed nothing; Nunga children continue to be detained in juvenile institutions throughout Australia at levels almost incomprehensible to white Australia.[133] And following on from this, the High Court in *Kruger* dismissed claims that the removal of First Nations children to state institutions was an act of genocide.

The final RCIADIC Report recommended a number of processes to reduce levels of incarceration of Indigenous People, but many of those recommendations were never implemented. Indeed, the incarceration level of Nungas continues to rise and the deaths in custody continue to haunt both Indigenous and mainstream Australia. At the end of the inquiry First Nations were left to ask the question 'what and who is going to change this to make sure that it doesn't happen again?' Twenty-five years later, there is no evidence that the incarceration of Aboriginal children will ever stop or even decline. The Australian Commonwealth government followed up on the RCIADIC by establishing another inquiry to hear evidence on the history of the removal of Aboriginal children.[134] This inquiry heard many of the stories of the forced removal of Nunga children, but at its conclusion no compensation or healing process was established for those now known as the 'stolen generations', nor was any apology made by the head of government at the time.[135] This was even while the Human Rights and Equal Opportunities Commissioner (HREOC) Ronald Wilson[136] considered the policies of removal were in breach

of international human rights law and constituted acts of genocide as defined in the *United Nations Genocide Convention*.[137]

Trauma

The face of contemporary genocide is not so much death by shooting or poisoning, as occurred in the nineteenth century; it is death arising out of severe trauma and a pain so big that many of our people let go of life. Indigenous people of the modern world have 'discovered' ways to kill the pain: suicide, drugs and alcohol. If we were to measure the contemporary impact of genocide and its experience, some of the worst indicators would be found in the mental health and physical health statistics of Nungas. Our profiles are Third World standard, in a country that enjoys being a leader among global capitalist economies. And if you studied our historical profile in terms of self-determination, land ownership and management, housing, health, cultural integrity, maintenance of languages and education, standards that we have lived under, you would begin to identify a destructive environment of state control. We are disappearing peoples.

Defined from existence

The process of defining First Nations out of existence continues and contemporary examples of colonialist practices are found scattered throughout Australian Commonwealth 'Aboriginal Affairs' policy. The Department of Human Services maintained a policy restricting access to an allowance called 'ABSTUDY', which, relating to Aboriginal education, constructed 'traditional' and 'non-traditional' Nunga communities. This policy deemed Indigenous youth from 'traditional' communities as being entitled to an independent allowance because of their initiated status. This same allowance is not available to Indigenous youth of the same age who reside in 'non-traditional' communities, so it excludes Indigenous youth from Victoria, NSW and Tasmania. This policy reflects past definitions of Aboriginality, which distinguished between 'half-caste' and 'Aboriginal native'; as in the past, the 'non-traditional' is expected to become further absorbed into white Australia, while the 'traditional' is treated differently, separated by policy from the constructed 'non-traditional'.

Mourning or celebration?

Australia Day is celebrated annually on 26 January. It marks the anniversary of the 1788 arrival of the first fleet of British ships that sailed into Sydney Cove in New South Wales and raised the flag of Great Britain for the first time for their first colonial governor, Arthur Phillip. Australia Day is now a

public holiday and it is a time when across the nation Australian citizens celebrate. During the Australia Day celebrations in 1988 and marking 200 years of colonial foundation, the Australian states centred their celebrations in Sydney performing a re-enactment of the initial invasion. The replica tall ship of the First Fleet and numerous others sailed into Sydney Harbour where they were met by an official party, including Prince Charles and Princess Diana and a protest of more than 50,000 people, calling for an end to the celebration of invasion and the genocide of First Nations Peoples. (The remaining 18 million Australian citizens celebrated.) Each year we are left with that choice – to protest the genocide and mourn its past and present, or, as the greater majority of peoples who now occupy the lands of First Nations Peoples do, to celebrate Australian citizenship.

The United States performs similar celebratory acts in their annual celebration of the coming of Columbus to the Americas, a time that also marks the commencement of the genocide of the Native Americans. These celebrations perform the state's ongoing connection to and support for European racial, cultural and spiritual superiority. The continued celebration of colonisation is a measure of how far we need to travel before we can believe the rhetorical attempts of states to improve their relations with First Nations Peoples.[138] Shawnee activist and academic Glen Morris told the UN Working Group on Indigenous Peoples:

> The use of a state apparatus for the promotion of national holidays, festivals, the construction of monuments, or other acts that serve to celebrate, either explicitly, or implicitly, the genocide and colonization of indigenous people is tantamount to the promotion of race hate and racism against indigenous peoples. Such activity is proscribed by several international instruments, and is recognized as promoting intolerance and discrimination. When an ideology that elevates to national hero status the architect of indigenous genocide, it infests the fabric of society. School children, from the time that they can reason, are inculcated with the notion that theft equals righteousness, colonialism equals liberation, that indigenous peoples were and are savages, and that Euro-American superiority has been vindicated through the colonialism of the western hemisphere. This holiday promotes the idea that indigenous peoples are inferior, and consequently, promotes racial intolerance, or worse, it promotes and justifies deliberate policies of indigenous dispossession and destruction – such as those that litter the entire political and legal landscape of the United States.[139]

Ward Churchill and others argued that the perpetration of the crime of genocide on the Indigenous Peoples of the United States was a legitimate defence against charges laid against members of the American Indian Movement who disrupted a Columbus Day celebratory parade in Denver on

12 October 1991.[140] The defendants had been charged with refusing to obey a police order, obstructing a public thoroughfare and disturbing the peace. They argued that Columbus Day was the celebration of genocide and was unlawful, particularly when the genocide of Native Americans was a continuing phenomenon. They argued that they had acted lawfully in attempting to halt the commission of a crime against humanity. The charges against the defendants were not dismissed, but a Denver jury acquitted all defendants on all counts on 26 June 1992. In post-verdict statements to the press, the jurors clearly indicated that they had been convinced by the defence that it was the Columbus Day celebrants and various collaborating officials, rather than the defendants, who had engaged in wrongful activities.[141]

Are we to mourn, celebrate or find a way forward into the future to end all possibilities of ongoing genocides of peoples?

Notes

1 Daisy Bates, *The Passing of the Aborigines* (John Murray, 1947), 80, recorded the comment of a dying Aboriginal person.
2 The Eora were the First Nation of the coastal lands around Sydney.
3 Kevin Buzzacott referring to Cook's landing when speaking on First Nations territory at La Perouse Invasion Day meeting 26 January 1988.
4 The oral history was told to me by Keith Smith in Sydney in 1974. This is one story of massacre; there are many other stories held in oral history and the collective memory of First Nations.
5 Antonia Mills, *Eagle Down is our Law* (UBC Press, 1995), 8. In 1884 one of the First Nations chiefs of Gitwangak, within what is now called British Columbia Canada, described the effects of invasion as like having limbs removed one by one until you are no longer able to function.
6 Interview with Tjama Napanangka, for the Ngardi-Kukatja people, in Zohl de Ishtar, *Daughters of the Pacific* (Spinifex Press, 1994), 140–141.
7 Noel Butlin, *Our Original Aggression: Aboriginal Population in South East Australia 1788–1850* (Allen & Unwin, 1983), 13–25, discusses the evidence for the deliberate spread of smallpox in North America and the evidence of a similar pattern occurring in Australia.
8 See Jeannine Purdy, 'British Common Law and Colonised Peoples: Studies in Trinidad and Western Australia' in Greta Bird, Gary Martin and Jennifer Nielsen (eds), *Majah Indigenous Peoples and the Law* (The Federation Press, 1996), 46 and generally 45–49 for the history of the violent establishment of the Western Australian colony.
9 Dirk Moses, *Genocide and the Settler Society: Frontier Violence and Stolen Indigenous Children in Australian History* (Berghahn Books, 2004), 33.
10 G. Hall, Parliamentary Debates, 28 August 1866, SA Legislative Council, 219.
11 James Blaut, *The Colonizer's Model of the World: Geographical Diffusionism and Eurocentric History* (Guilford Press, 1993), 186.
12 Tony Barta, 'After the Holocaust: Consciousness of Genocide in Australia' (1985) 31 *Australian Journal of Politics & History* 154; Henry Reynolds, *An Indelible Stain? The Question of Genocide in Australia's History* (Viking, 2001).
13 Robert Williams Jr, 'The Algebra of Federal Indian Law: The Hard Trail of Decolonizing And Americanizing The White Main's Indian Jurisprudence' (1986) 1 *Wisconsin Law Review* 219, 225.

14 In *Daishowa Inc* v *Friends of the Lubicon* [1995] OJ No. 1536. Daishowa corporation was sucessful in obtaining a court order preventing a Canadian support group of the Lubicon Cree from using the word 'genocide' to describe the situation confronting the Lubicon in their efforts to stop destructive developments on their lands.
15 Ward Churchill, *Indians Are Us? Culture and Genocide in Native North America* (Between the Lines, 1994), 245.
16 The concept of genocide was not formed until after the Second World War by Lemkin. While the concept of genocide had not formed at the time of early Australian colonial frontier invasion, the effect was of genocidal proportion.
17 In the extermination of those the Nazis viewed as subhuman, including Jews, Poles and Slavs.
18 Churchill, *Indians Are Us?* above, n. 15, 12.
19 Ibid., 13.
20 Ibid.
21 *International Convention on the Prevention and Punishment of the Crime of Genocide*, United Nations General Assembly Res 260A 111 (9 December 1948, entered into force 21 January 1951).
22 See Mason CJ and Deane J in *Minister for Immigration* v *Teoh* [1995] 183 CLR 273, 286–287; also in *Chow Hung Ching* v *The King* (1948) 77 CLR 449, 478–479, Dixon J said 'a treaty, at all events one which does not terminate a state of war, has no legal effect upon the rights and duties of the subjects of the Crown and speaking generally no power resides in the Crown to compel them to obey the provisions of a treaty'. The same view was expressed in *Koowarta* v *Bjelke Petersen* (1982) 153 CLR 168, 224–225 (Mason J).
23 *Koowarta* v *Bjelke-Petersen* (1982) 153 CLR 168, 224.
24 *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (1951), ICJ 15 at 23.
25 *Mabo* v *Queensland* (1992) 175 CLR 1, 16, (Brennan J).
26 Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press, 2008), 112, refers to terra nullius as a doctrine that jurists and the courts might consider reversing, but they find that they have no choice but to continue to function within the established framework of these doctrines.
27 *Re Thompson; Ex parte Nulyarimma* [1998], 136 ACTR 9.
28 *Transcript*, ACTSC no. 457 of 1998, 14 September 1998, in FCA A5/99.
29 Ibid., 13 September, paragraphs 69 and 72.
30 Ibid., paragraph 78.
31 The Adnyamathanha native title claim was one of the first to be registered in South Australia in March 1999. Within a month of registration and with that the 'right' to negotiate, the Australian federal government approved the Beverly Uranium Mine. The mine has been criticised for its use of leaching methods in the extraction of uranium. Agreement was not by traditional consensus protocols; a proportion of the Adnyamathanha people agreed to the development of the Beverly uranium mine.
32 Desmond Manderson, 'Unutterable Shame/ Unuttered Guilt: Semantics, Aporia and the Possibility of Mabo' (1998) 4 *Law Text and Culture* 241, 236.
33 N. MacCormick, cited in Valerie Kerruish, 'Responding to Kruger: The Constitutionality of Genocide' (1998) 11 *Australian Feminist Law Journal* 65, 73.
34 Evidence before Crispin J was given by Jenny Munroe and Isobel Coe of the Wiradjuri Nation; Billy Craigie of the Gomilaroy Nation; Robbie Thorpe, Wadjularbinna Nulyarimma and Kevin Buzzacott of the Arabunna Nation; and also Mingli Wanjurri Nungala, Alison Hoolihan, Ray Swan and Michael Anderson. Further affidavit evidence was presented on behalf of others who were unable to travel to the hearing.
35 *Re Thompson; Ex parte Nulyarimma* (1998), ACTSC 136, paragraphs 79 and 80.

