

RENOVATING THE ORTHODOX THEORY OF AUSTRALIAN TERRITORIAL SOVEREIGNTY

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Mabo v Queensland [No 2] opened for re-examination the fundamental principles underpinning the colonial foundations of Australia, stating the native title of Indigenous peoples could survive the assertions of territorial sovereignty by Great Britain. Finding their territories were 'sovereign'-less because they were 'backward peoples', an original, plenipotent sovereignty swept across the 3,000,000 square kilometres of 'New South Wales' on 7 February 1788, and across the balance of continental Australia in 1824 and 1829. This orthodox theory of sovereignty was unchallenged until Members of the Yorta Yorta Aboriginal Community v Victoria in 2002, where the High Court stressed the traditional laws and customs sourcing these native titles must be housed in pre-existing yet vital normative systems which likewise survived the assertions of sovereignty. Each native title determination thus acknowledges an Indigenous society whose laws and customs are sourced outside of the formal constitutional framework. The orthodox theory needs renovating in order to achieve a legally congruent and historically coherent framework.

I INTRODUCTION

In the 1992 watershed decision of *Mabo v Queensland [No 2]* ('*Mabo [No 2]*'),¹ the High Court of Australia recognised that a native title sourced in the laws and customs of Indigenous societies had survived the acquisition of sovereignty by the British Crown over New Holland/Australia. The decision was hailed as a 'judicial revolution',² generating an enormous volume of commentary, much of it critical.³

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1 (1992) 175 CLR 1 ('*Mabo [No 2]*'). There were three majority judgments: that of Brennan J, which was wholly concurred in by Mason CJ and McHugh J, that of Deane and Gaudron JJ, who wrote a joint judgment, and the sole judgment of Toohey J. Dawson J dissented.

2 One of the earliest publications examining the judgment was MA Stephenson and Suri Ratnapala (eds), *Mabo: A Judicial Revolution* (University of Queensland Press, 1993).

3 A former High Court justice has noted the 'forests of paper' consumed in commentary on the decision: Ian Callinan, 'The Queensland Contribution to the High Court' in Michael White and Aladin Rahemtulla (eds), *Queensland Judges on the High Court* (Supreme Court of Queensland Library, 2003) 200, 211.

In retrospect, few should have been surprised because allodial indigenous property rights had been generally recognised in the Imperial constitutional law from the earliest exposure to the New World and a 'native title' doctrine accepted in every other major common law jurisdiction.⁴ Australia was the exception to this general acceptance. The reasoning, as later noted, was 'strikingly conservative'⁵ and 'not a revolutionary doctrine'.⁶

The then-Australian Government, with a determination equal to the resistance to the judgment,⁷ negotiated the legislative response through both Houses of Parliament in late 1993. On the day the *Native Title Act 1993* (Cth) ('*NT Act*') passed into law, then-Prime Minister Keating told a packed news conference, 'a 200 year problem was put behind us'.⁸ The Prime Minister was plainly wrong. The recognition of native title remains an indissoluble part of the national landscape with commentators stating, a full decade after *Mabo [No 2]*, that native title was 'a deeply troubled work in progress'.⁹ Nearly 30 years on, and with some 450 positive determinations of native title made, hundreds of claims are still to be resolved. In reality, an ancient and perennial issue has only begun to be addressed and, as a consequence of the *Mabo [No 2]* decision, other long-dormant foundational issues were laid bare and exposed to the light for re-examination.¹⁰

Indeed, the clamour concerning this recognition of native title and its impact on the real property systems obscured the more profound aspects of *Mabo [No 2]* to all but a few commentators. Among those few, it was Professor Garth Nettheim who gave voice to the broader implications of the decision. Nettheim noted the *Mabo [No 2]* High Court 'presented the Common Law of Australia as leaving space for the co-existence of laws of indigenous peoples'.¹¹ The Australian jurisprudence had formally and irrevocably acknowledged other 'law' in the jural landscape which pre-dated the

4 Hocking stated, '[i]t has always been the accepted British practice to uphold any pre-existing native title in newly acquired colonies': Barbara Hocking, 'Native Land Rights' (Master of Laws Thesis, Monash University, 1971) 5.

5 Justice RG Atkinson, 'Commentary on "Sir Gerald Brennan: The Principled Judge"' in Michael White and Aladin Rahemtula (eds), *Queensland Judges on the High Court* (Supreme Court of Queensland Library, 2003) 123, 131.

6 Robert French, 'The Role of the High Court in the Recognition of Native Title' (2002) 30(2) *University of Western Australia Law Review* 129, 130.

7 '[T]here were many powerful interests including those in government who were discomforted and challenged by the decision': Atkinson (n 5) 131.

8 'Transcript of the Prime Minister, The Hon P J Keating, MP Press Conference, Parliament House' (Press Conference Transcript, Parliament of Australia, 21 December 1993).

9 Stuart Rintoul and Megan Saunders, 'It's Still Disputed Territory', *Mabo: Land Is Not Enough, The Weekend Australian* (Canberra, 1 June 2002) 24.

10 Interestingly, in the recent decision *Love v Commonwealth* (2020) 270 CLR 152 ('*Love/Thoms*'), Gordon J stated at 281 [364]:

[n]ative title is one legal consequence flowing from common law recognition of the connection between Aboriginal Australians and the land and waters that now make up Australia. That Aboriginal Australians are not 'aliens' within the meaning of that constitutional term in s 51(xix) is another.

See also Daniel Lavery, 'Judicial Distancing in the High Court: *Love/Thoms v Commonwealth*' (2020) 26 *James Cook University Law Review* 159.

11 Garth Nettheim, 'Mabo and Legal Pluralism: The Australian Aboriginal Justice Experience' in KM Hazlehurst (ed), *Legal Pluralism and the Colonial Legacy: Indigenous Experiences of Justice in Canada, Australia and New Zealand* (Avebury, 1995) 103, 107.

British assertions of territorial sovereignty and had survived those assertions. And it was Professor Bruce Kercher who saw the sovereignty implications made manifest by the decision, writing that the ‘sovereignty implications of the judgment are still to be worked out; how far do the co-existing sovereignties of the Crown and the indigenous people of Australia go?’¹² The acknowledgement of this ‘co-existence’ of laws and of the potential for recognition of concurrent sovereignties was the true revolution of the *Mabo [No 2]* decision.

Mabo [No 2] exposed these ‘sovereignty implications’ because it was the first decision in which the modern Australian jurisprudence was required to interrogate the principles underpinning the colonial foundations of Australia. What was excavated and exposed to closer examination was less than edifying, particularly the mode by which the British Crown had purportedly acquired its colonies on the New Holland continent. As explained by Brennan J, an ‘enlarged notion’ of terra nullius within the doctrine of Occupation permitted the acquisition of sovereignty over the territories of certain ‘backward peoples’ by European nations *as if* these territories were sovereign-less.¹³ The classical Occupation principles,¹⁴ and in particular the notion of an uninhabited terra nullius, were inflated by state practice into an engorged Occupation doctrine, and, according to Brennan J, ‘the sovereignty of the respective European nations’ was recognized ‘over the territory of “backward peoples”’ provided the discovery was confirmed by occupation and ‘provided the indigenous inhabitants were not organized in a society that was united permanently for political action’.¹⁵

All the Indigenous peoples of eastern New Holland were such ‘backward peoples’ and, accordingly, ‘the British acquisition of sovereignty over the Colony of New South Wales was regarded as dependent upon the settlement of territory that was terra nullius consequent on discovery’.¹⁶ Thus, on this assertion of sovereignty in 1788, it is theorized, an original and plenipotent British sovereignty coursed across the vast expanses of the New Holland landscape meeting no other ‘sovereigns’ in its passage.

The application of this Occupation of Backward Peoples doctrine to the Australian circumstances is not without its problems, historically and presently. The ‘discovery’ is an historical stretch into fantasy – most of the Australian continent was discovered, named and claimed by Dutch navigators¹⁷ – and the ‘occupation’ needed to evince ‘effective control’ of the whole seven million square kilometers

12 Bruce Kercher, *An Unruly Child: A History of Law in Australia* (Allen & Unwin, 1st ed, 1995) 200.

13 *Mabo [No 2]* (n 1) 36 (Brennan J).

14 Occupation was termed the doctrine of Discovery in the early international law. The term ‘discover’ is used throughout in its technical sense, unless otherwise indicated.

15 *Mabo [No 2]* (n 1) 32 (Brennan J).

16 *Ibid* 34.

17 Lieutenant James Cook, on the same day *Endeavour* departed New Holland in 1770, wrote in his journal that ‘on the Western side [of New Holland] I can make no new discovery the honour of which belongs to the Dutch navigators’: ‘Cook’s Journal: Wednesday 22 August 1770’, *National Museum of Australia* (Web Page) <<https://www.nma.gov.au/exhibitions/endeavour-voyage/cooks-journal/august-1770>>.

claimed was not achieved until the close of the 19th century.¹⁸ Of this 1788 ambit claim to sovereignty, respected British jurist Sir Kenneth Roberts-Wray wrote that it was ‘incredible’ to intellectually entertain such a scenario and he mocked any such claim in international law:

could a foothold in a small area on the east side of a sub-continent 2000 miles wide be sufficient in English law (as it certainly would not be in international law) to confer not only sovereignty but also title to the soil throughout the hinterland of nearly three million square miles?¹⁹

Yet this is the constitutional position presented by *Mabo [No 2]*: the Indigenous peoples of Australia were ‘backward peoples’, all were sovereign-less so that an original, instantaneous and plenipotent British sovereignty overwhelmed their territories.

