

CHAPTER 1

DISPOSSESSION AND COLONISATION

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INTRODUCTION

A decade from the time of writing, two practically and symbolically significant events took place with respect to Aboriginal and Torres Strait Islander peoples' legal relations with the colonial state. The first was in June 2007, when the Australian federal government announced the Northern Territory Intervention under the Howard Liberal government. This program of law reform required suspension of the *Race Discrimination Act 1975* (Cth) and the assumption, initially by the Australian Defence Force, of control over 73 Aboriginal communities in the Northern Territory. It was a program which was premised on the idea that Aboriginal peoples' citizenship and human rights could be suspended until they conformed to a western notion of responsible behaviour—a theme that, as is demonstrated across this chapter, has a long lineage in Australian settler–state relations. (The NT Intervention is discussed further in a number of chapters but see in particular Chapter 3). In September 2007 the Draft Declaration on the Rights of Indigenous Peoples was voted upon and overwhelmingly adopted by 143 countries at the General Assembly of the United Nations. Australia was one of four countries to vote against adoption of the Declaration. The Declaration affirms the rights of Indigenous peoples to their culture, land, natural resources and self-government. While the Declaration was belatedly adopted by Australia in 2009, these two events are reflective of a broader contest between and shift from liberal to neoliberal values. With this shift there is a decline in the moral consensus with

respect to, and persuasiveness of, human rights values. There is also a greater focus on 'personal responsibility' rather than systemic, structural and historical factors as an explanation for discrimination and inequality. This shift in values creates a new justification for, and iteration of, a much longer contest between colonial domination and Indigenous Australian peoples' claims to their country, communities, families and culture. The contest between these two opposing positions is discussed across this book.

But as Ellison has guided us, to understand this story we need to go back to the beginning (Ellison 1952, p. 9). The beginning takes us to history and mythology, the events and their retelling in stories, artwork, documents, monuments and national holidays that are foundational to Australia's past, present and future. These stories are contested in our national imagination and the conflict is evident in the legal histories of Australia's colonisation. This is a contest about might and its relation to power and authority. It is a contest about morality and justice, about greed and inequality, about pluralism and reconciliation. The history wars, that is, contests about how Australia was colonised, are highly emotional battles (Rowley 1970; Attwood 1996; Markus 1994; Reynolds 1981; Read 1992; Windshuttle 1994; Maynard 2007; Nugent 2009; Ryan 2012). This is not surprising. They are battles about identity and legitimacy. They are battles about a past which is difficult to reconcile with the basic tenets of human rights which have been widely accepted by the international community post the Second World War but which are challenged by neoliberal values. Neoliberal values preference a narrative of individuals creating their own fate, on a blank palette, through work and assumption of personal responsibility. Yet, we cannot understand ourselves without understanding our relations to others across time. At a national level, we cannot understand Australia's constitutional foundations without addressing the colonial relationship between the state and the original occupiers.

The understanding that imperialism offends foundational international human rights principles of self-determination is evident in UN resolutions and support for processes of decolonisation, in particular with respect to the European colonies which had majority non-European populations (General Assembly Resolution 1514 (xv), 14 December 1960). These processes, however, left a gaping moral and practical hole: what of Indigenous peoples who form a minority in post-colonial democracies? Over the last three decades the UN has attempted to address the position of Indigenous peoples with the recognition of Indigenous peoples' rights to land, culture and a distinct identity in a number of treaties including the International Covenant on Civil and Political Rights, the International Convention on the Elimination of All Forms of Discrimination and the Convention on the Rights of the Child (Anaya 2004). The Declaration of Indigenous Peoples Rights is the most comprehensive international statement with respect to Indigenous peoples' rights. (See Chapter 13 for a discussion of contemporary domestic and international human rights issues with respect to self-determination.) Australia has lagged behind comparable democracies such as Canada, New Zealand and the US in recognising Indigenous peoples' rights. It continues to be slow and ambivalent in its willingness to recognise the broader political and legal implications of prior Indigenous occupation. The recognition of native title in 1992 exposed, but left unresolved, issues with the legitimacy of Australia's constitutional foundations. These issues are discussed in this chapter with respect to the dispossession of Indigenous peoples by law and war in the late 19th and 20th centuries and some reference is

made to cases which contest Indigenous jurisdiction in the 21st century. (*Mabo v Queensland (No 2)*) and native title are discussed in Chapter 9.)