36 The colonies enacted a series of Aborigines Acts and Ordinances, and they were largely modelled on the *Aborigines Act 1886* (Qld). Tasmania had no legislation of this type as it was argued there were no Aborigines left alive. However, they still legislated the *Cape Barren Island Reserve Act 1912* (Tas), which established reserves where the survivors of genocidal policies lived as the invisible Tasmanians. The Tasmanian situation illustrates the duplicity of the coloniser: on one hand they peddle the myth of extinguishment of the Tasmanian First Nations and on the other they enact legislation to contain the supposedly extinguished peoples.

37 In 1890 the SA Protector Hamilton drafted an Aborigines Bill for the protection and management of the 'Aboriginal natives'. The Bill passed on 7 December as 'An Act to make provision for the better Protection and Control of the Aboriginal and Half-caste Inhabitants of the State of South Australia 1911' (SA). The initial proposal to enact legislation modelled on the *Queensland Aborigines Protection Act 1897* failed in SA. One of the proposals which came before the SA Select Committee was to introduce a permit system for employers of Nungas. It is thought that the Aborigines Protection Bill failed mainly because of successful lobbying by pastoralists who were concerned that they would lose the ability to exploit Aboriginal labour. However, the pressure to introduce an *Aborigines Protection Act* grew: see Robert Foster, *Aboriginal Policy and its Administration in South Australia, 1900–1962*: *A Report for the Native Title Unit* (Aboriginal Legal Rights Movement, 1997), 9.

38 Under the Aborigines Acts, the Protector of Aborigines was delegated power by the Crown to determine where Nungas were to reside. The protector also held power to determine the custody and education of children, the conditions under which Nunga children were placed in apprenticeships and the distribution of any monies payable as a result of labour.

39 For further discussion, see John Chesterman and Brian Galligan, *Citizens without Rights: Aborigines and Australian Citizenship* (Cambridge University Press, 1997), 32–33.

40 In 1983 the South Australian Museum was exposed for its hidden collection of Aboriginal human remains. Local colonial identity J. B. Cleland became infamous for his body snatching of Aboriginees at the time of their death.

41 Kathy Bowrey and Jane Anderson, 'The Politics of Global Information Sharing: Whose Cultural Agendas Are Being Advanced?' (2009), 18, *Social and Legal Studies*, 481.

42 See Hernán Santa Cruz, *Special Study of Racial Discrimination in the Political, Economic, Social and Cultural Spheres*, United Nations, Economic and Social Council E/CN 4/Sub 2/307, paras 366–367, and also José Martínez Cobo, *Study of the Problem against Indigenous Populations Final Report* (last part) UN Doc E/CN4/Sub2/1983/21/Add1 (10 June 1983), 5.

43 Sturt, cited in the Federal Court decision, *The Members of the Yorta Yorta Aboriginal Community* v *the State of Victoria* [1998] 1606 FCA, 31.

44 The assimilation polices that states have imposed upon Indigenous Peoples internationally are referred to in the *Special Study of Racial Discrimination in the Political, Economic, Social and Cultural Spheres* above, n. 42, para 370, also cited in the Cobo Report above, n. 42, 6. In the Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *Report of the Inquiry into the Death of Malcolm Smith* (1989) Hal Wooten, refers to the assimilation policy as being responsible for the death of Malcolm Smith and refers to the policy as being genocidal.

45 Charles Dunford Rowley, *The Destruction of Aboriginal Society* (Penguin Books, 1972), 399; also cited in Chris Cunneen and Terry Libesman, *Indigenous People and the Law in Australia* (Butterworths, 1995), 35.

46 While the Nunga population remained high, the colonialists were fearful of Nungas outnumbering the settler population. Once the colonial frontier had drastically reduced the number of First Nations Peoples, the intention was to keep separate survivors of the colonial frontier violence from colonial settlers. But as our numbers further declined, the policy shifted to one of assimilation. Colonial policies in Australia differed somewhat from Africa. The genocidal intent was that Aboriginal Peoples were to be absorbed into the white community, while Africans were to remain separated. For further discussions, see Chesterman and Galligan, above, n. 39, 13.

47 *Aborigines Act 1934–39* (SA) s. 11(a), exemption from the provisions of the *Aborigines Act*. For a further discussion of the history of the exemption system in SA, see Christobel Mattingly and Ken Hampton, *Survival in Our Own Land* (Wakefield Press, 1988), 49, including stories told by Nungas of their experiences of the exemption system.

48 In my own oral history, family members have told stories of exemption certificates being delivered to them without their prior notice. I have heard stories of them returning the exemption certificate, stating they had no need for it, as it only allowed them to drink in public and as they were not drinkers it was of no benefit.

49 Cited in Mattingly and Hampton, above, n. 47, 48.

50 Nungas who were exempted were entitled to the Commonwealth Maternity Allowance, Child Endowment Payments and Invalid Old Age Pension. But these entitlements were only paid to those who continued to live away from the reserves in a European lifestyle. This was a result of a 1942 Federal Cabinet decision which narrowed entitlement only to those holding a State Exemption Certificate. The *Social Services Act 1959* (Cth) extended entitlement to benefits to all Aborigines except 'nomadic full-bloods'.

51 Cited in Sharon Venne and Eileen Sasakamoose, 'The Water Paper', *Submission to the Canadian Royal Commission into Aboriginal Peoples* (1994), 11, taken from a quotation by Duncan Campbell Scott, Deputy Superintendent of Indian Affairs (1913–1932) in the film *Time Immemorial*.

52 In SA the Aborigines Act was repealed in the 1960s. However, in Queensland the Act was still law in the 1970s.

53 Its full title was 'An Act to repeal the *Aborigines Act, 1934–39*', and to promote the welfare and advancement of Aborigines and of persons of Aboriginal blood in South Australia and for other purposes.

54 *Report of the Aborigines Protection Board* (1962), 3; cited in Foster, above, n. 37, 46.

55 Ibid.; see *Aboriginal Affairs Act 1962* (SA) s. 17.

56 Following on from the 1970s, Nunga self-determination initiatives were developed to assist our peoples who were left struggling from the effects of genocide. A number of organisations that were essential to Indigenous recovery were established including Aboriginal Legal Services to cope with the world's highest indigenous incarceration rates, Aboriginal Health to deal with some of the worst health statistics and Aboriginal Housing to find homes for the growing First Nations diaspora, a movement from violent frontier conditions and dispossession from traditional lands. The federal government began to fund some of these initiatives and has used those funding relations to mythologise self-determination as the new federal government policy, and to also improve Australia's public profile in an attempt to dispel the growing international scrutiny of Australia as a white supremacist state. Many First Nations initiatives have been dismantled and are now controlled by state agendas through the politics of government funding. Increasingly, the only options are to use mainstream services if and where they are available. However, mainstream services were established to cater for the dominant cultural agendas and the colonial history remains largely embedded in those services. The provision of healthcare is

often funded by payments made via native title agreements – for example, to fund kidney dialysis services. These health services are considered a basic right by most people living in Australia.

57 *Kruger* v *Commonwealth* (1997) 190 CLR 1; for a critical review of this decision, see Kerruish above, n. 33, 65.

58 *International Convention on the Prevention and Punishment of the Crime of Genocide*, Article 11, i.

59 Cited in Quentin Beresford and Paul Omaji, *Our State of Mind: Racial Planning and the Stolen Generations* (Freemantle Arts Centre Press, 1998), 48–49. See also reference to the Western Australian history of the policy of 'biological absorption' in Purdy, 'British Common Law and Colonised Peoples', above, n. 8, 47–49.

60 *Thompson Ex parte Nulyarimma* (1998), 136, ACTR 9.

61 Wadjularbinna, Nulyarimma, 'Swimming for Lilies' in Stuart Rintoul (ed.), *The Wailing A National Black Oral History* (William Heinemann Australia, 1993), 142–143.

62 Kerruish, above, n. 33, 66.

63 *Aboriginals Ordinance 1918* (NT) s7 (1).

64 s 6 (1), (2).

65 s 16 (1).

66 Gaudron J in a dissenting judgment found the Ordinance invalid because it breached constitutional provisions, protecting free movement and association. The other dissenting judge, Toohey J, found the Ordinance invalid, for breaching constitutional rights to equal treatment.

67 *Kruger* v *Commonwealth* (1997) 190 CLR 1, para 111. It was determined by Dawson J that the first thing that may be said is there is nothing in the 1918 Ordinance, even if the acts authorised by it otherwise fell within the definition of genocide, which authorises acts committed with intent to destroy in whole or in part any Aboriginal group. On the contrary, as has already been observed, the powers conferred by the 1918 Ordinance were required to be exercised in the best interests of the Aboriginals concerned or of the Aboriginal population generally. The acts authorised do not, therefore, fall within the definition of genocide contained in the *Genocide Convention* . . . In any event, the Convention has not at any time formed part of Australian domestic law.
Since 2002, when Australia passed the *International Criminal Court Act* (Cth), the crime of genocide has become a part of Australian domestic law. The *Criminal Code Act 1995* (Cth) Division 268 now includes the crime of genocide.

68 Ibid., 388, McHugh J stated his opinion that the plaintiffs' claim that the *United Nations' Convention on the Prevention and Punishment of the Crime of Genocide* ('the *Genocide Convention*') gave effect to a fundamental rule of international law that

> s. 122 of the Constitution does not authorise a law that would breach such a rule . . . it is unnecessary to deal with the constitutional point. The 1918 Ordinance did not authorise genocide.

69 Kerruish, above, n. 33, 79.

70 Juvenile detention statistics reveal the ongoing nature of the highly disproportionate levels of Indigenous children incarcerated compared to non-Indigenous juveniles. Australian Bureau of Statistics data provides evidence that the number of Indigenous children (aged 10–17 years) in custody is increasing. As of June 2008, 54.7 per cent of children in detention were Indigenous. In 2006–2007, the rate of imprisonment of Indigenous children was 28 times higher than for other children. By comparison, Indigenous adults make up 24.3 per cent of the total prison population. See Kelly Richards, 'Trends in Juvenile Detention in Australia' *Trends & Issues in Crime and Criminal Justice* No. 412 (Institute of Criminology, 2011); Don Weatherburn,

Arresting Incarceration: Pathways out of Indigenous Imprisonment (Aboriginal Studies Press, 2014); for an earlier reference, see D. Dagger and S. Mukherjee (eds), *Persons in Juvenile Corrective Institutions*, Australian Institute of Criminology, No. 66, March 1994.Table 9, cited in Aboriginal and Torres Strait Islander Social Justice Commissioner, *Third Report* (Human Rights and Equal Opportunity Commission, 1995), 14–15.