Post *Mabo [No 2]*, there was a welter of decisions interpreting the complexities of the *NT Act* provisions but no further claims of native title were made at common law.²⁰ Any sustained judicial discussion of the constitutional common law principles underpinning the acquisition of territorial sovereignty of the British New Holland territories did not progress, and the discourse fell mute. Then, surprisingly, in a series of unconnected decisions concerning the fundamental principles underpinning the statutory definition of native title, culminating in the 2002 decision of *Members of the Yorta Yorta Aboriginal Community v Victoria* (‘*Yorta Yorta*’),²¹ the High Court had occasion to freshly illuminate the issues surrounding the British acquisitions of territorial sovereignty in New Holland and its legal impact on the then-existing Indigenous societies. *Yorta Yorta* set out a number of principles posited on an ‘intersection of two normative systems’.²² These principles acknowledge that the Indigenous peoples of New Holland were normative societies in 1788, at other relevant times and, most importantly, if their native title can be positively proven under the *NT Act*, these entities remain – indeed, must remain – vital normative societies into the present.

For the purposes of this article, two definitions of territorial ‘sovereignty’ are adopted. The first, following the inter-temporal rule, is from the international law of the late 18th to early 19th centuries and it means the ultimate legal and political authority over a defined territory. This very closely accords with the definition still accepted in the modern international law, where the concept of territorial sovereignty was defined by Arbitrator Huber in the *Island of Palmas Case* as:

18 These issues have been interrogated elsewhere and will not be examined here. The Occupation of Backward Peoples doctrine, as sourced and expressed by Brennan J in *Mabo [No 2]* (n 1), is critically examined in Daniel Lavery, ‘No Decorous Veil: The Continuing Reliance on an Enlarged Terra Nullius Notion in *Mabo [No 2]*’ (2019) 43(1) *Melbourne University Law Review* 233.

19 Sir Kenneth Roberts-Wray, *Commonwealth and Colonial Law* (Stevens & Sons, 1966) 631.

20 The assertion has been made that the *Native Title Act 1993* (Cth) (‘*NT Act*’) left no room for any concept of native title at common law yet a vast amount of underpinning, sub-structural jurisprudence rests in the Imperial constitutional law within the doctrine of aboriginal rights.

21 (2002) 214 CLR 422 (‘*Yorta Yorta*’).

22 Ibid 441–2 [39].

Sovereignty in relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State.²³

In the Australian national context, sovereignty is usually regarded as having both an ‘internal’ and an ‘external’ aspect and was classically explained by Jacobs J in *New South Wales v Commonwealth*,²⁴ where he stated:

[S]overeignty under the law of nations is a power and right, recognized or effectively asserted in respect of a defined part of the globe, to govern in respect of that part to the exclusion of nations or states or peoples occupying other parts of the globe. External sovereignty, so called, is not mere recognition by other powers but is reflection [of], a response to, the sovereignty exercised within the part of the globe. Looked at from the outside, the sovereignty within that part of the globe, assuming it to be full sovereignty and not the limited sovereignty which may exist in the case of protectorates and the like, is indivisible because foreign sovereigns are not concerned with the manner in which a sovereign state may under the laws of that sovereign state be required to exercise its powers or with the fact that the right to exercise those powers which constitute sovereignty may be divided vertically or horizontally in constitutional structure within the State.²⁵

This article outlines the basis of Australian territorial sovereignty articulated in the *Mabo [No 2]* decision, interrogates the orthodox theory of British sovereignty over New Holland/Australia and, then, exposes the not inconsiderable fissures in this changing Imperial narrative. Then is presented an alternative ‘intersection-of-norms’ vision which is permitted by the *Yorta Yorta* decision. The ramifications of this alternative jurisprudential vision of an intersection of normative systems in colonial Australia are examined, attempting to posit a coherent and defensible theoretical construct of Australian territorial sovereignty, from both an external and internal perspective. This renovated construct is based on our current knowledge and appreciation of the fundamental principles, one which warps and wefts together the historical and legal underpinnings to allow a collated and reconciled vision of Indigenous Australian sovereignty.

II THE ORTHODOX THEORY OF SOVEREIGNTY

The orthodox theory of British territorial sovereignty over eastern New Holland/Australia is that an instantaneous ‘sovereignty’ swept across the 3,000,000 square kilometres of this ‘New South Wales’²⁶ on 7 February 1788. From the tip of York

23 *Island of Palmas Case (Netherlands v United States of America) (Award)* (1928) 2 RIAA 829, 838.

24 *New South Wales v Commonwealth* (1975) 135 CLR 337, 479.

25 *Ibid* 479–80 (Jacobs J).

26 As described in Phillip’s Commissions of 12 October 1786 and 2 April 1787: Jenni Ferriss, ‘Governor Phillip’s First Commission’ (Research Paper, Governor of New South Wales) <<https://www.governor.nsw.gov.au/government-house/stories/governor-phillips-first-commission/>>. This ‘New South Wales’ was ‘an area vast in dimensions when compared to Captain Cook’s modest claim’ in 1770: see Elizabeth Evatt, ‘The Acquisition of Territory in Australia and New Zealand’ in Charles Henry Alexandrowicz (ed), *Studies in the History of Nations* (Martinus Nijhoff, 1970) 16, 27. References to New South Wales will be to this historical territory.

Cape south to Van Diemen's Land, and west to the 135th degree of longitude, as shown in Figure 1, purportedly became the unchallenged sovereign territory of the British Crown.²⁷

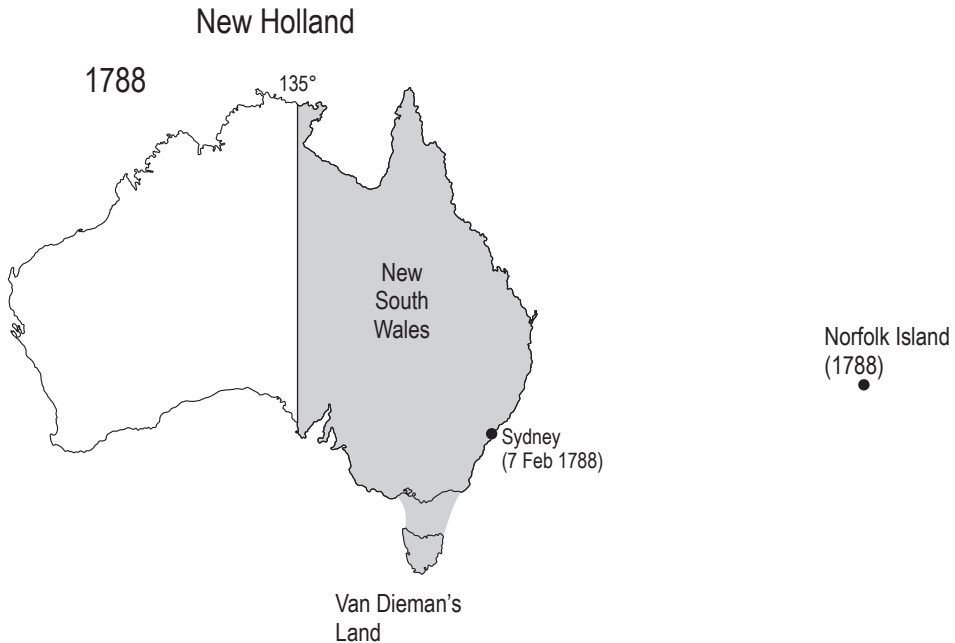


Figure 1: Initial assertion of British sovereignty in 1788

This assertion of territorial sovereignty over this large swathe of New Holland is said to have met no other 'sovereigns' in coursing across these vast territories. As expressed in *Mabo [No 2]*, the validity of this assertion of sovereignty rests on an Occupation of Backward Peoples doctrine, said to be accepted state practice in the international law in that epoch. As Justice Brennan explained, the Indigenous peoples in occupation of this territory were seen as 'backward peoples', so low on the scale of civilisation as not to possess any 'sovereignty' known to the international law.²⁸ Incredulously, the territorial sovereignty gained was not derived from these 'backward' Indigenous peoples but was said to be an original sovereignty.

Two other assertions of territorial sovereignty over tracts of continental New Holland followed. The second was in 1824 taking a central core of the continent to the 129th degree of longitude and expanding New South Wales (set out in Figure 2), and another annexation of the western balance of the continent in 1829 (Figure 3).

²⁷ Van Diemen's Land was believed to be part of mainland New Holland at this juncture in time.

²⁸ Justice Brennan does not state exactly *who* perceived these Indigenous peoples of New Holland to be backward and provides no other examples of the phenomenon.