Captain Cook is an iconic symbol of Australia's foundation as a nation. The contest between competing understandings of Australia's identity and legitimacy are evident in competing versions of Captain Cook's story (Beaglehole 1955; Healy 1997; Rose 1984; Nugent 2008). Accounts of Cook may be located at times and in places which Cook never literally visited but which engage allegorically with truths about colonisation. Symbolically, the iconography of Captain Cook and the arrival of the First Fleet at Botany Bay on 26 January 1788 converge in many cultural and popular accounts of these events. Aboriginal artists including Julie Gough, Daniel Boyd and Jason Wing and colonial artists such as E. Phillip Fox recount different perspectives on the Cook narrative, explorers and 'settlement'. They use artistic licence to embellish these events with normative meaning which legitimates a moral lesson about Australia's past. Julie Gough's work engages extensively with unresolved histories, memory, place and race, often reclaiming colonial spaces with her experience as a Trawlwoolway woman from what is currently called Tasmania. One of her early works, 'The Whispering Sand Ebb' (1998), explores the erasure and presence of memory through the installation of 16 life-size portraits of British colonists in the tidal flats of Eaglehawk Nest, southern Tasmania. Like many of the Indigenous people whose lives these colonial authorities degraded through child, land and cultural theft, the colonists depicted in her work are left anonymous. The figures submerged and re-emerged with the ebb and flow of the tide, presenting haunting images which carry hidden memories into an unresolved present. Other works address Captain Cook more directly. Both Daniel Boyd and Jason Wing represent Captain Cook as a pirate and a criminal. Wing's bronze statue of Captain Cook wearing a black balaclava, entitled 'Australia was Stolen by Armed Robbery', won the Parliament of New South Wales Aboriginal Art Prize in 2012. Daniel Boyd's 'We Call Them Pirates Out Here' appropriates the famous colonial painting of the 'birth' of Australia by Phillip E. Fox, 'Landing of Captain Cook at Botany Bay', with irony and humour. As Maria Nugent points out, in the painting by E. Phillip Fox Cook is signalling to his men, who are pointing rifles at two Indigenous men in the distance, to hold their fire. She notes that this is a 'flourish which the artist appears to have added because it has no basis in the historical records' (Nugent 2008, p. 469). Within Boyd's painting Cook is presented as a pirate, wearing an eye-patch and claiming possession of Australia with a skull and cross-bone Union Jack. Wing's and Boyd's art challenges the memorialisation of events which have caused great harm to their culture and communities. Memorials, monuments and days of commemoration reflect public acknowledgment of people and events. In 2017 Indigenous and non-Indigenous advocates campaigned to change the date for celebration of Australia Day from 26 January, which marks a date of mourning and loss for many Indigenous Australians.

The stylised accordance of significance to Australia's 'foundational story' is also evident in the legal history of colonisation, aspects of which will be recounted below. The events of the past and the principles of justice and legitimacy, which they either support or undermine, are of ongoing material significance in terms of the current experiences of Indigenous Australians as well as in terms of the moral legitimacy of the nation. This history is crucial to the contemporary relationship which Indigenous peoples have with the law in all spheres of life. Contemporary

legacies of the past, and how they impact on Indigenous peoples' relationship with the law, are discussed in the subsequent chapters.

DISCUSSION QUESTIONS

- 26 January marks the anniversary of the arrival of the First Fleet at Port Jackson and the raising of the British flag by Governor Phillip. Discuss how the anniversary of this event could have different meanings for contemporary Australian communities.
 - Research and discuss Indigenous and non-Indigenous stories with respect to Captain Cook's landing at Botany Bay.
 - Research Indigenous and non-Indigenous monuments and memorials and discuss the role they play in creating or supporting accounts of Australia's legal history.
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DISPOSSESSION POST MABO

Justice Brennan claimed in *Mabo v Queensland (No 2)* (1992) 175 CLR 1 that the common law could not be complicit in the violent and unjust dispossession of Aboriginal and Torres Strait Islander peoples. This was one reason offered for recognising native title and purporting to end the era of terra nullius. This claim is problematic for a number of reasons. The *Mabo* decision, while bold in descriptors of past wrong, is timid and evasive in its exploration of the implications of recognition of prior ownership by Indigenous peoples. Most troublesome is its failure to address the implications of its own recognition of an existing system of laws within Aboriginal and Torres Strait Islander communities. How can Aboriginal and Torres Strait Islander peoples' laws be acknowledged for the purpose of recognising native title while simultaneously denied for all other purposes? How can the common law take the moral high ground with its recognition of prior ownership while leaving this title vulnerable to extinguishment by governments? (For a discussion of native title see Chapter 9.) Although the recognition of native title had not been challenged in the High Court before *Mabo (No 2)* in 1992, it would be disingenuous to suggest that the common law was not implicated in the regulation of Aboriginal and Torres Strait Islander peoples in a way that was fundamental to their dispossession. Indigenous peoples have had the law applied to them in discriminatory ways for as long as English law has operated in Australian colonies. The status of Indigenous peoples was ambiguous at the time of colonisation and, as the early case law discussed below suggests, the legal characterisation of Indigenous peoples appears to be closely tied to the needs and capacities of the colonial powers.