71 Special Study of Racial Discrimination in the Political, Economic, Social and Cultural Spheres above, n. 42, para. 450, and cited in the Cobo Report above, n. 42, 16.

72 Galarrwuy Yunupingu, *Our Land is Our Life* (University of Queensland Press, 1997), 2.

73 Cobo Report above, n. 42, 17–18.

74 Irene Watson, 'Aboriginal(ising) International Law and other Centres of Power' (2011) 20 *Griffith Law Review* 619.

75 Joseph Lo Bianco, 'Struggle to Speak: Taking Funding Away From Aboriginal Bi-Lingual Education' (1999) 7 *Australian Language Matters* 1, 6. For an international perspective, see Tove Skutnabb-Kangas, *Linguistic Genocide in Education or Worldwide Diversity and Human Rights* (Taylor & Francis, 2013); see also Suzanne Romaine, 'The Impact of Language Policy on Endangered Languages' in Mathias Koenig (ed.) *Democracy and Human Rights in Multicultural Societies* (Angus & Robertson, 2007).

76 Tove Skutnabb-Kangas, 'Language and Self-Determination', in Donald Clark and Robert Williamson (eds) *Self Determination International Perspectives* (St Martin's Press, 1996), 128, for a discussion of linguistic genocide.

77 For the Commonwealth Parliamentary discussion, see Hansard Report, House of Representatives, 10 December 1998, 39th Parliament, First Session-First Period, 1402–1404; also cited in Lo Bianco, above, n. 75, 1. In 2010, the Northern Territory government produced a draft Literacy Framework for Students with English as an Additional Language. The policy states that for the first four hours of teaching (when students are most attentive) in a school day English will be the 'predominant' language. 'Home languages' may be used in these hours as a support to teaching. The draft was adopted as policy in June 2012. See Northern Territory Government, *Draft Literacy Framework for Students with English as an Additional Language*. Some commentators see this as a retreat from the government's previous position; see, for example, Emma Murphy, 'NT Government Quietly Abandons Bilingual Ban' *Tracker* 15 August 2012.

78 Debra Harry, 'Biocolonialism and Indigenous Knowledge in United Nations Discourse' (2011) 20 *Griffith Law Review* 702; Greta Bird, 'Koori Cultural Heritage: Reclaiming the Past?', in Greta Bird, Gary Martin and Jennifer Nielsen (eds), *Majah: Indigenous Peoples and the Law* (The Federation Press, 1996), 105–106.

79 Named after Governor Hindmarsh, one of the first governors of South Australia.

80 Iris Stevens, South Australia, Hindmarsh Island Bridge Royal Commission *Report* (1995), 287.

81 Ibid., 80. I understand that this is the first time a Royal Commission inquiry had commenced proceedings with an acknowledgement to traditional owners of the land. Note this ownership asserted by the Kaurna is contested by Ramindjeri claims.

82 The term 'secret sacred women's business' was constructed by the Royal Commission. The Ngarrindjeri miminis had used the term 'restricted women's businesses'.

83 The Hindmarsh Island Bridge Royal Commission Transcript (1996), 19–22; see the statement by the women as presented by their counsel Clair O'Connor.

84 Haunani-Kay Trask, *From a Native Daughter: Colonialism and Sovereignty in Hawaii* (Common Courage Press, 1993), 151; see also Helen Stacy, 'Lacan's Split Subjects: Raced and Gendered Transformations' (1996) 20 *The Legal Studies Forum* 277, 291.

85 Trask, above, n. 84, 155.

86 Hindmarsh Island Transcript, above, n. 83, 17.

87 Ibid., 237–238; the commissioner was unable to appropriately address the conflict which arose between the 'proponent women', those who supported the existence of secret sacred women's law, and the dissident women, those women who rejected the existence of women's law. The Commission fuelled the fires of conflict, which created further divisions.
88 Ibid., 128; Mr Abbot, counsel acting for the dissident women, made it clear to the inquiry that the dissident women did not reject women's business, but did reject secret sacred women's business. It was culturally inappropriate to place these issues before a judicial inquiry and to use males to present information; in the context of Aboriginal law, a man speaking in this way is offensive and a violation of law.
89 Ibid., 127–128.
90 Nonie Sharp, *No Ordinary Judgement* (Aboriginal Studies Press, 1996), 170.
91 Ronald Berndt and Catherine Berndt, *A World That Was* (Melbourne University Press, 1993) has been elevated to the last word on 'authentic' Ngarrindjeri culture. Tonkinson, also an anthropologist, refuted evidence of secret-sacred beliefs among the Ngarrindjeri. However, in his foreword to the Berndt text he qualifies this statement to reveal that the Berndt's research had been sourced from the 'memories of fallible people', and that work had been shaped by their own biases, interests at the time, the kinds of questions they asked and their selectivity in recording information. Tonkinson concluded that the work of the Berndts had not exhausted the extensive repertoire of cultural knowledge held by the Yaraldi people (also known as Ngarrindjeri); see Berndt and Berndt (1995), xix.
92 See Jan Pettman, *Living in the Margins: Racism Sexism and Feminism in Australia* (Allen & Unwin, 1992), 24–25, for further discussion of the colonial image of Nunga miminis.
93 The reliance on experts and the written word was central to Commissioner Stevens's approach; in Chapter 5, n. 31 refers to the evidence of Philip Clarke (1995), 112, and n. 34 refers to the *Yorta Yorta* [1998] 1606 FCA. Olney J relied on the writings of Curr, an early colonist, when he decided that members of the Yorta Yorta community were not able to establish a connection to the claimed lands under the *Native Title Act 1993*. Similar to the reasoning of Commissioner Stevens, Olney J refutes the evidence of anthropologist Deborah Bird Rose. Olney J dismissed her expert evidence because, as he claims, she had relied too much on the statements of the applicants and not enough on the writings of earlier colonists, to prove the genealogical connection to ancestors who lived in the claimed areas prior to the 1788 invasion.
94 Hindmarsh Island Transcript, above, n. 83, 191.
95 The*Yorta Yorta* [1998] 1606 FCA (Olney J), 106 and 114. The writings of Curr were some of the primary evidence Olney J relied on when he denied the Yorta Yorta People an ongoing connection to their lands.
96 Hindmarsh Island Transcript, above, n. 83, 3744–3746.
97 Ibid., 205–207.
98 Hindmarsh Island Bridge Royal Commission, a written Statement of Evidence by Steven John Hemming, 28 July 1995.
99 Clarke in his evidence to the Royal Commission into Hindmarsh Island Transcript above, n. 83, 321.
100 Hindmarsh Island Transcript above, n. 83, 3702.
101 Ibid., 179.
102 Ibid., 4275–4276.
103 Personal communication to the author from Uncle Ron and Aunty Lola Bonney during 1988.
104 Stevens, above, n. 80, 287.

105 Ibid., 241.
106 Ibid., 276–278.
107 Ibid., 280. Dr Fergie is criticised by both Clarke and Jones throughout the hearing and accused of importing a Western desert construct of restricted women's business. They claim this was the basis of the restricted women's business cited in her report to Professor Saunders; see Hindmarsh Island Transcript above, n. 80, 3657–3658.
108 Deloria Vine Jr, statement made at the 1982 Western Social Science Association Conference; cited in Churchill, *Indians Are Us?* above, n. 15, 190.
109 Stevens, above, n. 80, 298.
110 Following on from the Commission the High Court, in *Kartinyeri* v *Commonwealth* [1998] 195 CLR 337, validated the Hindmarsh Island Bridge Act 1997. The legislation was enacted to prevent further section 10 applications under the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) for a declaration to prohibit or restrict the building of a bridge to Kumarangk.
111 See *Mabo* v *Queensland* (1992) 175 CLR 1 59–60; see also 184–188 (Toohey J).
112 Ibid., 69 (Brennan J).
113 Ibid., 89 (Deane and Gaudron JJ).
114 *Wik People* v *Queensland* [1996], 187 CLR 84 (Brennan CJ).
115 *Yorta Yorta* [1998] 1606 FCA (Olney J) at 121.
116 Ibid., 124.
117 Ibid., 126.
118 This was affirmed and extended in the 1998 amendments to the Act.
119 Australian Mining Industry Council, Advertisement, *The Age* (Melbourne), 14 August 1993; *The Weekend Australian* (Sydney), 21–22 August 1993.
120 Reconciliation is itself a loaded term and, like recognition, is sourced in a colonialist history which is far from justice; see Steven Newcombe, 'The UN Declaration on the Rights of Indigenous Peoples and the Paradigm of Domination' (2011) 20 *Griffith Law Review* 3. Steven Newcombe, 'A Critique of a Doctrine of Reconciliation', *Indian Country Today*, 15 June 2011.
121 *Mabo* v *Queensland* (1992) 175 CLR 1, 31–35 and 78.
122 The Wiradjuri Peoples occupy southern areas of New South Wales.
123 Paul Coe, 'Mabo-Confirming Dispossession', *Broadside*, 10 February 1993, 9.
124 Joyce Green similarly discusses *Delgamuukw* and the construction of the settlement thesis as being pre-ordained. See Joyce Green, 'Towards a Détente with History Confronting Canada's Colonial Legacy' (1995) 12 *International Journal of Canadian Studies* 85, 90.
125 Anghie, above, n. 26, 79.
126 Ibid., 82.
127 Ibid., 98.
128 The Royal Commission into Aboriginal Deaths in Custody was established in response to international pressure and questions put to the UN WGIP and other UN fora.
129 Jeannine Purdy, 'Royal Commissions and Omissions: What Was Left Out of the Report on the Death of John Pat' (1994) 10 *Australian Journal of Law and Society* 37.
130 Ibid., and taken from the National Report into Aboriginal Deaths in Custody, 1.1.3; 1.2.2.
131 Purdy, 'Royal Commissions and Omissions' above, n. 130.
132 Commonwealth Royal Commission into Aboriginal Deaths in Custody, *Report of the Inquiry into the Death of Malcolm Charles Smith* (1989).
133 Ibid., n. 70. Associated Press reported a complaint to Western Australia's Police Commissioner Bob Falconer, that more than half the Aboriginal youths in custody

were beaten. An Aboriginal Legal Service (ALS) submission to a state parliamentary committee on crime reported 52 per cent of Aboriginal youths in custody were beaten and only a third were informed of their rights. Some 85 per cent of Aboriginal youths in custody were verbally abused and 65 per cent were assaulted. The ALS survey also showed Aboriginal youths made up only 4 per cent of the youth population, but accounted for more than 20 per cent of juvenile court appearances. See Australian Associated Press, 'Half Aboriginal Youth in Custody Bashed', 9 April 1999. There is no evidence that indicates a shift, suicide is increasing and incarceration rates remain high.