Figure 2: Extension of New South Wales in 1824

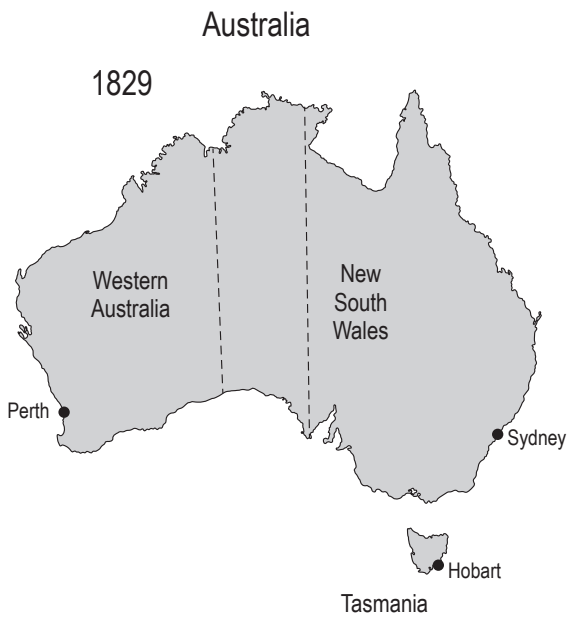


Figure 3: The taking of the entire continent

Presumably, this remaining 4.5 million square kilometres was likewise claimed in 1824 and 1829 under the Occupation of Backward Peoples doctrine.²⁹

Under the orthodox theory of British sovereignty over New Holland, on each of these occasions in 1788, 1824 and 1829, the British Crown purported to acquire an unchallenged territorial sovereignty, regardless of the historical fact that it was inhabited almost in its entirety by Indigenous societies. And the common law also arrived. As one legal historian lyrically portrayed the reception of this new alien law in 1788, ‘as soon as the original settlers had reached the colony, their invisible and inescapable cargo of English law fell from their shoulders and attached itself to the soil on which they stood’.³⁰ Seemingly, it fell from other shoulders in 1824 and 1829. Also, with this plenipotent sovereignty travelled a ‘radical title’ which vested in the British Crown over these vast areas.³¹ This radical title was ‘paramount’³² and was exercised by the Crown unilaterally and could result in the Indigenous peoples losing their native titles to their lands without any lawful process, without any compensation and without recourse to any other protective principles carried in that ‘inescapable cargo of English law’.

A Versions of the Story of Sovereignty

The ‘backward peoples’ narrative presented in *Mabo [No 2]* is merely the latest version of the story of Australian sovereignty. It is a fluid story, renovated with the times. In the earliest Imperial version, New Holland was not inhabited by humankind, or sparsely so. However, some 30 years after initial colonisation, the uncertainty around the lawful basis of territorial sovereignty was still a live issue and legal advice was sought from London as to the basis of sovereignty. The 1819 advice given by the Colonial Office to the Secretary of State for the Colonies, Lord Bathurst, was that New South Wales had been occupied by the Crown as a ‘desert and uninhabited’ territory.³³ The Colonial Office lawyers relied on the classical Occupation mode to base this claim. If New South Wales was uninhabited, it was terra nullius and therefore open to occupation. This was iterated in 1822 when James Stephen, permanent counsel to the Colonial Office and who would go on to become its Under-Secretary, advised that New South Wales had been ‘acquired neither by conquest nor cession, but by the mere occupation of a desert or uninhabited land’.³⁴ As late as 1849, a unanimous New South Wales Supreme Court was still

29 Despite the Occupation of Backward Peoples doctrine being a fundamental premise of the future Australian nation state, it is difficult to find historical or legal statements in any of the surrounding literature concerning the basis of these two further assertions of territorial sovereignty.

30 RTE Latham, ‘The Law and the Commonwealth’ in WK Hancock (ed), *Survey of British Commonwealth Affairs* (Oxford University Press, 1937) vol 1, 517.

31 *Mabo [No 2]* (n 1) 57 (Brennan J).

32 *Ibid.*

33 See the letter from Messrs. Shepherd and Gifford to Earl Bathurst, dated 15 February 1819, in *Historical Records of Australia: Series IV, Legal Papers* (Library Committee of the Commonwealth Parliament, 1922) vol 1, 330, 330. This opinion was jointly that of the Attorney-General and the Solicitor-General.

34 Quoted in Henry Reynolds, *Aboriginal Sovereignty: Reflections on Race, State and Nation* (Allen & Unwin, 1996) 110.

asserting that the expanses of Australia were ‘unpeopled territories’.³⁵ Colonial and Imperial authorities were necessarily in lockstep; territorial sovereignty over the Australian territories was claimed under the classical Occupation principles as an *uninhabited* terra nullius. It should be noted that, on these occasions, no internationally accepted expansion of this Occupation doctrine to deem ‘backward peoples’ sovereign-less was either claimed by the Colonial Office or asserted by the Australian colonial courts.

The earlier Colonial Office legal opinions were written in London, thousands of miles distant from the Australian colonies and harbouring the lingering false belief that the Indigenous population was small, coastal-bound and likely to desert their territories. It might have been argued that the tracts of territory surrounding the discrete settlement at Port Jackson were being de-populated,³⁶ so as to become *terra derelicti* – a once occupied but now deserted territory – which therefore was now open to occupation as uninhabited and terra nullius (such as with Norfolk Island).³⁷ However, this is not how the acquisition of New South Wales, or the remainder of Australia, was narrated. And by 1849 it was a patent judicial falsehood to claim that the Australian territories were ‘unpeopled’. The ‘Aborigines’, though depopulated by disease and violent dispossession, had not become extinct as widely prophesised.³⁸ The so-called ‘various tribes’ could no longer be convincingly imagined to be not in the frontier landscape when the governments were actively devoted to ‘mopping up’ or ‘bringing in’ the surviving remnants of the Indigenous peoples to offer them a measure of ‘protection’. At the coalface frontiers of the Australian colonies, it was increasingly difficult to maintain the pretence that these territories were uninhabited, and the territorial sovereignty was thus acquired under the classical Occupation mode.

With the facts no longer supporting this pure Occupation basis upon which territorial sovereignty over Australia was first claimed, a sophistry crept into this sovereignty narrative in the latter part of the 19th century. If the objective reality could no longer be manipulated to fit the then-orthodox theory as to the acquisition of New South Wales, the narrative would need to be re-crafted, however contrived it might appear. The wide-spread belief that ‘the Aborigines’ were a doomed and dying race was still current and this would attend to the issue. This new judicial rationalisation began almost a full century after the event. In a prosecution for trading on a Sunday in *M’Hugh v Robertson*,³⁹ Holroyd J stated:

35 *Wilson v Terry* (1849) 1 Legge 505, 508 (Stephen CJ for the Court).

36 For a first-hand account of this, see Watkin Tench, *A Narrative of the Expedition to Botany Bay with an Account of New South Wales, its Productions, Inhabitants, & to Which Is Subjoined, a List of Civil and Military Establishments at Port Jackson* (J Debrett, 1789).

37 MF Lindley, *The Acquisition and Government of Backward Territory in International Law (Being a Treatise on the Law and Practice Relating to Colonial Expansion)* (Negro Universities Press, 1969) 48–51. This *fin de siècle* work is the definitive rendition of the legal approach to these issues in the Age of Empire.

38 The most notable soothsayer was Charles Darwin, see Russell McGregor, *Imagined Destinies: Aboriginal Australians and the Doomed Race Theory, 1880–1939* (Melbourne University Press, 1997).

39 (1885) 11 VLR 410.

In determining that the restrictive law before mentioned was reasonably capable of being applied in New South Wales in 1828, I have altogether put out of mind the aboriginal inhabitants. The Imperial Parliament was not thinking of them. From the first the English have occupied Australia *as if it were* an uninhabited and desert country. The native population were [sic] not conquered, but the English Government and afterwards the colonial authorities, assumed jurisdiction over them *as if they were* strangers who had immigrated into British territory ...⁴⁰

The assertion that ‘New South Wales’ was uninhabited or deserted was thus abandoned in the colonial jurisprudence and gave way to this metaphorical position. The Imperial Parliament had imagined ‘the aboriginal inhabitants’ not there, but these Indigenous peoples now became visible to the Anglo-Australian constitutional jurisprudence albeit ‘as if they were strangers’ immigrating into British territory. And, even then, they could be ‘altogether put out of mind’. This ‘native population’ was there, but they were not there, too.

The apotheosis of this changed sovereignty narrative came just a few years later in the highest court of Empire, the Judicial Committee of the Privy Council, in the 1889 advice in *Cooper v Stuart*.⁴¹ An appeal from the Supreme Court of New South Wales, the issue was whether a floating reservation in a Crown grant of land at Cumberland in 1823 was void for being contrary to the rule against perpetuities. The reception of this common law rule, if at all, into the law of the colony was at issue. In discussing the reception of English law into British colonies, Lord Watson, on behalf of himself and his fellow Privy Councillors, stated that the manner of introduction of English law into a British colony, and its extent, must necessarily vary according to the circumstances. Their Lordships wrote:

There is a great difference between the case of a Colony acquired by conquest or cession, 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.⁴²

This disconnected dictum – both factually and legally incorrect – became the leading statement of the relevant law and the formal judicial narrative of Imperial sovereignty over the Australian territories until it was critically examined by the *Mabo [No 2]* decision over 100 years later.

The century-long hiatus in the jurisprudence proved problematic for Indigenous and non-Indigenous alike. Repudiating *Cooper v Stuart*, the High Court in *Mabo [No 2]* corrected the historical record holding that Indigenous societies inhabited the whole continent, that these Indigenous peoples had laws and customs in a defined territory, and the Australian continent had not been ‘peacefully annexed’ but appropriated by a violent colonial process that, in the words of Deane and Gaudron JJ, was a ‘conflagration of oppression and conflict which was ... to spread across the continent to dispossess, degrade and devastate the Aboriginal peoples and leave a national legacy of unutterable shame’.⁴³

40 Ibid 431 (emphasis added).

41 (1889) App Cas 286.

42 Ibid 291.

43 *Mabo [No 2]* (n 1) 104 (Deane and Gaudron JJ).