LEGAL PROCESS OF DISPOSSESSION

In English law a legal distinction is made between the acquisition of territory and the acquisition of land. It is this distinction which enabled the High Court of Australia in *Mabo (No 2)* to recognise Indigenous peoples' right to native title without fundamentally reviewing the legitimacy with which Australia was colonised. While technically and legally this distinction could be made,

the recognition of Aboriginal and Torres Strait Islander peoples' original ownership of land inevitably leads to questions about the legitimacy of the colonisation of Australia which remain unanswered. If recognising native title addresses the myth of terra nullius with respect to title, what about the parallel presumptions about Indigenous Australians with respect to the acquisition of sovereignty? While the common law sustains a distinction between territorial sovereignty and the acquisition of land, this distinction is not part of Indigenous laws and social organisation.

At the time of colonisation, the method for acquisition of colonies was outlined in international and municipal English law. English law gave the Crown the prerogative to acquire new territories, and did not require the acquisition to be made in compliance with international law. For the purpose of English law, it is the intention of the Crown which is ascertained by its own acts and surrounding circumstances which determines whether sovereignty has been attained. Classification of how a territory has been colonised formally determines the law operating in a colony and the power of the Crown to legislate in the colony. In conquered or ceded territories, local law remained in place to the extent that it was not 'unconscionable' or incompatible with the acquired sovereignty. In these territories, the Crown had the power to make laws which were not incompatible with existing law until a representative legislative assembly was established. In settled colonies, which were classified as those areas which were uninhabited or virtually uninhabited, English law accompanied colonisation to the extent that it was suitable to the local circumstances (McNeil 1989, pp. 109–133).

These simple classifications with clear consequences did not have easy or obvious application in many colonial contexts, including Australia. As the discussion of case law below illustrates, a mix of 'customary' and English law was applied to Aboriginal and Torres Strait Islander peoples for at least the first 40 years of colonisation. The relationship between the common law and customary law still remains contested and ambiguous as is evident in the development of native title law, the controversy surrounding the revocation of customary law considerations in sentencing of criminal matters, and the development of alternative court and decision-making processes with respect to dispute resolution relevant to Indigenous peoples in the criminal justice and child welfare systems (see Chapters 3–7). While there was no single definition of what constituted an 'uninhabited' country, one of the clearest indicators used by colonial courts was the lack of an established system of law as understood by colonial courts. Lord Watson made the following assessment of New South Wales in *Cooper v Stuart*:

There is a great difference between the case of a colony acquired by conquest or cessation, in which there is an established system of law, and that of a Colony which consisted of a tract of territory practically unoccupied, without settled inhabitants or settled law, at the time when it was peacefully annexed to the British dominions. The Colony of New South Wales belongs to the latter class (*Cooper v Stuart* 1889, p. 291).

This decision was made on presumptions with respect to Aboriginal societies rather than evidence. The presumptions with respect to a lack of law and with respect to peaceful settlement were clearly wrong. The question of whether Indigenous law continued/s to operate once British sovereignty has been declared, while ambiguous in parts of the 19th century, has been categorically rejected by the High Court in contemporary cases both before and after *Mabo (No 2)*.

DISCUSSION QUESTIONS

- Should laws be based on a factual foundation or is the established and long-standing acceptance of a law sufficient to give it legitimacy?
 - What role do past or present moral values play in the legitimacy of current laws?
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CONTEXT OF COLONISATION

The disregard for Aboriginal and Torres Strait Islander peoples' occupation of Australia at the time of colonisation appears to be founded in a combination of expedience and racist philosophical and political ideas. Theories about race at the time of colonisation were both influenced by and contributed to colonial expansion. During the period of European exploration from the 16th century onwards, ideas about different races were developed to explain the different peoples who were encountered in the 'new world'. From the 1750s, racial theories ostensibly based on scientific evidence developed typologies which divided people into races. These typologies were developed with notions of 'civilised' and 'barbaric' races, forming a chain of human evolution. This chain of human evolution, which placed Europeans at the top of the hierarchy and Indigenous peoples in a state of nature, also influenced legal thinking. This is evident in the frequent reference to Aboriginal peoples as barbaric and uncivilised in the 19th-century cases discussed below.