134 The Human Rights and Equal Opportunities Commission, (HREOC) established a national inquiry into the child removal policies of the nineteenth and twentieth century. Ronald Wilson, *Bringing Them Home*: *Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from* their *Families* (1997).

135 Margo Kingston, 'Stolen Justice', *The Sydney Morning Herald*, 6 March 1999. The prime minister's rejection of a compromise form of apology to the stolen generations was suggested by his Council for Aboriginal Reconciliation. The draft included a heavily qualified general apology to Aboriginal people for past injustices designed to accommodate Mr Howard's refusal to budge on an apology. The draft stated: 'We hereby take this step: as one part of the nation expresses its sorrow and profoundly regrets the injustices of the past, so the other part accepts the apology and forgives.' The wording was designed to give Mr Howard a way out of his refusal to apologise officially to the stolen generations by putting the word 'apology' in the mouths of Indigenous Peoples. An apology was made by Labour Prime Minister Kevin Rudd in February 2008.

136 Ronald Wilson was a former High Court Judge.

137 Wilson, *Bringing Them Home Report*, above, n. 134, 266.

138 See Irene Watson, '1993: International Year of Indigenous Peoples' (1992), 2, *Aboriginal Law Bulletin* 11, 11–13, for a discussion of the UN theme of 1993, 'Indigenous People – a New Partnership'. The International Year for the World's Indigenous People is a result of United Nations General Assembly Resolution 46/128, (17 December 1991).

139 Glen Morris, 'Intervention – Review of Recent Developments', UN Working Group on Indigenous Populations, Tenth Session, 20–31 July 1992.

140 Churchill, *Indians Are Us?* above, n. 15, 11.

141 Ibid., 45–46.

Chapter 7

Indigenous ways

A future

We continue to challenge the idea that somewhere we have become 'lost' or that we never existed as the First Nations Peoples. We are as we have been since time immemorial. We also challenge the idea that we have lost our international juridical status as nations and peoples. First Nations' status as sovereign and independent peoples cannot be given to us by the states recognised by the UN and its international mechanisms; rather we seek a reaffirmation of who we have always been. Indigenous Peoples have not been created out of international law; we have come to international law as pre-existing, already formed entities, as subjects in international law in our own right and from within First Nations' horizons. The prevailing view is that eventually we will be annihilated and disappear from the face of the earth, but First Nations' laws know that we will recycle to begin again. The resurgence of our ancient ways is an ongoing part of the earth's natural cycles of being, and it is the law.

Meanwhile, we continue to provide the opportunity for the United Nations and its member states to correct injustice and their exclusion of Aboriginal peoples. This exclusion is based on racism and imperialism, and as a minimum it must be corrected. The colonial project has worked to construct an outcome that holds no place in which First Nations can live in the future. We are left to ponder the question: is a First Nations future merely a utopian dream?[1] And if that is true, what does the future hold for the whole of the natural world?

If there is a future for First Nations (as there is), what is to be considered in resisting the ideas of annihilation and in making what otherwise is a utopian dream? Perhaps we could begin by having a review of the breaches of laws, which have occurred across the colonial project, coupled with a consideration of possible remedies for those breaches. Perhaps this approach might also open a space for us to begin again to consider the possibilities of a new international order, which is inclusive of all peoples, where the will and power of peoples can override the current exclusionary powers of states.

Survival is no longer exclusively a question for we Nungas; it is a question for all humanity, of how human beings will co-exist with each other and within

the natural world. Global colonialism has damaged our relationships with the natural world; many First Nations Peoples have no land base and live within cities, suburbs and country towns. However, while many First Nations are without physical control over our territories we still hold the law, the stories and the songs for country. And while some of our territories have been damaged, the law continues to live in those places because of the 'Dreaming that will never be taken away.'[2]

The work before us was elicited by elder Lavina White, intent upon an obligation to bring an end to the 'colonial mind set'.[3] And perhaps being able to renounce the colonised self might open up and liberate many more peoples into a relational approach to the natural world. The colonial settlers, who have for centuries positioned us as the 'other', need to know that there is no other place to go. Earth – this is it. We are all part of this living organism. The truth is that there are other ways of knowing and being. We are not confined by the matrix of colonial power; we can transform the place. We can, in fact, think our way out of this prison. The natural world upon which we are all dependent was not always enslaved. It can become free again; eventually it will in any event empower and free itself, for that is the law. The prospect is before us now; the climate is changing and much is coming with it.

Transforming the space

Colonialism was forged by the idea of the 'native's deficit, a deficit that could be remedied by christianity, civilisation, progress and development. But the proposed remedies turned out to be the cause of 'native suffering', a part of the problem rather than a solution.[4] Although these matters are discussed in the contemporary space, the same old colonial remedies are still operative.

Globally, much of the Indigenous world has been damaged and altered beyond recognition. Many First Nations laws have been breached and many have not even been recognised as law. The colonial states' ignorance is still based on the racist ideology that the 'native' is of no value, has no law and no society. Special Rapporteur Miguel Martínez of the UN Study on Treaties identified what he called the 'Indigenous problematic' as an ethical dilemma. Martínez called on the UN state members to correct the debt they owed to Indigenous Peoples as a result of their historical misdeeds against us. He claimed that there remained 'an ethical imperative to undo the wrongs done, both spiritually and materially, to the Indigenous peoples'.[5]

One of the greatest wrongs has been crimes of genocide and ecocide visited upon First Nations Peoples and our territories. And while it might be said that assimilation was carried out without evil intent – as the court decided in *Kruger*,[6] and that the forced removal of children was done in their 'best interests'– the effect of that 'caring' imposed on the First Nations communities was the genocidal removal of children. And the impact saturated and imprisoned First Nations into a type of 'liberal laws dream' and an entry into

Western European civility[7] in an attempt to end the 'savagery'. In positing assimilation as a form of genocide, the question arises: are there still possibilities for First Nations' life on Earth? Of course, many contemporary colonial settlers remain unconcerned about the effect of assimilation; the common response to this question is that there is no wrong or harm meant in assimilation. Many suggest that First Nations should assimilate and simply 'get over' colonialism. But the end result of assimilation is the death of the native.

However, if there is another way, we cannot accept this as our destination. Death cannot be our resolution, for it goes against our law ways and as such we have an obligation to resist it. We have an obligation to throw over the discourse of death and our 'progress' towards death, and open a new transformative space to return us to our ancient cycles of renewal, of new beginnings and of bringing the old into the new.

International processes and mechanisms

Advocates of Indigenous rights have argued for the urgent creation of an international independent mechanism that is enabled and resourced to report independently and act upon the ongoing and critical position of First Nations. Meanwhile, there are a number of existing UN mechanisms that could be taken up, but they are ignored by states or met with responses such as 'we are sovereign entities and are not compelled to respond to UN recommendations'.[8]

In 1999 the UN Treaty Study recommended the establishment of an international body empowered to act as an international body of review in disputes between Indigenous and non-Indigenous peoples, and at the same time recommended the creation of a permanent forum on Indigenous Peoples. At the time the Treaty Study was written, the UN Permanent Forum on Indigenous Issues[9] (UNPFII) had not yet come into existence; it was established in 2000.[10] The *UN Declaration on the Rights of Indigenous Peoples* was adopted in September 2007.[11] Article 42 of the UNDRIP states:

> The United Nations, its bodies, including the Permanent Forum on Indigenous Issues, and specialized agencies, including at the country level, and States shall promote respect for and full application of the provisions of this Declaration.

So, under Article 42 the UNPFII is charged with integrating the declaration into its work and monitoring the effectiveness of its implementation. But from the start the declaration itself had limited status and its only source of law is 'customary international law'. The characterisation of the declaration as being 'human rights' in character places further limits and has the effect of emptying Article 3 of its group rights content while conforming to the narrow

interpretative agenda of states. The framework in which the UNPFII works has shifted from the early positions held by First Nations Peoples who actively sought UN intervention and focus on the recognition of Indigenous Peoples as nations and 'proper subjects of international law' to one of more conformity.[12] UNPFII stands as an example of what Schulte-Tenckhoff and Khan commend to us as an institution that has collaborated with the states in the silencing of 'other voices'.[13] Anghie argues that contemporary international law is continuing to act as it has always done in respect of Indigenous Peoples to legitimise and further the ongoing colonial project.[14] While the UNPFII is not empowered nor has the capacity to resolve disputes between states and First Nations (it was never established with that intention in mind), an international mechanism with the power and capacity to effectively listen to our voices, and to act and intervene for and from a First Nations' way of being is still urgently required.[15]

While the UNDRIP recapitulates upon minimum universally relevant human rights standards, the reality is that it will not be effective in protecting and affirming the sovereignty or lawfulness of Aboriginal Peoples. As I argued above, the declaration is being interpreted as a human rights instrument emptied of the recognition of group rights and any right to self-determination of Indigenous Peoples is contained as the recognition of internal self-determination. And the declaration is limited in what it can achieve within the 'domestic paradigm'. Article 46 places limitations on the possibility of First Nations achieving self-determination as it privileges the territorial integrity of states. Similarly, other articles of the UNDRIP can only occur when emasculated by states and remain within the purview of state power. The UNDRIP enables business as usual, the power of states to do as they wish with our lands, resources, lives and laws. The states remain empowered to determine which 'human rights' are in our 'best interests'. Under the UN, what is achievable in terms of self-determination is limited by the power of the states to contain First Nations as state captives of colonialism.

Decolonisation

While colonialism rolls on, the crisis of classical liberalism and nation-states nearing their own end has forced the question: what future lies beyond the liberal state?[16] First Nations had their ways but their ways to the future became submerged by the various colonial projects. However, while the First Nations ways remain alive in the land and the bodies of its peoples, they can be dreamed and visioned back into the present.

In 'knowing' their human selves as being fundamentally different from animals and the rest of the natural world, the Europeans ended up with their focus being centred on relationships between humans. This limited them; the focus resulted in a hegemony, a 'master' and 'slave' relationship with the natural world (and others of their own kind). The colonial project imposed

the same dynamic when the Europeans invaded our territories,[17] and as 'natives' we ranked as slaves or less. The intergenerational effects of hegemonic relationships like this impact on contemporary discourses of recognition and the 'structural and psycho-affective dimensions of imperial power'.[18] The force and violence of colonialism are the legacies we are left to decolonise from.

The resolution of contemporary colonial violence requires the deflation of power in its grandest forms of corporatised power and the colonial state, which in its modern form has grown from three centuries of Western political theory. 'Decolonizing the state means reducing the influence of the regional history and conceptual logic of Western political theory.'[19] Decolonisation would decentre Western political theories and a global order, which is regulated by linear thinking, thinking that has produced a 'colonial matrix of power' that holds dispossession of those colonised by the state at its core.[20] However, to dispossess, enslave, exploit and dispose of human beings is unlawful, and the state cannot continue to legitimise and make lawful its own crimes.[21] Walter Mignolo suggests instead that systems of governance that suit the needs of peoples above states be established and enable a process where peoples take in their own hands control of their own destinies.[22] If the states are (as many more are now suggesting) in their last hours, then the case for a new international order could emerge, especially when the future of not only First Nations but human life on earth is at stake. Those are the stakes; we may not have a future for any peoples.