The *Mabo [No 2]* decision did belatedly recognize that ‘title to the soil’ was held by the Indigenous inhabitants of the Australian continent, partly correcting the mocking criticism made by Roberts-Wray noted earlier.⁴⁴ And the official story of sovereignty changed yet again. The ‘practically unoccupied’ territories narrative stated by the Privy Councillors was now restated as the ‘backward peoples’ doctrine, a doctrine allegedly part of the international law of the epoch.⁴⁵ As expressed by Brennan J, the classical Occupation principles were enlarged by state practice into this Occupation of Backward Peoples doctrine, which permitted the European nations to parcel out the newly-discovered territories of ‘backward peoples’ to the sovereigns of the respective European discoverers as if they were sovereign-less.⁴⁶

Had it not been for the national furore surrounding the belated recognition of this ‘native title’, this latest judicial iteration of the sovereignty narrative may have attracted greater scrutiny. One of the more curious questions arising from the *Mabo [No 2]* decision is this: if the Occupation of Backward Peoples doctrine, with enlarged notion of terra nullius, was known to the relevant epoch,⁴⁷ why was it not asserted as the lawful basis of territorial sovereignty from the earliest claims to territory in New Holland? The *au courant* Sir William Blackstone, an avid student of the continental jurisprudence, of the colonisation of the Americas and of the incipient international law, makes no mention of any such doctrine concerning ‘backward peoples’ in his four-volume *Commentaries on the Laws of England* published, most relevantly, in the period 1765–69.⁴⁸ And the Colonial Office lawyers, in casting around for a formal and accepted basis upon which to rest the Crown’s claims of territorial sovereignty in New Holland, could not find anything in their international legal tote of the early 19th century. None more redoubtable a figure and constitutional law expert than Sir James Stephen was left to lamely assert during this epoch that the New Holland continent was ‘desert or uninhabited’. If there was any ready-made international norm or relevant state practice to assist them validate the territorial sovereignty that Great Britain asserted, Stephen and the other Colonial Office lawyers would have readily seized upon it.⁴⁹ In truth, there was no such international norm or accepted state practice in this epoch.

44 Roberts-Wray (n 19).

45 Exactly where the Privy Councillors sourced the ‘practically unoccupied’ principle they relied upon is unstated in the Advice.

46 The issue of whether any sovereignty in their *countries* might also reside in the Indigenous peoples under the international law of the relevant epoch was unexplored in the *Mabo [No 2]* decision.

47 For the purpose of this article, the relevant epoch is taken to be 1760 to 1830. This captures Blackstone’s ground-breaking volumes of his *Commentaries on the Laws of England*, James Cook’s 1770 assertion of ‘possession’ to that part of eastern New Holland his expedition had ‘discovered’, the issuing of Phillip’s Commissions in 1776–77, the ceremonial taking of New South Wales on 7 February 1788, and the later assertions of sovereignty over the balance of the continent in 1824 and 1829.

48 William Blackstone, *Commentaries on the Laws of England* (University of Chicago Press, 1979).

49 Stephen, speaking of Chief Justice John Marshall’s opinions in the early United States Supreme Court decisions, candidly wrote, ‘[w]hatever may be the ground occupied by international jurists, they never forget the policy and interests of their own Country. Their business is to give to rapacity and injustice the most decorous veil which legal ingenuity can weave’: Sidney L Harring, *White Man’s Law: Native*

Realising the ‘interpretive crisis’⁵⁰ presented by *Mabo [No 2]*, some legal scholars attempted to posit other, perhaps sounder, bases upon which to rest the territorial sovereignty of the modern Australian nation. Under the extant international law of that late 18th century and early 19th century, conquest would provide not only an unassailable and defensible root of title, and also certainty as to the consequences of the acquisitions.⁵¹ This argument has found little acceptance in Imperial or Anglo-Australian law, or generally.⁵² The British, on this view, could not be seen as peaceful settlers of the Australian continent, but as invaders and conquerors. This battle has waged most relentlessly among the historiographers, not the jurists, and is seemingly settled. However it still has currency because of Indigenous assertions that, from their perspective at the colonial frontiers, it presented as an invasion of their sovereign territories.⁵³ Prescription, too, has been proffered as a backstop legal justification but, again, without any great traction and with an unsteady historical foundation.⁵⁴ This doctrinal debate – and any search for a sounder basis of territorial sovereignty – was proving both infertile and unsatisfying until the *Yorta Yorta* decision in 2002.

III THE *YORTA YORTA* DECISION

The facts in *Yorta Yorta* can be briefly stated. The native title determination application was lodged in 1994 by the Yorta Yorta People for portions of land and waters along a broad section of the closely-settled Murray and Goulbourn rivers. It was the first native title matter to go to trial in the Federal Court and, after a marathon trial, the Court found against the Yorta Yorta. Olney J concluded that ‘the tide of history’ had washed away any real acknowledgment or observance of Yorta Yorta traditional laws and customs.⁵⁵

In his judgment in *Mabo [No 2]*, Brennan J said, parenthetically, that ‘the term “native title” conveniently describes the interests and rights of indigenous inhabitants in land, whether communal, group or individual, possessed under the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants’.⁵⁶ Importantly, when the decision was translated into legislative form, the statutory definition of ‘native title’ captured the concept that the rights and interests which were to be recognised and protected were sourced

People in Nineteenth-Century Canadian Jurisprudence (University of Toronto, 1998) 21 <<https://doi.org/10.2307/744061>>.

50 Gerry Simpson, ‘*Mabo*, International Law, Terra Nullius and the Stories of Settlement: An Unresolved Jurisprudence’ (1993) 19(1) *Melbourne University Law Review* 195, 197.

51 Ibid 197–8.

52 See, eg, Rowan Nicholson, ‘Was the Colonisation of Australia an Invasion of Sovereign Territory?’ (2019) 20(2) *Melbourne Journal of International Law* 493.

53 Ibid.

54 Senate Standing Committee on Constitutional and Legal Affairs, Parliament of Australia, *Two Hundred Years Later: Report on the Feasibility of a Compact, or ‘Makarrata’ between the Commonwealth and Aboriginal People* (Parliamentary Paper No 107/1983, 13 September 1983).

55 *Yorta Yorta Aboriginal Community v Victoria* [1998] FCA 1606, [129] (Olney J).

56 *Mabo [No 2]* (n 1) 57 (Brennan J).

in and generated by the laws and customs of the respective Indigenous peoples. It is defined as:

223 Native title

Common law rights and interests

- (1) The expression *native title* or *native title rights and interests* means the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where:
 - (a) the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and
 - (b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and
 - (c) the rights and interests are recognised by the common law of Australia.⁵⁷

The decision was appealed, and in the Full Federal Court deep divisions surfaced as to what was intended by the ‘tide of history’ metaphor to the erosion of the Yorta Yorta laws and customs.⁵⁸ To this time little focus had been given to the definitional requirement in section 223(1) of the *NT Act* that it was the ‘traditional’ laws and customs that generated the native title sought to be recognised.⁵⁹

The High Court heard and dismissed the appeal by the Yorta Yorta claimants by a majority of 5:2.⁶⁰ Olney J’s findings were examined, with the High Court concluding that his express rejection of the assertion that the Yorta Yorta had continuously acknowledged and observed ‘traditional’ laws and customs since the time prior to 1788 was, more fundamentally, a finding that ‘the society which had once observed traditional laws and customs had ceased to do so’ and by so ceasing, ‘no longer constituted the society out of which the traditional laws and customs sprang’.⁶¹ Essentially, the High Court determined that the traditional jural foundations of the native title which are capable of recognition at common law and under the *NT Act* had been irrevocably eroded. Accordingly, no native title, as defined in section 223(1), could ever be recognised for the Yorta Yorta.⁶²

The plurality opinion, that of Gleeson CJ and Gummow and Hayne JJ, which was concurred with by McHugh and Callinan JJ, is undoubtedly the leading expression of the relevant law in *Yorta Yorta*. It begins by re-emphasising that because this was an application for determination of native title made pursuant to the *NT Act*, it is necessary to begin and conclude with a consideration of the

⁵⁷ *Native Title Act 1993* (Cth) s 223.

⁵⁸ Brennan J first employed the ‘tide of history’ metaphor in *Mabo [No 2]* (n 1) 60.

⁵⁹ *Members of the Yorta Yorta Community v Victoria* (2001) 110 FCR 244. The Full Court divided 2:1 in dismissing the appeal, with Black CJ in dissent. For a discussion of the decision at this level, see Simon Young, ‘The Trouble with “Tradition”: Native Title and the Yorta Yorta Decision’ (2001) 30(1) *University of Western Australia Law Review* 28.

⁶⁰ For the majority, Gleeson CJ, Gummow and Hayne JJ gave a joint opinion, and McHugh and Callinan JJ wrote separate judgments dismissing the appeal. McHugh J, in a short opinion, concurred in the joint majority judgment. Gaudron and Kirby JJ dissented.

⁶¹ *Yorta Yorta* (n 21) 458 [95] (Gleeson CJ, Gummow and Hayne JJ).

⁶² *Ibid* 458 [96].

provisions of the legislation itself.⁶³ However, their Honours stated, to understand what the *NT Act* seeks to achieve and what is defined in section 223(1) as ‘native title’, it is important to comprehend ‘some fundamental principles’.⁶⁴ The leading judgment then, of especial interest, enunciates a body of common law constitutional principles which underpin the acquisition of territorial sovereignty by the British and colonial Crowns across the now Australian territories.