It is likely that Cook and Banks believed that there were few Indigenous people along the coast and even fewer inland. Australia was colonised at a time when the ideas of John Locke influenced understandings of property ownership. Locke's ideas provided a useful justification for the imperial project which required dispossession of Indigenous peoples. Locke argued that if there was no sign of agriculture then the natives must still be living in a state of nature. This view coincided with the mid 18th-century writings of Sir William Blackstone in *Commentaries on the Laws of England*, which were influential in providing legal arguments to justify colonisation. Blackstone argued that there were two types of colonies: those that were 'desert and uncultivated' which were discovered and occupied by colonial powers, and those which were already cultivated and were gained through conquest or ceded by a treaty to the colonial power (Blackstone 1765). While Australia was colonised as a settled colony, as the cases discussed below illustrate, these categorisations did not fit neatly with experience on the ground. While Australia was classified as settled, in practical terms it was recognised that Aboriginal peoples had systems of laws which governed relations between them. More than half a century after colonisation, the application of the English criminal law between Aboriginal peoples, with respect to the most serious of criminal offences—murder—remained unsettled. The paucity of cases brought against Aboriginal peoples for crimes committed in the colony, in the first half-century, also evidences a more complex experience of race relations than the simple categorisation as a settled colony would suggest.

CONTESTED SOVEREIGNTY

The idea of a single body of law applying to Indigenous and other Australians has been contested in Australian courts at least since 1828, starting with the case of *R v Ballard* as discussed below. The contemporary judiciary's obsession with a singular sovereignty seems to be founded in what could be considered to be an outdated understanding of nation states as operating almost exclusively autonomously. This defies the experience of globalisation, which has impacted on the autonomy of all nations. It defies the development of international law, which has attempted to balance the human rights of individuals with recognition of states' autonomy and independence since the Declaration of Human Rights. In more recent years, international human rights law has developed jurisprudence which attempts to balance not only individual but also collective minority and Indigenous peoples' rights with state rights. (For a discussion of the gradual response of international human rights jurisprudence to Indigenous peoples' claims to be recognised, see Chapter 13.) Australian courts have, however, been very slow to accept that recognising legal pluralism, in particular the distinct identity of Indigenous peoples, will not cause the sky to fall. It could in fact strengthen the Australian political system and provide greater, rather than less, certainty and security.

DISCUSSION QUESTION

- Discuss ways in which sovereignty for nation states is different in the 21st century compared with the 19th century.
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THE RULE OF LAW

The position of Aboriginal peoples, as British subjects, at the time of colonisation was at best ambiguous. The two basic tenets of the rule of law have been denied to Aboriginal and Torres Strait Islander people consistently from the time of colonisation. The first is that laws should not be exercised arbitrarily, and the second is that law should sustain a normative order and thereby contribute to the maintenance of law and order within communities. It is plain from the evidence of frontier violence, and the role of police in this violence, that laws were arbitrarily applied to Aboriginal communities. The ongoing arbitrary exercise of laws with respect to Aboriginal and Torres Strait Islander people is evident in discussion throughout this book, but it was particularly pronounced in the Protection era (see Chapter 2). The failure of the courts to recognise Aboriginal law and custom, as outlined below in cases from *R v Murrell* to *Wik Peoples v Queensland*, has denied Aboriginal peoples a fundamental way of maintaining social cohesion and reinforcing understood community standards of behaviour. Both these denials have ongoing repercussions for Indigenous peoples in terms of their right to equality and law and order within their communities.

Governor Phillip's original instructions from the Colonial Office in Britain distinguished Aboriginal people from 'our subjects' but also required Governor Phillip to provide legal protection to Aboriginal people. What ensued was a combination of attempts to manage and

pacify Aboriginal resistance to the taking of their land and violence against their communities. This took many forms, including military-style responses to resistance and turning a blind eye to vigilante responses to threats or incursions experienced by colonists from Aboriginal groups. The Royal Commission into Aboriginal Deaths in Custody reported on some of the responses to Aboriginal resistance which breached the rule of law:

In 1797, Governor Hunter declared Aboriginal people a danger and sent out armed parties to pacify them. By 1816 [Governor] Macquarie had made a martial law-style proclamation. He banned Aboriginal meetings, the carrying of weapons (including those used for hunting), abolished their own system of punishments and reconciliation, and entitled settlers and the military troops to use Force of arms; on armed Aboriginal people or unarmed groups of six or more (Johnston 1991).