How might decolonisation occur and what is the decolonisation of the mind? Perhaps one example to consider is how we might think about the condition of dispossession outside of the 'logic of possession (as a hallmark of modernity, liberalism, and humanism)'[23] and to enable instead a First Nations' standpoint. The challenge would be to think outside of the colonial matrix of power, thinking in terms of a new international law, which is 'disconnected from its own imperial sources and history'.[24] It would challenge the imperial connections that have shaped the foundations of international law and, if effected, would enable us to move away from its colonial origins and foundations. However, it requires transformative renewal to begin again[25] and move away from what is still considered a 'normal' way of being.

In 2013 the UN study On the Promotion of an Equitable and Democratic International Order[26] recommended that the UN General Assembly consider the referral of specific legal questions, including issues of self-determination to the International Court of Justice for advisory opinions. It also recommended that it consider referring self-determination issues to the Special Committee on Decolonization and/or other United Nations bodies instancing communications by Indigenous and unrepresented peoples wherever they reside. The list of territories included, *inter alia*, Alaska, Australia, Canada, Chile, China, the Dakotas, French Polynesia, Hawaii, Kashmir, the Middle East, the Moluccas, New Caledonia, Northern Africa, Sri Lanka and West Papua, and the report referenced Chapter XI of the Charter of the United Nations.

The study also recommended that the General Assembly consider amending its rules and procedures to allow for the participation of Indigenous and non-represented peoples. It also urged states to implement the UNDRIP.[27] The recommendations included issues and countries previously excluded from consideration, but which Indigenous Peoples have raised for many years.

Whether the possibility of a process of real decolonisation opens up for First Nations Peoples is yet to be seen, and in any event the process to date has not provided those now 'decolonised' peoples with freedom from the old colonial power matrix. As it is, the same mechanisms used to create international law and achieve decolonisation remain under the control of the same powers, which legitimised colonialism in the first place. It effectively means that colonialism is perpetuated. While sovereignty was transferred to the newly 'decolonised states,' the transfer of power and control of the political economy did not transfer with it.[28] Anghie suggests that the only shifts that have been made are shifts from a discourse based on race to one based on economics, where the 'uncivilised' become 'developing'.[29]

Treaty

The word 'treaty' indicates a loaded concept. This is particularly so when it is applied to the politico–legal relationship between First Nations Peoples and a colonial settler state. Imperial Britain never entered into treaty agreements with First Nations Peoples of Indigenous Australia. That colonisation proceeded as though we did not exist. Imperial Britain removed itself from the colonial frontline in 1901 and was replaced by the nation-state 'Australia'. This has implications for a future treaty, particularly in determining who the parties to a treaty are. While the original colonial violence was due to imperial Britain's violence and policies, treaty law requires that the same body or party that initiated the original colonial foundation be involved, and Britain and Australia are not the same jurispolitical identity.

One of the recommendations made by José Martínez Cobo in his *Study of the Problem of Discrimination against Indigenous Populations* was that a study of treaties and conventions signed and ratified by governments and First Nations Peoples be completed.[30] As a result of this recommendation and accompanied by extensive lobbying from Indigenous Peoples, a treaty study was commenced in 1988. From the beginning of the study its author, Miguel Alfonso Martínez,[31] recognised that 'the norms and customs that regulate the life of Indigenous populations' should be placed on an equal footing with 'public international law. . . and the municipal law of the States'.[32] However, in doing so Martínez risked positing public international law, municipal law and the framework from which Indigenous law might be read as being the same.

What the Treaty Study did reveal is that treaties entered into with First Nations favoured one treaty party – the state, in every instance.[33] The special rapporteur of the *Study on Treaties, Agreements and Other Constructive Arrangements*

Between States and Indigenous Populations argued that the legal relationships that Indigenous North Americans and the European parties entered into during the eighteenth, nineteenth and twentieth centuries were contractual relations between sovereign nations, with all the legal implications that such agreements carried at the time in international law.[34] While such legitimisation was seen by Europeans as necessary to secure the colonisation and trade interests of their states,[35] in the contemporary context conflicts on the interpretation of treaties have arisen between states and First Nations. States view treaties as a means of acquiring territory and jurisdiction; First Nations view the same treaties as peace agreements and evidence of their sovereignty, comprising a genuine capacity to continue to exercise it.

First nations relations with each other

Prior to the 1788 British invasion, First Nations Peoples of Indigenous Australia shared a history of peaceful co-existence. The agreements negotiated between First Nations are evidenced by the songlines shared between peoples, the meeting of songlines, shared places, exclusive places, private places, public places and trading places. While we have no written evidence of these treaties among First Nations, they are nevertheless recorded in the songlines and other agreements we made with each other regarding territorial boundaries, languages, laws and society. Unfortunately, the UN Treaty Study did not have the resources to research and include this vast body of Indigenous knowledges.[36] It is unfortunate because the history of First Nations' relations with each other is not commonly known, and the states that now control our territories remain 'blissfully ignorant' of the facts.[37] But Martínez recommended that the inclusion of Indigenous knowledge was critical to the work required in developing protocols and approaches in future negotiations.[38] The limited access First Nations have to international processes was also raised in the UN Treaty Study.[39] Martínez recommended a case-by-case approach when considering the opportunities available for Aboriginal peoples to speak as subjects of international law,[40] mindful that historically international law has been about imposing 'universal' standards, which work to the advantage of European interests.

Indigenous philosophy

Murrabina is a celebration for the renewal of life and the changing of seasons; this is law. Murrabina is a declaration, an agreement with the spirit world, the air, earth, water, fire, animals, plants, rocks, and the fullness and oneness of creation, for the continuance of law, land and peoples, an agreement to engage in the wholeness of the creative process of living in law. From Kaldowinyeri, Nungas have lived as sovereign peoples, respecting and recognising the sovereignty of others and having independent authority over a

territory. Hundreds of First Nations in existence at the time of colonisation (many of them surviving post-invasion) are evidence of this respect and recognition for each other. While the European idea of sovereignty was a concept alien to Nungas, the Europeans failed to comprehend or accept that First Nations' sovereignty even existed. This is the unfinished business or unlevel playing field, which must be addressed before we can consider entering into a dialogue. An equitable and just process should be established before a discussion of 'treaty' occurs between the peoples who occupy this country now named 'Australia'.

In their different understanding of what constitutes sovereignty, krinkiris 'know' that the sovereignty of Indigenous Peoples is extinguished, but in opposition we declare our sovereignty in the law of song, a law, which cannot ever be extinguished. 'Our grandfathers, our fathers, our Dreamings, our sacred sites, we want them left untouched. We do not want that changed.'[41]

Since the invasion commenced many negotiations entered into in the name of First Nations have taken us further into the colonial system and its understandings and relationships to land and its law. We have never reached a point where we have sat and talked about the land in the way it is for First Nations Peoples – as peoples who care for our country. The idea that we cannot sell the land has never yet been acknowledged by the invader as a concept that it can deal with. Part of its problem is that the West assumes that what is normal is the assimilation of First Nations and that a First Nations' perspective is non-existent. The West remains confident that it will continue to dominate the way the world is 'worlded'. It is confident of its power to bury other ways of knowing the world and its ongoing threat is that it will continue to bury our philosophies and our ways of knowing the world. For example, where Indigenous Peoples see law, the West sees the propertied value of art, or where we hear our stories of relationality with the world we live in exist, the West sees entertainment and cultural tourism. In places in which we see lawful ceremony, blessings and interrelationality with the natural world, the West sees as places to be developed and commodified. Where we envisage a claim against imperial Britain contesting sovereignty, the state offers us a document of 'reconciliation', which resides within its own domestic paradigm and we remain situated as 'Australia's Aborigines'.

The utopian ideal is one in which we are able to participate on our own terms as First Nations Peoples. The historical process of colonialism has relegated us to places where we are precluded, dominated and extinguished. Why is it that the Indigenous horizon is denied life? There can be no meaningful talk of healing the breaches of our law in the process of treaty-making unless a place can be occupied with the freedom for the song law to be sung without the power and interference of the muldarbi. A muldarbi-free place is a place to love the ruwe and its song law. Love of ruwe and its song law is the ground, which needs to be revitalised, before any meaningful dialogue can begin. When I speak of space and establishing ground I am not

simply speaking of land-ownership and control, although the resolution of these issues is fundamental to our life. When our old people spoke of being the boss or the owner for country, their meaning of being in ownership encompassed a relationship of love for ruwe, a relationship, which is ancient and continues forever; it cannot be traded or sold in exchange for beads or money. There can be no lawful agreement to sell the ruwe or its songs, for they are the law.

How we speak to each other, with the dominance of the muldarbi way of knowing is marred by the gaps in understanding. The groundwork is yet to be done, the muldarbi is yet to shed its clothes and come to a place where we can begin to consider how we might move on, away from the colonial project. There, it can revisit its own colonial histories and come to apprehend that we were not the 'primitive peoples' it had constructed, that we were peoples who held deep attachments to country and had ancient processes of negotiation with outsiders coming on to our lands.[42] Here the work is for the non-Indigenous, to develop better understandings of themselves and their role in the discourse of the 'primitive'.

If the proper relationship to ruwe, song and people had been understood, colonial settler society would have discovered more than territories and resources to build an empire; they would have discovered the laws of Indigenous Australia and found a different place. They would have learned that we had no concept of selling or consenting to the destruction of ruwe. The Western myth that trading beads with a simple people was adequate compensation for occupation of their land was a lie, a colonialist fantasy. It was a lie and it laid a burden on future generations to which we are all now bearing witness. The new generations are no longer sustained by ruwe, as she hardens from past and continuing violations.

The application of terra nullius to Australia was a muldarbi rule, which was used to excuse the colonisers not only from their failure to negotiate a treaty, but more importantly, their failure to come to ruwe naked, to sit by the fire in the murrabina properly and negotiate an entry. And still there is reluctance. But we are reluctant as well. What would a treaty do for our laws and ruwe? The power of the muldarbi still runs amok and its face is ever-present in all spaces and places. What space is there for a treaty, in the shadow of even our recent history and the contemporary scams of native title?

What do we need an agreement on? Who would be the parties to an agreement? First Nations, the Commonwealth of Australia, its states? And where might imperial Britain sit? Who would monitor the treaty talk? Would negotiations be conducted by 'key government negotiators' and 'key Indigenous leaders'? We have been down that path, with the *Native Title Act 1993* (Cth). The negotiations for that legislation were not based upon any lawful First Nations process, but an imposed colonial process. The Native Title Act 1993 was created by the Australian government and eventually supported by corporate interests that are intent upon maintaining the development of

Indigenous natural resources. The muldarbi worked its power, energised by the popular media to make its lie, and the illusion of a just settlement appeared to be true. The history of terra nullius is still with us. How can we talk of treaty while the boundaries of terra nullius have not shifted? And if we don't talk of treaty, what of our future?