Assuming always that an acquisition of territorial sovereignty is unquestionable in the municipal courts,⁶⁵ these fundamental principles commence theoretically with the (now) well-established proposition that certain Indigenous interests survived the Crown’s initial assertion of sovereignty in 1788, and those that followed. What survived for the Indigenous peoples, according to *Mabo [No 2]*, were allodial rights and interests in relation to land or waters. These rights and interests had their origin in the traditional laws acknowledged and the traditional customs observed by the relevant Indigenous society, that is, the joint judgment stated, to ‘a normative system’ other than that of the incoming sovereign.⁶⁶

The normative system concept is then developed. The rights and interests in relation to land or waters must find their origins in and be generated by laws or customs derived from a body of norms that existed *before* the assertions of British sovereignty. ‘Thus’, the judgment reads, ‘to continue the metaphor of intersection, the relevant intersection, concerning as it does rights and interests in land, is an intersection of two sets of norms.’⁶⁷

[T]he fundamental premise from which the decision in *Mabo [No 2]* proceeded is that the laws and customs of the indigenous peoples of this country constituted bodies of normative rules which could give rise to, and had in fact given rise to, rights and interests in relation to land or waters. And of more immediate significance, the fundamental premise from which the *Native Title Act* proceeds is that the rights and interests with which it deals (and to which it refers as ‘native title’) can be possessed under traditional laws and customs.⁶⁸

Their Honours then state that what is important is to recognise ‘some consequences that follow from the Crown’s assertion of sovereignty’.⁶⁹ Then followed an elaborate enunciation of principle which was not necessary for the decision but, the judgment states, must be taken into consideration in the understanding of the statutory definition of native title.⁷⁰ In explaining this, their Honours stated:

[a]s six members of the Court said in *Fejo v Northern Territory*:

Native title has its origin in the traditional laws acknowledged and the customs observed by the indigenous people who possess the native title. Native title is

63 Ibid 440–1 [32]–[36].

64 Ibid 441 [36] (Gleeson CJ, Gummow and Hayne JJ).

65 The acquisition itself is unchallengeable as an Act of State, but the consequences are justiciable, see *Mabo [No 2]* (n 1) 32 (Brennan J).

66 *Yorta Yorta* (n 21) 441 [38] (Gleeson CJ, Gummow and Hayne JJ).

67 Ibid.

68 Ibid 442 [40].

69 Ibid 443.

70 Ibid. Curiously, the Court denied the existence of any post-*NT Act* ‘common law’ native title: *Yorta Yorta* (n 21) 453 [75]–[76] (Gleeson CJ, Gummow and Hayne JJ). McHugh J pointedly disagreed with this interpretation, at 467–8 [129]–[134], albeit in concurring with the joint judgment.

neither an institution of the common law nor a form of common law tenure but it is recognised by the common law. *There is, therefore, an intersection of traditional laws and customs with the common law.*⁷¹

What the High Court did in *Mabo [No 2]*, their Honours explained, was to acknowledge and protect this recognition in the Australian common law. In the subsequent legislative response, however, this ‘native title’ was defined and protected thereunder. Thus, their Honours stressed, the definition of native title in section 223(1) was centrally important. Their Honours asked what meaning was to be attributed to ‘traditional’ in sub-paragraph (a) and (b).

As the claimants submitted, ‘traditional’ is a word apt to refer to a means of transmission of law or custom. A traditional law or custom is one which has been passed from generation to generation of a society, usually by word of mouth and common practice.⁷²

But, their Honours, warned, in the context of the *NT Act*, ‘traditional’ carries with it two other elements in its meaning. First, it conveys an understanding of the age of the traditions: the origins of the content of the law or custom concerned are to be found in the normative rules of the Indigenous societies *prior* to the assertions of sovereignty by the British Crown. They stated that ‘[i]t is *only* those normative rules that are “traditional” laws and customs’.⁷³ ‘Secondly, and no less importantly,’ the judgment reads,

the reference to rights or interests in land or waters being *possessed* under traditional laws acknowledged and traditional customs observed by the peoples concerned, requires that the normative system under which the rights and interests are possessed (the traditional laws and customs) is a system that has had a continuous existence and vitality since sovereignty.⁷⁴

The origins of the Indigenous laws and customs in which these rights and interests are sourced, and which are then capable of recognition and protection by the *NT Act*, must thus pre-date the assertion of British sovereignty over the relevant Indigenous territory. Otherwise, their Honours stated, the term ‘traditional’ would have no present meaning in the statutory definition.

Their Honours held that acknowledgment and observance of these traditional laws and customs by the Indigenous society claiming this native title must have continued, ‘substantially uninterrupted’, since the time of assertion of British sovereignty for their native title rights and interests to achieve, and to maintain, recognition and protection.⁷⁵ For the Yorta Yorta People, that relevant date was 7 February 1788. In explaining this qualification, the leading opinion stated:

It is a qualification that must be made in order to recognise that proof of continuous acknowledgment and observance, over the many years that have elapsed since sovereignty, of traditions that are oral traditions is very difficult. It is a qualification that must be made to recognise that European settlement has had the most profound

71 Ibid 439 [31] (Gleeson CJ, Gummow and Hayne JJ) quoting *Fejo v Northern Territory* (1998) 195 CLR 96, 128 [46] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ) (emphasis in original) (citations omitted).

72 Ibid 444 [46] (Gleeson CJ, Gummow and Hayne JJ).

73 Ibid (emphasis added).

74 Ibid 444 [47] (emphasis in original).

75 Ibid 456 [87].

effects on Aboriginal societies and that it is, therefore, inevitable that the structures and practices of those societies, and their members, will have undergone great change since European settlement.⁷⁶

Not unlike the *Mabo [No 2]* decision, the foundational significance of the *Yorta Yorta* intersection of normative systems principles largely escaped critical attention. There was a flurry of condemnation from native title advocates because the High Court's interpretation of 'traditional', as used in section 223(1)(a) of the *NT Act*, required a meaning additional to what is suggested by the ordinary meaning of that term, one which placed a greater forensic burden on Indigenous claimants of native title than previously understood.⁷⁷ For a successful prosecution of an application for a determination of native title under the *NT Act*, it now had to be established that an Indigenous society has continued through the post-British sovereignty epoch as a vital society, substantially united in the acknowledgment and observance of their pre-sovereignty laws and customs.⁷⁸ This narrow definitional portal to the *NT Act* was thus likely to prove fatal to many applications for determinations of native title,⁷⁹ and it was suggested by one commentator that amendment was necessary to the legislation to re-define the term 'traditional' and so override this restrictive interpretation.⁸⁰

At the doctrinal level, these intersection of normative system principles present a significant illumination of the original constitutional terms upon which the British Crown assumed sovereignty over the many distinct Indigenous peoples of New Holland and their territories. The High Court constructed a major annex to the theory surrounding the assertions of British sovereignty, adding flesh to the skeletal doctrine of aboriginal rights in the Anglo-Australian constitutional common law. While *Mabo [No 2]* had acknowledged that the Indigenous peoples of New Holland possessed laws and customs, giving rise to rights and interests in land and waters which were cognisable to the Australian common law, and thus a continuing legal plurality in modern Australia, this *Yorta Yorta* doctrine acknowledges that the Indigenous peoples of Australia were normative societies, in 1788, at other relevant times, and, most importantly, that if their native title can be proved up, these entities remain vital normative societies into the present.

In their discussion, the plurality in *Yorta Yorta* took one issue beyond debate. They will brook no argument that the other 'law' in the Australian jural landscape, the allodial *Law* of these Indigenous peoples first recognised in *Mabo [No 2]* is

76 Ibid 456 [89].

77 For a tidy overview, see Vance Hughston, 'A Practitioner's Perspective of Native Title' [2009] (93) *Australian Law Reform Commission Reform Journal* 28.

78 *Yorta Yorta* (n 21) 456–7 [89] (Gleeson CJ, Gummow and Hayne JJ).

79 See, eg, Richard Bartlett, 'An Obsession with Traditional Laws and Customs Creates Difficulty Establishing Native Title Claims in the South: *Yorta Yorta*' (2003) 31(1) *Western Australia Law Review* 35; J Waters, 'Members of the *Yorta Yorta* Aboriginal Community v *Victoria*' (2003) 6(1) *Native Title News* 6.

80 Noel Pearson, 'The High Court's Abandonment of the Time-Honoured Methodology of the Common Law in its Interpretation of Native Title in *Miriwung Gajerrong* and *Yorta Yorta*' (Lecture, Sir Ninian Stephen Annual Lecture University of Newcastle Law School, 17 March 2003) <<https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressrel%2F8ZB96%22>>.

not law, both historically and presently.⁸¹ Jurisprudential meanderings of what Benthamite stage of enlightened civilisation one may have discovered Indigenous ‘law’ or whether, under Austinian theory, a cognisable ‘sovereign’ could be found in these Indigenous societies, will not be entertained. The High Court built a permanent bridge to the pre- and post-sovereignty Indigenous laws and customs, labelling them normative, and removing any positivist argument that their laws and customs are so low on a scale of civilisation as not to be cognisable as ‘law’. This is consonant with the legal, historical and anthropological record, and with *Mabo* [No 2].

A No Continuing Parallel Law-Making?

While this doctrine of intersection of normative systems is well stated by their Honours, two discordant notes are struck in their discussion. The first such note is the claim that:

[W]hat the assertion of sovereignty by the British Crown necessarily entailed was that there could thereafter be no parallel law-making system in the territory over which it asserted sovereignty. *To hold otherwise would be to deny the acquisition of sovereignty* and as has been pointed out earlier, that is not permissible.⁸²

This denial of any parallel law-making systems meets two immediate logical obstacles. First, it seems to deny that there can be any change to those other laws and customs, as if the Indigenous normative systems are struck into impotency upon the Crown’s assertion of sovereignty. Second, it would appear to be an insurmountable burden to not possess any law-making capacity and yet remain a vital and continuous normative society. Their Honours’ statement in this regard thus appears challengeable on both the factual and doctrinal fronts.