Declarations and proclamations such as the one above suggest the difficulty colonial governments had in maintaining law and order, and their acute awareness of Indigenous resistance to dispossession from their lands. The extent to which officials and colonists recognised Indigenous peoples' prior ownership of their land and their resistance to being dispossessed is not reflected in legal doctrine. It was particularly detached in cases such as *Cooper v Stuart*, which was heard in the House of Lords and was therefore divorced from evidence or practical experience of the frontier.

DISCUSSION QUESTIONS

- Discuss arguments with respect to how recognition of Indigenous peoples' laws and customs could strengthen or abrogate the application of the rule of law.
 - Research and discuss the English common law's capacity for plurality in other British colonies.
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'QUIETENING' THE FRONTIER

Although colonial governments did not officially endorse violence against Aboriginal peoples, it was often condoned. British colonists arrived in Port Jackson ill-equipped to respond to the tasks they faced, including the levels of resistance from local Aboriginal tribes. Considerable evidence points to the intentional spread of smallpox leading to the 1789 outbreak in Port Jackson (Foley 2001a; Bennett 2009; Warren 2014). Smallpox had been deployed and documented as an imperial war strategy from at least the 1770s (Fenn 2000). Warren argues that British officials, rather than rogue convicts, were most likely to have spread smallpox as their 'only' means to defend the colony (Warren 2014). While the doctrine of settlement enabled the colonial government to grant Aboriginal land, at a practical level it usually had to be taken by force. The response of numerous governors to groups of Aboriginal people, including declarations of martial law and banning of Aboriginal meetings, is indicative of the level of fear generated among the colonists by conflict over land. Aboriginal people were often dispersed or 'quietened'

by native or general police. There are many accounts of killings and massacres by both civilians and police (Elder 1988; Evans et al. 1988; Reynolds 1989; Markus 1990; Richards 2008; Bottoms 2013; Ryan interactive map ongoing). Some, such as the Coniston massacre in the Northern Territory, took place in the 20th century (Markus 1990, pp. 135–136). While prosecution of violent offenders was rare, there are some examples, such as the trial and execution of the perpetrators of the Myall Creek massacre in 1838. As Bottoms demonstrates, in Queensland, despite documentation of excessive and brutal killings, there was largely a conspiracy of silence in response to this knowledge (Bottoms 2013).

CASE STUDY: THE MASSACRE AT WATERLOO CREEK

Detailed accounts of the extensive and indiscriminate killing by the New South Wales mounted police, under the command of Major James Nunn, at Waterloo Creek in 1838, reached Governor Gipps in Port Phillip by the time Nunn returned from his expedition. It is estimated that he and his troops killed 40–50 Aborigines in a single encounter at Waterloo Creek. Bruce Elder describes the aftermath of the massacre:

And then his men engaged in a typical frontier style mopping-up operation which meant that any Aborigine they came into contact with, they killed. After the massacre they hunted the survivors through the riverbank scrub, shooting and slashing at them. Those Aborigines who tried to swim to freedom were shot mid stream. The creek ran with blood. The women who had been at the camp were captured and forced to lead the troopers to other camps where similar massacres occurred. Nunn kept no record. The details and the scale remained imprecise ... Somewhere between the Gwydie and the Namoi, Nunn left the niceties of British law behind him ... he was lionised all the way back to Sydney (Elder 1988, p. 70).

While Nunn was not prosecuted, the perpetrators of the Myall Creek massacre, which occurred less than a year later, were brought to justice. Elder interprets this prosecution as a sign of Governor Gipps' intolerance of indiscriminate frontier violence. Others have argued that it was easier for Governor Gipps to prosecute the ex-convict stockmen who were responsible for the Myall Creek massacre than the mounted police who were responsible for more extensive killings. Historian David Neal points out the equivocal position faced by Governor Gipps with respect to addressing police violence on the frontier. The first problem he faced was that he depended on the mounted police to protect colonists. The second problem was that colonisation, by definition, required the quashing of resistance and protection of white land-holders. Neal suggests that the mix of law and power at the frontier 'was heavily weighted towards the latter and, in the case of Nunn, it clearly spilled over into lawlessness' (Neal 1991, p. 154).

The use of Aboriginal people as police and their involvement in violent attacks or assisting perpetrators has caused considerable controversy. The Queensland Mounted Police, who were