First Nations and imperial colonial states

Treaties have been used to regulate the relationships between colonisers and colonised,[43] and often those treaties made between colonial powers and First Nations have become the object of positivist scrutiny. Antony Anghie argues that much of the scrutiny that positivists have given to the written agreements has resulted in the erasure of First Nations' standings, even though the positivists have claimed to have looked merely to identify the intentions of First Nations parties to the treaty. However, more often than not it turned out that the focus was on the words of the treaty to the exclusion of the context in which the treaty had been negotiated.[44]

While there is a history of agreements among and between the First Nations Peoples of Indigenous Australia, there are no existing treaties between First Nations Peoples and imperial Britain. This position remains unfinished business – that is, if there was an intention to bring an end to colonialism, First Nations would have to negotiate with imperial Britain. While 'Australia' now stands in for imperial Britain, the original colonial foundation was constructed by imperial Britain and that unlawful construct remains intact. Britain was the original aggressor and our claims are against Britain. However, as history moves along, a potential claim gets moved further and further away from discussion and settlement. Imperial Britain sits comfortably off the hook of culpability while the construct of the Australian state stands removed from the original colonising act. Meanwhile, Aboriginal sovereignty risks being deprived of its essential attributes piece by piece, as our capacity to enter into international agreements and govern ourselves is eroded by dispossession, reduced population and the effects of assimilation.[45]

In Australia, treaty debates are almost non-existent. While a discourse around the Australian Constitution talks up the ideals of embedding principles of the recognition of First Nations, the original document enshrines a racist 'white Australia' foundation, which assumed the genocide of Aboriginal peoples and the exclusion of non-white peoples.[46]

Consent of the natives

Scattered across early colonial jurisprudence there is an aspirational clause repeated: 'with the consent of the native'. I don't have the space here to elaborate on how this was or wasn't played out across Australian colonial

legal history, but I will consider some of the issues the 'consent of the native' idea might raise in the contemporary space. Native title law is one aspect of this.

Negotiations that occur under native title law are known as Indigenous Land Usage Agreements (ILUAs)[47] and they are agreements that identify 'traditional owners' of land in accord with the governmental statutory requirements under the *Native Title Act 1993.* Agreements in relation to deemed 'native title lands' are entered into with the traditional owners on one hand and parties with an interest in developing those lands on the other. On the face of it, ILUAs might seem a sensible way to go about business, but in practice, these agreements fall short in a number of ways, particularly when it comes to the standards set for 'free, prior and informed consent' of the traditional owners. Often native title and ILUAs have resulted in the validation of non-Indigenous title and the extinguishment of native title.[48] The power relations between the state and/or other parties interested in development in 'native titled' lands favour the more powerful interests, usually the state and the state-backed developer. The possibility of obtaining the free, prior and informed consent of First Nations is jeopardised where power imbalances control the process.[49] The 'attempt to make native consent an integral part of the scheme facilitated the construction of the pretence that natives had in fact consented to their own dispossession'.[50] Within the colonial matrix 'native consent' has no reality. It was another colonial tool aimed at dispossession. What peoples would consent to their own genocide and dispossession?

The Australian state is unable to point to any evidence of any First Nations having renounced sovereignty. The legal principle that no one can go against their own acts goes back to ancient Rome and was valid as a general principle of international law at the time of first contact and dispossession.[51] The question remains: by what lawful authority did imperial Britain assume sovereignty over First Nations territories? By what means other than by force of arms could First Nations have been deprived of their sovereignty?[52]

In any negotiation there exist 'non-negotiables' – for example, the principle of the extinguishment of native title should not be a condition for the settlement of Indigenous Peoples' claims. It remains to be seen to what extent the existence of such 'non-negotiables' – if imposed by state negotiators – compromises the validity not only of the agreements already reached, but also of those that might occur in the future. The ILUA example is an agreement between the state and Indigenous Peoples who have been deemed by the court to hold native title rights; these agreements are entirely domestic.[53]

I repeat again, by what lawful authority has the state of Australia come into existence? The question remains open. It is illogical to assume that because there were no juridical relations between First Nations and colonial powers that the situation should result in a differentiation between their respective

rights.[54] The question remains relevant because while the theory of terra nullius was in part rejected in *Mabo (No. 2)*, it remains embedded as a legitimating principle for the foundation of the state and in the native title conferred by the state.[55] The underlying principle of the foundation of Australian law remains unchallenged, even though Article 2.4 of the Charter of the United Nations provides that contemporary international law must reject rights that are secured via unethical means.[56]

The burden of proving our continuing sovereignty and that a colonial state is illegitimate is currently shouldered by Indigenous Peoples. Rightfully, however, the state should carry the burden of proof and be called upon to prove *by what lawful authority {it has} come into existence*. Martínez held the view that:

> it must be presumed until proven otherwise that Indigenous Peoples continue to enjoy such status. Consequently, the burden to prove otherwise falls on the party challenging their status as nations. In any possible adjudication of such an important issue, due attention should be given to an evaluation of the merits of the juridical rationale advanced to support the argument that the Indigenous people in question have somehow lost their original status.[57]

Representation

Issues of representation are complex. Nungas who allow themselves to be positioned in a place of 'leadership' are in danger of being perceived by the state as having a mandate to enter into agreements on behalf of all the people; this approach contradicts First Nations consensus models and lawfullness. The question of who might represent global First Nations Peoples arose during the UN General Assembly adoption of the UNDRIP in 2007. When the declaration was adopted by the General Assembly only a small number of Indigenous individuals were present and they claimed to be representative of the entire world's Indigenous Peoples. And on those rare occasions when there have been talks of a 'treaty', issues around representation have also arisen within Australia.

Who are the parties?

There can be no equality of the parties while the colonial project remains in place, but as I have discussed above, the identities have become elusive. The colonial project was commenced by imperial Britain, and our claims would have to be against the original aggressor. We never entered into any arrangement with Britain, and we have never entered into an agreement that would enable the Australian state to stand in the position of the original aggressor.

So what is the truth of the position between First Nations and the Australian state? While imperial Britain and the Australian state might argue that they formalised decolonisation beginning with the formation of the Australian Commonwealth in 1901, there has been no dialogue between First Nations and Britain regarding their original act of aggression, which went on to become their unlawful foundation of Indigenous Australia. It was a foundation unilaterally deemed lawful within their own colonialist horizon. What was missing was the First Nations' position.

Equality of the parties

No discussion can begin until the true parties, which are the hundreds of First Nations of Indigenous Australia and imperial Britain, are in the conversation. Then the question of equal power between the parties has to be settled. The question of the equality of the parties cannot be settled while one of the parties dictates the perimeters of the discourse. There can be no possibility of equality where the militarily more powerful party dictates the framework of the discussion and disables any possibility for the less powerful – the First Nations – to deploy our own way of being into those discussions. The exclusion of First Nations' ways of being is to again make impossible equality between the parties. The prevailing assumptions that Indigenous Peoples are still assimilating into the colonial paradigm and that the future still lies in the ongoing colonised–colonial settler relationships of power makes equality between the parties impossible. The future of a treaty in Australia must lie in the possibility of remedying those old colonial relationships of subjugation and domination; it may be facilitated in a new international way of being, which centres First Nations' ways of being. Further elaborating on principles of equality, Isabelle Schulte-Tenckhoff writes that the:

> intelligible rationale for treaty-making is what Jorg Fisch calls negative equality. Peoples previously unknown to each other, he writes, can only envisage a form of exchange that entails identical rights and obligations for all, with relations firmly confined to the realm of external sovereignty. In this sense, controversy arises from the fact that non-Indigenous treaty parties at one point shifted from that rationale and abandoned reciprocity as a fundamental principle of law.[58]

Michael Detmold argued that in contract law, equality of the parties is not implied from the terms of the contract, but is implicit in the fact of making a contract. These 'fine ideas' have their origin as:

> creative understandings of contract itself, not inventions. The equality of the parties to a contract is the absolute essence of the thing. *There is no*

> *law of contract without it.* If the parties are not equal, the stronger imposes upon the other. To the extent that that obtains in a case there is simply no contract. Far from being invented, if this principle were not fundamental there would be no law of contract at all.[59]

The same principles should apply in treaty-making as in contract law. Without the equality of the parties there can be no treaty. In past negotiated arrangements between states and Indigenous Peoples, the states have imposed their own interpretations of the terms of the treaty. First Nations' concepts have been largely excluded from the process of interpretation of treaties. Moreover, colonising states have adopted the paradigm of domestication, interpreting treaties – originally represented as being between sovereign entities – as domestic arrangements, as the state party denies any equality of international personality to Indigenous Peoples. The dilemma surrounding treaties in North America is well represented by Ward Churchill's critique:

> Indigenous peoples were sovereign enough to enter into treaties with the purpose of ceding legal title to their lands and territories, but were not sovereign enough to continue to function as independent political entities. Nor, for that matter, were they sovereign enough to protect the remnants of their sovereignty against incursions of the state.[60]

We need to ask the question: what is the point of upholding a treaty process if the equality of the frameworks and parties going forward is not acknowledged? If these basic principles are ignored, then there is no potential for any Indigenous futures beyond subjugation and the assimilation into the body of the state, because the state would continue to do what it has throughout its history: subjugate any 'agreement' to its power.

Isobelle Schulte-Tenckhoff argues that there are usually different desires existing between the treaty parties. The Indigenous people enter into an agreement based on the understanding that the principle of reciprocity applies, 'while states . . . utilize treaties initially to gain territorial or other advantages and ultimately to achieve hegemony'.[61]

A self-government agreement between Canada and the Inuit became one of the largest land and sea claims 'settled' in Canada and is known as a comprehensive claims agreement. On 1 April 1999 the new territory of Nunavut, in Canada's eastern Arctic region was 'created'. Nunavut was previously a part of Canada's Northwest Territories. In 1999 the Inuit comprised 85 per cent of Nunavut's 27,000 residents. Negotiations for the agreement began in the 1970s and in 1992, 54 per cent of voters in the Canadian Northwest Territories accepted a proposal to divide the territory into an eastern section, Nunavut, and a Western section, Denedeh. The land division was supported by the Inuit proponents of Nunavut, but opposed by the Dene nation. The Canadian comprehensive claims agreement concerned

lands over which no previous treaty or agreement had been made and the state had deemed that Aboriginal title had not been extinguished.

Provisions in the comprehensive claims agreement allowing extinguishment are found in Article 2.8.1 which agreed to (a) cede, release and surrender to Her Majesty in Right of Canada, all their Aboriginal claims, rights, title and interests, if any, in and to lands and waters anywhere within Canada and adjacent offshore areas within the sovereignty or jurisdiction of Canada, and (b) agree, on their behalf, and on behalf of their heirs, descendants and successors not to assert any cause of action, action for a declaration, claim or demand of whatever kind or nature, which they ever had, now have or may hereafter have against Her Majesty in Right of Canada or any province, the government of any territory or any person based on any Aboriginal claims, rights, title or interests in and to lands and waters described in (a). Negotiations with the Inuit focused on both the land claims settlement and the creation of Nunavut.