1 The Factual Front

From the factual perspective, it is most difficult to suggest that no parallel law-making occurred in the Indigenous societies after the British assertions of sovereignty. A quick re-visit to the factual setting of the 1971 *Milirrpum v Nabalco Pty Ltd* (‘*Milirrpum*’) decision⁸³ evidences this conclusively.

Unbeknown to the Yolngu People of Arnhem Land, a foreign sovereign had seized both the territorial sovereignty over, and a paramount radical title in, their traditional lands in early February 1788, matters which may not have become fully apparent to their descendants until some 150 years later. Until the mid-20th century, the Yolngu lived a life untouched by Anglo-Australian authority. Their foreign intercourse, which was uncircumscribed by British or other colonial authority, was

81 As recently as July 2013, former Prime Minister Kevin Rudd said that the 1963 Yirrkala Bark Petition ‘was the beginning of an understanding that there was another, older, law in place on this land’: Kevin Rudd, ‘Speech at 50th Anniversary of Yirrkala Bark Petitions’ (Speech, Yirrkala, 10 July 2013) <<https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id:%22media/pressrel/2583255%22>>.

82 *Yorta Yorta* (n 21) 443–4 [44] (Gleeson CJ, Gummow and Hayne JJ) (emphasis added).

83 (1971) 17 FLR 141 (‘*Milirrpum*’).

largely with the Maccassans.⁸⁴ Settlements at Fort Dundas, Fort Wellington and Port Essington in the period of the 1820s–40s failed and were abandoned.⁸⁵ It was not until the arrival of European missionaries in the late 1920s and conflicts with Japanese interests over marine resources began to manifest in the 1930s, that the Australian government sent representatives to north-east Arnhem Land.⁸⁶ By the 1960s, however, with the discovery of valuable bauxite in their traditional *country* the Yolngu had engaged with the Anglo-Australian legal system to attempt to enforce interests known to their *Rom*, their *Law*. This *Rom* has, inferentially, been the source of their normative rules and behaviours from time immemorial, well prior to 1788, and subsequently.

In *Milirrpum*,⁸⁷ the trial and judgment comprised the first searching look by a court at the juridical foundations of an Indigenous society in Anglo-Australian jurisprudence. The Yolngu People failed on every factual and legal ground, bar one. Indicating that the court had no lack of evidence, Blackburn J made a finding that is of continuing and fundamental relevance, stating:

I am very clearly of [the] opinion, upon the evidence, that the social rules and customs of the plaintiffs cannot possibly be dismissed as lying on the other side of an unbridgeable gulf. The evidence shows a subtle and elaborate system highly adapted to the country in which the people led their lives, which provided a stable order of society and was remarkably free from the vagaries of personal whim or influence. If ever a system could be called 'a government of laws, and not of men', it is that shown in the evidence before me.⁸⁸

The Commonwealth had argued that any 'system' demonstrated on the evidence did not have the characteristics of a 'system' of law and that Yolngu conceptions of rights, duties and of 'law' could not be recognised by an Anglo-Australian court. Blackburn J would have none of it.

In my opinion, the arguments put to me do not justify the refusal to recognise the system proved by the plaintiffs in evidence as a system of law. Great as they are, the differences between that system and our system are, for the purposes in hand, differences of degree. I hold that I must recognise the system revealed by the evidence as a system of law.⁸⁹

84 This trade was outlawed in the early-20th century: see *Gumana v Northern Territory* (2005) 141 FCR 457 ('*Blue Mud Bay*').

85 Fort Dundas (1824–29) was on Melville Island, with Fort Wellington (1827–29) and Port Essington (1838–49) on the Cobourgh Peninsula. None were in Yolngu territory.

86 See *Blue Mud Bay* (n 84) 296 [10] (Selway J). This conflict resulted in the first case of an Indigenous litigant to be heard in the High Court of Australia: *Tuckiar v R* (1934) 52 CLR 335. These representatives included the celebrated anthropologist, Donald Thomson: *Blue Mud Bay* (n 84) 297 [14] (Selway J).

87 *Milirrpum* (n 83).

88 Ibid 267. Justice Toohey, after retiring from the High Court, called this statement one of 'the most powerful affirmations' of Indigenous law by someone not Indigenous: see John Toohey, 'Aboriginal Customary Laws Reference: An Overview' (Western Australian Law Reform Commission, 1999) 191. The reference to 'the other side of an unbridgeable gulf' is to the quickly discredited advice by the Judicial Committee in *Re Southern Rhodesia* [1919] AC 211, 233 where Lord Sumner wrote that:

The estimation of the rights of aboriginal tribes is always inherently difficult. Some tribes are so low in the scale of social organization that their usages and conceptions of rights and duties are not to be reconciled with the institutions or the legal ideas of civilized society. Such a gulf cannot be bridged.

89 *Milirrpum* (n 83) 268.

Judge Blackburn was scrutinising this Indigenous society in the late 1960s and early 1970s and would not accept that the Yolngu did not then possess, on the evidence presented to the court, a body of laws and customs cognisable to the Supreme Court of the Northern Territory as ‘a system of law’. As for the hundreds of other such Indigenous societies that existed in New Holland in 1788, Blackburn J was openly questioning of the notion that these societies had no ordered communal life upon the assertion of British sovereignty, writing: ‘having heard the evidence in this case, I am, to say the least, suspicious about the truth of the assertions of the early settlers of New South Wales that the aboriginals [sic] had no ordered manner of community life’.⁹⁰

If Blackburn J found a vibrant, wholly functioning system of law in the Yolngu in the early 1970s, it is a historical, anthropological and intellectual pretence to suggest that, upon the assertion of sovereignty by the British Crown, Yolngu society was instantly stunned into stasis on 7 February 1788, and was thereafter incapable of parallel law-making or law-changing. Far from ridding fictions from the jurisprudential theory, the judges are adopting yet another. Yolngu society remained wholly unaffected by the assertion of British sovereignty in 1788, their *Rom* remained unaffected and, for the Yolngu People, their society normative and with plenipotent autonomy.

2 The Doctrinal Perspective

From the doctrinal perspective, it is submitted that the High Court judgment – in denying any prospect of continuing legal plurality – fell into error in a manner similar to that judicially condemned in *Mabo [No 2]*. Brennan J stated that the change of beneficial ownership in traditional lands was not occasioned when British sovereignty was asserted, but was subsequently extinguished by the exercise of a paramount power.⁹¹ By adopting the false assumption that the law-making capacity of the Indigenous societies was necessarily vitiated upon the acquisition of sovereignty by the British Crown, the judges are being guided perhaps by the notion of a plenipotent, indivisible sovereignty. They state, as the only reason for their assumption, that ‘[t]o hold otherwise would be to deny the acquisition of sovereignty and ... that is not permissible’.⁹² This point was not developed in argument between the Bench and counsel and a more rigorous position may have been adopted had it been debated. A normative system, one would logically contend, in order to continue to be a normative system, must necessarily *generate* ‘norms’. If it no longer generates norms, self-evidently it would cease to be normative.⁹³

⁹⁰ Ibid 266.

⁹¹ *Mabo [No 2]* (n 1) 58.

⁹² *Yorta Yorta* (n 21) 444 [44] (Gleeson CJ, Gummow and Hayne JJ). This axiomatic reasoning is addressed below.

⁹³ In *Northern Territory v Alyawarr; Kaytetye, Warumungu, Wakaya Native Title Claim Group* (2005) 145 FCR 442 (*‘Alyawarr’*), the Full Federal Court stated, at 476–7 [116]:

The form of the determination ... involves an acceptance that the community of native title holders is a living society. It is not consistent with the purposes of the *NT Act*, nor productive of any practical benefit

The restriction on continued law-making is a curious addendum, and apart from the circular explanation that it would be a denial of territorial sovereignty, no cogent reason or binding authority is thereafter given by their Honours why this parallel law-making capacity is denied to the pre-existing Indigenous societies. Perhaps, it is submitted, they were merely re-asserting that under the Act of State doctrine, challenges to the various assertions of sovereignty are impermissible in the domestic courts.⁹⁴ Yet there is no cogent reason or any authority why a claim as to the consequences of the acquisition could not be pleaded and entertained by a superior municipal court. As Brennan J stated in *Mabo [No 2]*, although the question of whether a territory has been acquired by the Crown is not justiciable in the municipal courts, ‘those courts have jurisdiction to determine the consequences of an acquisition under municipal law’.⁹⁵

Certainly, the prospect of arguing an *external* sovereignty in the Indigenous societies in Australia would be automatically denied to petitioners, but the assertion of an *internal* law-making capacity is plainly open to them and, indeed, is a necessary concomitant to a successful native title determination application. However, if their Honours are contending that no parallel internal law-making systems could exist in the territory over which was asserted territorial sovereignty, then the statement exceeds the objective reality.⁹⁶ These quantities, British sovereignty and Indigenous law-making, are not mutually exclusive, and the inevitability of that consequence of a denial of sovereignty is by no means foregone, as the experience in the constitutional jurisprudence of other nations with a common law heritage, such as Canada, New Zealand and the United States of America, clearly shows.

B Another Vision?

While the *Yorta Yorta* decision was subject to strident criticism for its increased forensic requirements as earlier noted, the extrapolation of the fundamental premise of *Mabo [No 2]* and the intersection of normative systems principles in *Yorta Yorta* permit another more-nuanced vision of how the acquisitions of British sovereignty over New Holland might be reconciled with the Indigenous societies that existed there, and which continue to co-exist into present-day Australia. This vision sees

to require that the laws and customs of indigenous society and the rights and interests arising under them be presented as some kind of organism in amber whose microanatomy is available for convenient inspection by non-indigenous authorities.

94 Professor Lumb, too, broadens this restriction by stating that acts of state ‘could not be *queried* in a court of law’: see RD Lumb, ‘Native Title to Land in Australia: Recent High Court Decisions’ (1993) 42(1) *International and Comparative Law Quarterly* 84, 89 (emphasis added) <<https://doi.org/10.1093/ICLQAJ/42.1.84>>. Lumb also asserted, confidently but wrongly, that it was ‘a distortion of history to assert that such [native title] rights exist or may be claimed because of a defect in title of the British Crown’: RD Lumb, ‘Is Australia an “Occupied” or “Conquered” Country?’ (1984) 11 (December) *Queensland Bar News* 16, 20.

95 *Mabo [No 2]* (n 1) 32.

96 This argument is similar to that made by the Solicitor-General of Queensland to the High Court members in *Mabo [No 2]* when he stated that ‘sovereignty’ connoted an absolute title in the soil, and that the Meriam People thus could have ‘lawfully been driven into the sea’: Transcript of Proceedings, *Mabo v Queensland [No 2]* (High Court of Australia, Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ, 30 May 1991) 280 (GL Davies QC).

each determination of native title in the post-*Mabo* [No 2] era acknowledge not only an extant native title, but also acknowledging an Indigenous society with a functioning normative system wherein traditional laws and customs are presently extant and vital. The intersection doctrine of *Yorta Yorta* thus presents a coign of vantage from which a renovated theory of territorial sovereignty, one in which history and law are reconciled, may be viewed.

IV A RENOVATED THEORY OF SOVEREIGNTY

New Zealand's former Chief Justice, Dame Sian Elias, in speaking of sovereignty issues into the 21st century, asked whether it is fanciful to entertain the notion that 'sovereignty' posed a special anxiety for Australia and New Zealand. She posed some nettled questions, noting the constitutional order of the United Kingdom has been transformed with little fuss in our lifetimes:

By comparison, we seem unaccountably anxious. Is our agitation because our independence has been only recently perfected and sovereignty seems all the more precious for that? Is it because the constitutional arrangements of our jurisdictions have been incompletely explored? Or is it because both of us have indigenous people to accommodate within the constitutional framework?⁹⁷

Her final question is most perceptive. For Australia, there is *no* accommodation of these Indigenous peoples in the formal constitutional framework. And not merely are the constitutional arrangements in the Australian context 'incompletely unexplored', even polite discussion is eschewed.

Yet the juridical issues that needed to be resolved with respect to the conflict of immigrant European and the Indigenous peoples in the New Holland context were by no means novel to the Imperial constitutional law. Jurisdictions facing these same issues – the so-called 'settler' societies of Canada, the United States of America and New Zealand – necessarily had to find their own path through the many difficult and thorny issues. In Australia, there is no *Treaty of Waitangi* of 1842 as in New Zealand, no 'domestic dependent' nationhood construct as in the American jurisprudence,⁹⁸ or, as with Canada, no acknowledgment and affirmation of 'aboriginal rights' in a modern constitution.⁹⁹

The enormous challenge for each of these common law jurisdictions has been, or remains, to fashion its own approach. Australia, alone among them, has made no formal constitutional acknowledgement that when the British arrived, Indigenous peoples were present. A shared common law Imperial jurisprudence

97 Dame Sian Elias, 'Sovereignty in the 21st Century: Another Spin on the Merry-Go-Round' (2003) 14 *Public Law Review* 148, 149.

98 *Cherokee Nation v State of Georgia*, 30 US (5 Pet) 1 (1831) ('*Cherokee Nation*'). In *obiter*, Marshall CJ stated that the 'Indian nations have always been considered as distinct, independent, political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial': *Worcester v State of Georgia*, 31 US (6 Pet) 515, 559 (1832).

99 The *Canada Act 1982* (UK) c 11, sch B ('*Constitution Act 1982*') provides, in section 35 subsection (1) that 'The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed'. Subsection (2) states that the "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada'.

does offer some guidance yet, because of the differing historical background, each jurisprudence is necessarily bespoke. The Anglo-Australian jurisprudence with its initial denial of Indigenous peoples, its bizarre characterisation of these peoples as ‘strangers’ immigrating into British territory, then adjudging their territories as ‘practically unoccupied’ and ‘peacefully annexed’, was always going to find it difficult to extricate itself from this dense layer of historical and legal falsehoods and to face a reckoning. Indeed, as late as 1901, the first federal Attorney-General, Alfred Deakin, explicitly spelt it out the freshly-minted Commonwealth of Australia’s position, saying:

We have the power to deal with people of any and every race within our borders, except the Aboriginal inhabitants of the continent, who remain under the custody of the states. There is that single exception of a dying race; and if they be a dying race, let us hope that in their last hours they will be able to recognise not simply the justice, but the generosity of the treatment which the white race, who are dispossessing them and entering into their heritage, are according them.¹⁰⁰

Coming from such an egregious position, soaked in eugenicist notions of a superior ‘white race’ dispossessing ‘a dying race’, and the justice and generosity of their so doing, the Anglo-Australian jurisprudence understandably has exhibited little stomach for any sustained debate of these unanswered juridical questions. For the post-Imperial Australian jurisprudence, the task is made more difficult because of the almost complete absence – other than denial and the elaborate falsehoods – of any such discourse. Prior to *Mabo [No 2]*, the answer given to the fundamental constitutional issues by the Anglo-Australian jurisprudence was that there was none extant in these Indigenous societies – no title, no sovereignty, and no need for wordy explanation.

Then, in 1992, that changed. The Australian jurisprudence accepted in *Mabo [No 2]* that the annexed territories were inhabited by Indigenous peoples possessed of systems of laws and customs. As former Chief Justice Robert French has said, the ‘Cult of Disremembering was dealt a great blow’.¹⁰¹ There was an irrevocable acknowledgment by the Australian legal system that the manifold Indigenous societies generated their own laws and customs, sourcing rights and interests, which had not been extinguished upon the assertions of non-Indigenous sovereignty. These traditional laws and customs ran in the jural landscape prior to any assertions of British sovereignty, and many continue to course in those Indigenous societies today. The *Mabo [No 2]* decision meant that the Australian jurisprudence could never again ‘disremember’.¹⁰²

But still the Australian jurisprudence remains most reluctant – and understandably so – to confront the unresolved constitutional issues and further expose both the unpalatable historical truths and the long-upheld judicial fictions. The current theory of territorial sovereignty is hopelessly conflicted, yet it is doggedly maintained within a jurisprudence fearful of addressing its oldest

100 Alfred Deakin, ‘The Commonwealth of Australia Shall Mean a “White Australia”’ in Sally Warhaft (ed), *Well May We Say: The Speeches That Made Australia* (Black Inc, 2004) 216, 218.

101 French (n 6) 130.

102 WEH Stanner, *After the Dreaming* (Australian Broadcasting Commission, 1991) 25. The term is taken from his phrase the ‘Cult of Disremembering’.

foundational issues. Yet if the Australian jurisprudence is to continue to assert that these normative Indigenous societies did *not* have any form of recognisable ‘sovereignty’, it must defend the proposition that these Indigenous societies were too low on the scale of civilisation – too ‘backward’ – in 1788 and other relevant times to be accorded any such quality. Such a prosecution would be an unenviable task, being indefensible in the international law of that epoch and drenched in notions most jurists would find repugnant. Few have stepped forward to defend the Occupation of Backward Peoples doctrine, many eschewing, sometimes artlessly, the hard historical facts and/or the sticky confected fictions.

As poor as the appetite is for foundational introspection, the High Court in the leading judgment in *Yorta Yorta* made the fundamental step of retreating from the old, conflicted theory and beginning to posit a more viable construct of an intersection of normative systems – the ancient laws and customs of the Indigenous societies of New Holland intersecting with the imported European law. Indeed, the *Yorta Yorta* doctrine signals the beginning of the abandonment of the orthodox theory of sovereignty and the start of the construction of an alternative theory. To the present day, there have been over 450 positive determinations of native title under the *NT Act*. Each of these determinations of native title formally recognises not merely ‘native title’ but also – viewed through the lens afforded by *Yorta Yorta* – an extant Indigenous normative system wherein traditional laws and customs are vital, operative and functioning. As such, these determinations of native title can be viewed as the re-emergence in the jural landscape of quiescent Indigenous normative entities which survived the British assertions of territorial sovereignty and survive to the present day. Like re-growth after a conflagration, these dormant entities are stirring to life in that landscape. Each determination of native title under the *NT Act* is a formal acknowledgment by one normative system, the Australian, of another, that of a traditional yet still functioning Indigenous normative system. The intersection-of-normative-systems doctrine views an Indigenous people whose native title has been recognised in their *country*¹⁰³ as a vital normative society and, at the doctrinal level, the consequences are manifold.

A The Consequences

The first consequence of continuing relevance is that every determination of native title under Australian law is a formal recognition that the relevant Indigenous society has ‘traditional’ laws and customs which can be traced to the pre-British sovereignty epoch, yet which are presently extant and demonstrable. Indigenous *Laws* are thus recognised by the Australian law as both present in New Holland/Australia at the time of the assertions of British sovereignty, and importantly, these same *Laws* are present and normative in contemporary Australia.