In Australia, the Nunavut agreement was one of a number of models proposed for future directions, particularly in the Northern Territory of Australia.[62] However, the rights claimed by the Inuit under the agreement are primarily administrative, not legislative. This means that the approval of a Canadian federal government minister is still required for most major decisions, so ultimate authority still lies with the federal government, not with the Inuit. The boards of management and even the territorial elections are not intended to be matters for Inuit self-determination, but rather for lower administrative arms of the Canadian government – so 'self-government' rests on the presumption that Canadian national values, not Indigenous ones, determine the rules of the game. Moreover, the Nunavut territorial government will remain an Inuit government only while the Inuit remain the majority. When the population shifts, and if and when the Inuit become the minority, they will have negotiated away their First Nations sovereignty, rights to land for some money (while it lasted) and the control (while they remain a majority) over a Canadian modelled government.[63] This position has become secured as the government of Nunavut becomes increasingly populated by non-Inuit from the south – mostly Canadian government employees who have been seconded to the territories of the Inuit, a move that is likely to ensure that the laws of the Nunavut mirror those of the Canadian government in the south. The Inuit on the ground are not happy even though they are still the majority. At the commencement of the Nunavut arrangements Mr Okalik, the newly appointed Inuit premier, conceded that the time could come when Inuit were no longer the majority and a non-Inuit could be elected premier. 'That would be up to the people,' he said. 'We're a democracy like anywhere else.'[64] But what is the future of the Inuit when that day arrives, when they are no longer a majority? How will their democracy work for them then? Currently, the Nunavut system of governance is becoming a mirror of the south – another ugly governance model. That equates to the peoples losing

control of their lands. The mining industry is expanding and the land is impacted by global warming; the suicide rate among the youth is the highest in the world. One might ask why this is occurring. Some have responded that this is a result of people giving up their relationship with the land and the next generation are suffering.[65]

I would argue that for 'proper' dialogue to begin, we need to begin again, from the time Cook set foot upon our shores. Cook needs to walk back in time, holding the flag in his hand, row back to his ship, and wait there, wait there for the old people to sing him a welcoming to ruwe. Then he needs to sit down and wait for the smoking and the cleansing of his spirit. Then the teaching could begin. Cook could learn the protocols for him to observe in his coming to our ruwe. He could learn that there was already law, and that it was in songs and the land. For him to come into that place, he would have to learn the 'proper' way to come to ruwe.

So the songs would be sung, from the shores of this land now called Australia. The offspring of all the boat-peoples who reside here now and the Nungas, like those in the Waargle story who left the law, need to go, sit down and relearn how to come into ruwe, its song and ceremony. That is the law, which has been violated for more than two centuries. Its breach needs to be mended, so that we can begin to talk, for the first time, because we have never sat down and talked about the important business of ruwe and its songs. We need to sing for this time when Cook returns to his ship and comes to ruwe in this new way. Cook and all of his mob need to come and say sorry, compensate for the muldarbi they carried with them and learn, from the old people, how to smoke the muldarbi from our shores.

The lawful relationship of this old ruwe is the one it has always been. The laws are alive in the land and the spirit of the song still walks the land. This way is the basis of any future relationship. It's a different and more complex process from that which the Australian government and some 'Aboriginal leaders' continue to propose. They propose a process that would (at the best) involve the gathering of 'representative' Aboriginal bodies and their 'key Aboriginal negotiators' to meet with heads of the political system of the coloniser with its factotums waiting in the wings to whip the result of negotiations through their colonial parliamentary system – white male rules for a white male legal system. This is what they did with 'native title' and other genocidal legislation. The Nunga process is different. It is engaged in the law of ruwe or the peace and shared love for ruwe and song. A lawful treaty process requires that it come to the earth of our mother in the proper Nunga way, a way, which enters the land in reverence and respect.

The law of this old ruwe, of creation, is the only lawful basis for a treaty between the holders of law and those who share this ruwe. We can agree to co-exist in the laws of ruwe and part of the agreement would bar trespass on to the land of others, stealing and damaging its natural resources.

Are people who have unlawfully invaded and occupied our ruwe for more than two centuries ready for this process? Are they ready to unknow nakedness, to discard the clothing of the muldarbi and walk gently across the ruwe in a way that is proper? We cannot enter into a treaty to negotiate the plunder of ruwe and our natural world. We have an obligation and a mandate to care for and nurture all things for the benefit of future generations still coming. We have an obligation to pass on country to the future. We cannot enter agreements that would destroy life and ruwe. Proposals to develop nuclear waste dumps, or to construct mines that will pollute the natural world, are the artefacts of muldarbi deals. [66]

Our sovereignty and right to self-determination have never been surrendered or lost; they cannot be extinguished. Our sovereign laws were birthed by the creative processes of the natural world and given to us to care for country and to pass on its teachings. The Australian state cannot extinguish them. It comes to the table to negotiate but it always brings its muldarbi constructions. The First Nations Peoples cannot treat with the muldarbi. What would be the purpose, what would be the result? It could only produce a muldarbi deal.

In talking of agreements or treaties, the issue of representation arises; I have discussed it already. Who represents the old people who are gone and yet still with us, and who represents the children still coming? How is the natural world represented? Back in 1993, the black men in suits – the 'Aboriginal leaders' – were presented as the chosen ones with a mandate, to negotiate on behalf of all of Indigenous Australia's peoples and they ushered the coming into being of the *Native Title Act 1993* (Cth). Similar processes, flawed, compromised and full of trouble, continue as these men in suits negotiate and assert the mandates of First Nations Peoples as they sit at the colonisers' tables and enter into native title agreements and, again begin to talk of a treaty.

Haida elder Lavina White said the following about treaty negotiations:

> We had no treaties with Canada because we cannot treaty our lands away. And the only way they'll treaty with us is not a friendship treaty or a peace treaty, but to take away our rights on our resources and to be the people that are governing us. And we can't do that. Our Creator gave us instructions on the contrary to that. And so we cannot treaty with Canada. If our people treaty with Canada, then we cannot go to any court in the world to try and redeem our sovereignty or our lands. And so I do not look forward to any kind of a treaty except . . . friendship and peace between the natives. And I understand from many of the elders in some of the ones that had treaties, that they weren't treaties to give away their lands. They didn't cede their lands, they didn't cede their sovereignty. They were treaties of friendship. Our philosophy as most of us know, most of the nations have the same philosophy, the highest philosophy we have is of sharing. And that's how we lost control of our lands.[67]

'As long as the sun shines, rises in the east and sets in the west, as long as the water runs downhill, as long as the grass grows green, our relationship will continue.' These words are repeated in many of the different treaties throughout Great Turtle Island, otherwise known as the 'Americas'. They hold the key to understanding the Indigenous way of seeing the world and the understandings the people had when they entered into agreements with the colonising powers. But in regions such as Great Turtle Island and Aotearoa, where treaties have been negotiated between the First Nations and colonial settler states, we find that the states are busy redefining the treaty terms negotiated and replacing the international character of the treaties with a 'domestic interpretation'.[68]

A 'Declaration of Peace' made on 27 January 1999 at the Aboriginal Tent Embassy in Canberra called on the Australian government to honour international laws and standards by commencing a genuine process of decolonisation of our Indigenous territories. It also called on the government to recognise the sovereignty of the First Nations Peoples, to return our stolen lands, to end the crimes of genocide perpetrated upon us, and to apologise, repatriate and compensate for the crimes of colonialism.[69] Prime Minister Howard's cabinet answered the Aboriginal Tent Embassy's Declaration for Peace by instructing the Australian Federal Police and Australian Protective Services to move the 27-year-old Tent Embassy from the grounds of Old Parliament House on 15 February 1999. On 18 February 1999, members of the Tent Embassy met with the Governor-General of Australia, requesting that he use his constitutional powers to dismiss the unlawful government of Australia and to intervene in the government's attempt to dismantle the Tent Embassy. The Governor-General advised the delegation that he could not act.

A call for First Nations unity was made by Haida elder Lavina White, recommending that the colonial state Canada and imperial Britain be charged with theft and genocide. She added that every colonised country should join forces and save the natural world. The United Nations will not do it – they are the same people who colonised us in the first place.[70]

Prophesy and obligations to the earth

When we begin to peel away the layers of colonialism we see the land before us and we hear the elders. The elders have been speaking forever of the changes that have been and of the changes to come. Now the changing climate is upon us. In the past there have been prophesies that warned of a time when the people would be confused, and the old and the young would die first. The prophecies said that the trees would die from the tops down and the world would be in danger. The story of the Frog tells of this time, a time when there will be no water left to share. The Waargle also tells of

a time when law is no more, when the will to live in law has gone from the majority of humanity.

In recent times science has come to realise the significance of Indigenous knowledge and 'native' observations, and has come to greater understandings of the connectedness between peoples, the earth and the further universe. The old people respected and acknowledged their relationship and obligations to the mother earth. While the world has changed before and continues to change, the spirit that lives in all things remains constant. The spirit survives beyond genocide. Our spiritual connections to our laws sustain us. The life force in the spirit of the law is like the five ancestors of the Waargle, who continued to affirm the law when all other peoples had abandoned and violated it. It is strength of spirit, which enables processes to continue when all else in the physical world appears to be falling apart. The time of the Waargle is with us again today, a time when most of humanity seems to have abandoned the law. Indigenous peoples are a global minority but are like the five spirits in the Waargle, still carrying the law.

The Sun Woman illuminates the future and the future is a return to beginnings as though we had never left them. Our songs and stories gave us knowledge for survival, to live a good life in harmony with all things. The song law passed from one generation to the next and was taken on by each generation as an obligation and commitment to the spirit ancestors. The original agreements entered into are still alive, as are the obligations to honour them.

We have an onerous obligation to keep the ruwe as it was at the first sunrise. When Cook landed he saw the land as it was at the first sunrise. Had he listened to the songs he may have begun to undress himself, so that he could properly hear what that song was singing to him. Cook may have learned to become a lover of his own nakedness and become like us, a passionate lover of the ruwe. But that day ended and darkness descended. As with all cycles, the light re-emerges and each morning the magpies who lifted the darkness with sticks to bring on the light of the first day sing each new day into being. Carers for country will continue the business of caring for country, for that is the law.

We know that the current international mechanisms and processes do not, cannot and will not accommodate the native; those very same processes were developed on the bones of our ancestors' lives and lands. We need to begin again to create a new international way forward. We need to do more than to try to fit into a world order, which does not accommodate our Indigenous ways of being. Our ways are oppositional to the current hegemony. If we continue to try to work along the trajectory of hegemonic power it will not work for us; we know that it is completely against First Nations' ways of being. If we play the same kinds of power games that have oppressed us, then we will get caught up and become captives of the colonial power

matrix. We have got to step outside of that and find a new way of being, an old way of being, outside that of colonial power. We have to sit down on country and let the proper voices for country sing and speak again.

In beginning again we don't need to reinvent the wheel or create anew; we come from ancient models that have sustained First Nations since time immemorial. We have ancient models that pre-exist the colonisation of our lands and lives. We don't really need to look anywhere else but at ourselves; we need simply to re-emerge as First Nations Peoples.

Notes

1 I would argue First Nations once knew this place but for now it has become a dream that has no longer a place on earth, other than those places we are able to dream; see Jean-Luc Nancy, 'In Place of Utopia' Patricia Vieira and Michael Marder (eds), *Existential Utopia New Perspectives on Utopian Thought* (Continuum, 2012).
2 Evidence to House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, *Inquiry into the Reeves Report on the Aboriginal Land Rights (Northern Territory) Act*, Kalkarindji, 13 April 1999, 294 (Banjo).
3 Evidence to First Nations International Court of Justice, *Transcript* [1996] Vol. 11, 72 (Lavina White).
4 Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press, 2008), 178.
5 Miguel Alfonso Martínez, *Final Report of the Study on Treaties, Agreements and other Constructive Arrangements between States and Indigenous Populations* (E/CN4/Sub.2/1999/20 (22 June 1999), para. 255.
6 *Kruger* v *Commonwealth* (1997) 190 CLR 1.
7 Elizabeth A. Povinelli, *The Cunning of Recognition, Indigenous Alterities and the Making of Australian Multiculturalism* (Duke University Press, 2002), 268.
8 In the face of international criticism of the imperialism and racism of the NT Intervention by UN High Commissioner for Human Rights Navi Pilay, John Howard continued to defend the actions of his then government. See Yuko Narashima and Lindsay Murdoch, 'It was Right to Step In, Howard Insists', *Sydney Morning Herald*, 21 May 2011. See also Lindsay Murdoch, 'Intervention Facing Criticism', *The Age* (Melbourne), 23 May 2011.
9 It is suggested that the term 'issues' has been used instead of 'peoples' or even 'populations', to ensure the mainstreaming, dilution and erosion of an 'indigenous rights' discourse; see Isabelle Schulte-Tenckhoff and Adil Hasan Kahn, 'The Permanent Quest for a Mandate: Assessing the UN Permanent Forum on Indigenous Issues' (2011) 20 *Griffith Law Review* 674.
10 UN Economic and Social Council resolution 2000/22, (28 July 2000).
11 UN General Assembly Resolution 61/295, 13 September 2007.
12 Schulte-Tenckhoff and Kahn, above, n. 9, 682–684.
13 See ibid., 692–694 for an example of UNPFII's collaboration with state narratives of 'progress'. For the UNPFII's response to the resistance of Indigenous Peoples and the ongoing struggle to be heard on concerns regarding the United Nations Collaborative Programme on Reducing Emissions from Deforestation and Forest Degradation in Developing Countries), see video *The May Revolt*, (Directed by Rebecca Sommer, Draft One News Reel, 2008), available at: www.youtube.com/watch?v=UtORVi7GybY&feature=player-embedded
14 Anghie, *Imperialism, Sovereignty and the Making of International Law*, above, n. 4.

15 Martínez, *Final Report of the Study on Treaties*, above, n. 5, para. 315; Schulte-Tenckhoff and Kahn, above, n. 9, 673–701.
16 Walter Mignolo, 'Decolonizing the Nation-State: Zionism in the Colonial Horizon of Modernity', in Gianni Vattimo and Michael Marder (eds), *Deconstructing Zionism: A Critique of Political Metaphysics* (Bloomsbury Academic, 2014), 71.
17 Frantz Fanon, *The Wretched of the Earth* (Harmondsworth, 1966).
18 Glen Coulthard, 'Subjects of Empire: Indigenous Peoples and the "Politics of Recognition" in Canada' (2007), 6, *Contemporary Political Theory*, 437, 439.
19 Mignolo, above, n. 16, 60; Mignolo is writing about the Zionist project, which could be translated to the colonial project, with the difference that the Zionist state was modelled on the modern European nation-state, while the colonial project grew up the nation-state.
20 Mignolo, above, n. 16, 67.
21 Mignolo, above, n. 16, 68.
22 Ibid., 72–73; see also Antony Anghie, 'Rethinking Sovereignty in International Law', (2009), 5, *Annual Review of Law and Social Science*, 291.
23 Athena Athanasiou and Judith Butler, *Dispossession: The Performative in the Political* (Polity Press, 2013), 6–7.
24 Anghie, *Imperialism, Sovereignty and the Making of International Law*, above, n. 4, 317.
25 Ibid., 8.
26 *Promotion of a Democratic and Equitable International Order*, G A Res 67/175, 67th Sess (20 December 2012), established the study by the independent Expert Professor Alfred de Zayas, Professor de Zayas reported to the UN General Assembly on 28 October 2013.
27 UN General Assembly A/68/284, at its Sixty-eighth session, Item 69 (c), Promotion and protection of human rights: human rights situations and reports of special rapporteurs and representatives, *Promotion of a Democratic and Equitable International Order*, Recommendation 69, m and n.
28 Anghie, *Imperialism, Sovereignty and the Making of International Law*, above, n. 4, 180.
29 Ibid., 193.
30 Cited in Schulte-Tenckhoff, 'Re-assessing the Paradigm of Domestication: The Problematic of Indigenous Treaties' (1998), 4, *Review of Constitutional Studies* 239, 241; Jose Martínez Cobo, *Study of the Problem of Discrimination against Indigenous Populations*, Vol. V, 'Conclusions, Proposals and Recommendations', E/CN.4 Sub.2/1983/21/Add.8, paras 388–392.
31 Ibid., Miguel Alfonso Martínez was a member of the United Nations Working Group on Indigenous Peoples, and also the Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, and author of the *Study on Treaties, Agreements and Other Constructive Arrangements Between States and Indigenous Populations, Preliminary Report*, 1991 UN Doc E/CN.4/Sub.2/1991/33; further treaty reports are: Miguel Alfonso Martínez, *First Progress Report*, UN Doc E/CN.4/Sub.2/1992/32; Miguel Alfonso Martínez, *Study on Treaties, Agreements and Other Constructive Arrangements Between States and Indigenous Populations: Second Progress Report* UN Doc E/CN.4/Sub.2/1995/27 (31 July 1995); Miguel Alfonso Martínez, *Study on Treaties, Agreements and Other Constructive Arrangements Between States and Indigenous Populations: Third Progress Report*, UN docE/CN./Sub.2/1996/23.
32 Cited in Schulte-Tenckhoff, above, n. 30, 241.
33 Schulte-Tenckhoff, above, n. 30, 257.
34 Ibid., 260 and taken from Martínez, *First Progress Report* above, n. 31, para. 138, and *Second Progress Report*, above, n. 31, paras 130–133.
35 Martínez, *Final Report of the Study on Treaties*, above, n. 5, para. 111.
36 Ibid., para. 56, 57, 98.

37 Ibid., para 223.
38 Ibid., para, 62.
39 Ibid., para. 47.
40 Ibid., para. 50, 55.
41 Evidence to the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, *Inquiry into the Reeves Report on the Aboriginal land Rights (Northern Territory) Act*, 13 April 1999, Kalkarindji, 295 (Lily Hargraves).
42 See Schulte-Tenckhoff, above, n. 30, 244–245 for a discussion on how primitivist assumptions have dominated the discourse and interpretation of treaties negotiated between colonial governments and Indigenous Peoples.
43 Anghie, *Imperialism, Sovereignty and the Making of International Law*, above, n. 4, 67.
44 Ibid., 71.
45 Ibid., para. 105.
46 *Australian Constitution 1901* (Cth), s. 125 and s. 51, (xxvi). This section originally gave parliament power to make laws for 'the people of any race, other than the aboriginal race in any State, for whom it is deemed necessary to make special laws'. The words 'other than the aboriginal race' were deleted in the 1967 referendum. The original intention of the drafters of the Constitution was to empower parliament to make discriminatory laws against migrant labour such as Chinese workers. For an analysis of s. 52 (xxvi) in respect of the Queensland government's attempt to use the power to racially discriminate against Aboriginal people, see *Koowarta* v *Bjelke-Petersen* (1982) 153 CLR 168.
47 *Native Title Act 1993* (Cth), Division B, Subdivision 3, Indigenous Land Use Agreements.
48 *Native Title Act 1993* (Cth), s. 24AA (3) provides that future acts are validated if the parties consent to it being done. Often ILUAs result in the validation of non-Indigenous title, and the extinguishment of native title.
49 Martínez, *Final Report of the Study on Treaties*, above, n. 5, para. 302.
50 Anghie, *Imperialism, Sovereignty and the Making of International Law*, above, n. 4, 105.
51 Ibid., para. 194–195, para. 267.
52 Ibid., para 284.
53 Ibid para: 187, para 192.
54 Ibid., para. 285.
55 *Mabo No. 2* [1992] 175 C.L.R. 1, 30.
56 Martínez, *Final Report of the Study on Treaties*, above, n. 5, para. 287.
57 Ibid., para. 288.
58 Schulte-Tenckhoff, above, n. 30, 267.
59 Michael Detmold,'The New Constitutional Law' (1994) 16 *Sydney Law Review* 228, 236.
60 Cited in Schulte-Tenckhoff, 'Re-assessing the Paradigm of Domestication', above, n. 39, 254, from Ward Churchill and G. T. Morris, 'Key Indian Laws and Cases' in M. A. Jaimes (ed.), *The State of Native America* (South End Press, 1992), 18.
61 Schulte-Tenckhoff, 'Re-assessing the Paradigm of Domestication', above, n. 39, 264.
62 J. Peter Jull, *An Aboriginal Northern Territory: Creating Canada's Nunavut* (Discussion Paper No. 9, North Australia Research Unit, 1992).
63 See Joan Policastri, 'Nunavut: An experiment in Self-Government' (1992), 2, *Fourth World Bulletin* for discussion on the issues arising out of the Nunavut agreement.
64 Reported by Anthony Depalma, 'One Man's Tale is a Symbol of Hope for His People', *The New York Times*, Monday, 5 April 1999.
65 Personal communication, Sharon Venne, 2014.
66 Native title ILUAs have been used – for example, the Beverly Uranium Mine in mid north of South Australia, the Kistler Space Base at Woomera also in the mid north

of South Australia and the expansion to the Roxby Downs uranium mine. Often consultants like Mick Dodson have been involved in agreements between the multinational corporation Kistler and the native title holders of the lands at Woomera for the Kistler space base.

67 *FNICJ Transcript*, 104–107 (Lavina White), above, n. 3.

68 See Schulte Tenckhoff, above, n. 30 for further discussion on state attempts to erode and dismantle treaty agreements.

69 Helen McCabe, 'Secret Plan to Close Aboriginal Tent Embassy', *Daily Telegraph* (Sydney), 25 January 1999.

> The Federal Government has enacted a 68-year-old law, a 1932 trespass ordinance late last year for the "parliamentary triangle," the law was introduced by the Territories Minister Ian Macdonald. The area that the law applies to includes the lawns of Old Parliament House where the tent embassy has been camped for 27 years. Government sources said talk of the plan had been kept confidential because of fears of violent demonstrations similar to those in 1972 when the then Liberal Government moved to tear down the embassy.

70 *FNICJ Transcript*, 69, 78–79 (Lavina White), above, n. 3.

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