The second important consequence is the recognition of not merely a vast legal plurality but of a continuing societal plurality. The intersection of norms

103 In *Love/Thoms* (n 10) Justices Bell, Nettle, Gordon and Edelman all adopt the term *country* to describe that distinct tract of land and/or sea territory to which an Indigenous society has a special physical and spiritual connection.

doctrine recognises that Indigenous societies existed pre-1788 and continue to currently co-exist in present-day Australia. The Indigenous society, under which laws and customs the native title is said to be possessed, must have continued to exist throughout that post-British sovereignty period as a society united by its acknowledgment and observance of the laws and customs. Indeed, all of the Indigenous societies which have been recognised as having native title under the *NT Act* must continue to be vital societal normative systems in order to ensure the continuance of recognition of their native title.¹⁰⁴ Yet, as the Full Federal Court explained in 2005, in *Northern Territory v Alyawarr; Kaytetye, Warumungu, Wakaya Native Claim Group*, there is no mystery in the term ‘society’:

The concept of a ‘society’ in existence since sovereignty as the repository of traditional laws and customs in existence since that time derives from the reasoning in *Yorta Yorta*. The relevant ordinary meaning of society is ‘a body of people forming a community or living under the same government’ – Shorter Oxford English Dictionary. It does not require arcane construction. It is not a word which appears in the *NT Act*. It is a conceptual tool for use in its application. It does not introduce, into the judgments required by the *NT Act*, technical, jurisprudential or social scientific criteria for the classification of groups or aggregations of people as ‘societies’.¹⁰⁵

The third consequence is that the Indigenous normative systems *survived* the assertions of British sovereignty over continental New Holland and were not necessarily extinguished at discrete moments in time in 1788, 1824 or 1829. The jural landscape of New Holland was not empty but densely populated: *Law* was everywhere. Prior to the *Yorta Yorta* decision, Pearson posited these intersections as a mutual ‘recognition space’¹⁰⁶ but it is clearer now that the recognition was not merely of native title but an inter-societal recognition. This is a reversal of the legal fiction that the Indigenous societies of New Holland were not there at all or, whilst physically there as an objective reality, were ‘invisible’ to the new sovereign. These societies continue to be vital and functioning, and must show a demonstrable ‘continuous existence and vitality since sovereignty’, as the High Court stressed in the *Yorta Yorta* formulation, to both successfully secure a positive determination of native title under the *NT Act* and to maintain that determination.¹⁰⁷

The picture that also emerges of the ‘intersection’ to which their Honours in *Yorta Yorta* referred, is that it did not occur – and indeed could not have occurred – at discrete moments in time in 1788, 1824 and 1829, but was incremental. The intersection *began* with the assertion of British sovereignty over the historical New South Wales in 1788 and continues into the present. The sovereignty asserted by the British in the late 18th and early 19th centuries did not sweep across the physical and jural landscape in an instantaneous and inexplicable act of legal sorcery. This

104 See under *NT Act* (n 20) section 87 and the observations in *Western Australia v Ward* (2002) 213 CLR 1, 71–2 [32] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

105 *Alyawarr* (n 93) 466 [78] (Wilcox, French and Weinberg JJ).

106 Noel Pearson, ‘The Concept of Native Title at Common Law’ in Galarrwuy Yunupingu (ed), *Our Land is Our Life: Land Rights – Past Present Future* (University of Queensland Press, 1997) 154.

107 ‘[I]t must be shown that the society ... has continued to exist throughout that period as a body united by its acknowledgment and observance of the laws and customs’: *Yorta Yorta* (n 21) 457 [89] (Gleeson CJ, Gummow and Hayne JJ).

is now widely accepted in the native title jurisprudence, with the Federal Court and its judges speaking of the dates of ‘effective sovereignty’ or ‘practical’ sovereignty in positive determinations rather than the date of the formal assertion of territorial sovereignty.¹⁰⁸

Yet the most profound consequence is unaddressed in *Yorta Yorta*. It is this: these autochthonous normative entities to which their Honours stated to have survived the British assertions of sovereignty – and many survive still – are *outside* of the formal Australian constitutional framework. These normative entities, presently numbered in their hundreds, are not captured in the present constitutional framework and therefore represent a vast source of law running parallel with the Crown in right of Commonwealth and the States and Territories. In Kelsenite terms, each set of traditional Indigenous laws and customs emanate from a *grundnorm* other than that of the foundational Australian legal *grundnorm*.¹⁰⁹ It is clear that the sovereignty asserted by the British was never plenipotent but was necessarily limited because it did not formally absorb the autonomous Indigenous entities which are now being recognised in the Australian jurisprudence as extant at colonisation and, upon every recognition of native title, as functioning and uninterrupted societies existing now. Within each of these Indigenous normative societies lies a residuum of allodial sovereignty which was quiescent to the Anglo-Australian jurisprudence yet is not presently acknowledged in the formal constitutional arrangements.

After the assertions of British sovereignty many Indigenous peoples remained independent and self-governing, each with a system of laws and customs which successfully rendered them as small, stable and functioning societies. An assertion of British sovereignty may have been first made in 1788, but it was legally unsound and is, in the light of known facts and our present understandings, historically and legally indefensible.¹¹⁰ The most that can be said of the assertions in 1788, 1824 and 1829 was that an accretion of territorial sovereignty *began* at these times and proceeded to flow across the continent.

But is there a coherent and defensible alternative theory of territorial sovereignty which might capture these historical and legal strands – the non-Indigenous and the

108 Most recently, see *Stuart v South Australia* [No 3] [2021] FCA 230 (Charlesworth J). See also *Smirke on behalf of the Jurruru People v Western Australia* [No 2] [2020] FCA 1728 (Mortimer J); *Ashwin on behalf of the Wutha People v Western Australia* [No 4] [2019] FCA 308 (Bromberg J). In Western Australia, territorial sovereignty was asserted in 1829, yet it is common for the Federal Court to hold that sovereignty was not affected until the early 1900s: see *Sturt on behalf of the Jaru Native Title Claim v Western Australia* [2018] FCA 1923 (Mortimer J). The author wishes to thank the anonymous reviewer who raised this very helpful point.

109 Hans Kelsen, *Pure Theory of Law*, tr Max Knight (University of California Press, 1967). In *Love/Thoms* (n 10), Kiefel CJ in a minority opinion oddly denied that the traditional laws and customs of these Indigenous societies were recognized by the Australian common law despite those laws and customs being a definitional component both at common law and under the *NT Act* (n 20): at 179–80 [34]–[38]. It is a similar position adopted in *M'Hugh v Robertson* (n 39) with regard to the ‘native population’ being there, but not being there too. Sophistries about the existence of Indigenous laws and customs being extant as a matter of fact but not being recognised as a matter of law are no longer sustainable.

110 If such territories were uninhabited in fact and truly terra nullius, the most the Crown obtained in 1788, and which would be recognised in international law, was an inchoate right against other European nations to effectively occupy the balance of the claimed territory within a reasonable time.

Indigenous – and reconcile them? There are well-noted difficulties accommodating diversity and groups-specific formal recognition within constitutional democracies, particularly that of the formal Indigenous-settler relationship.¹¹¹ Some Australian philosophers and political scientists have begun this re-imagining,¹¹² in the belief that federalism can be more accommodating than other systems in recognising the rights of peoples.¹¹³ However, given other pressure on the rudderless *Australian Constitution*, the time may be right to likewise renovate the orthodox theory of Australian territorial sovereignty, something unspoken of in the parched 19th century document that is the *Constitution*.

A renovated theory of Anglo-Australian sovereignty might proceed thus. It is clear that at the time of the assertions of sovereignty by Great Britain, New Holland was occupied by many hundreds of small, autonomous Indigenous societies. As late as 1820, for example, the colonised area of eastern New Holland was very discrete, amounting to no more than a few thousand square kilometres of the three million square kilometres of half-continent claimed some 30 years earlier. However, once Great Britain began the colonisation of the east coast of New Holland, the loss of these Indigenous territorial sovereignties commenced under a process of domination, with an accretion of British occupation, and thus of territorial sovereignty, across the Australian continent and Tasmania. Then in the period from 1820 to the 1880s as the New South Wales colony transformed from a penal colony to a civil society and then aggregated into other colonies, there was rapid expansion and the effective control of the continental land mass, in large measure, was achieved.¹¹⁴ If a plotting exercise of sovereignty were conducted, it would show an accretion of British territorial sovereignty across the continent until, with certainty, one could proclaim that upon the federation of the former British colonies into the Commonwealth of Australia on 1 January 1901, no *external* Indigenous territorial sovereignties remained.¹¹⁵ All had entered under the aegis of the federated Australian nation state and the small Indigenous societies had lost their capacity as ‘states’ and, accordingly, could not exercise independent relations with other nation states.

However, it must likewise be acknowledged that the Indigenous societies of New Holland continued to exercise qualified autonomies after 1788, as between their own members and between other Indigenous societies. And if a normative

111 See James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge University Press, 1995) <<https://doi.org/10.1017/CBO9781139170888>>. Kymlicka has pointed out that it is not only indigenous populations that have these difficulties but minority groups such as the Basque and the Bretons: see Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford University Press, 1995) <<https://doi.org/10.1093/0198290918.001.0001>>.

112 See, eg, Duncan Ivison, Paul Patton and Will Sanders (eds), *Political Theory and the Rights of Indigenous Peoples* (Cambridge University Press, 2000).

113 Ian Brownlie, ‘The Rights of Peoples in Modern International Law’ in James Crawford (ed), *The Rights of Peoples* (Clarendon Press, 1988) 1, 6 <<https://doi.org/10.2307/2203340>>.

114 See, eg, Noel Loos, *Invasion and Resistance: Aboriginal-European Relations on the North Queensland Frontier, 1861–1897* (ANU Press, 1982).

115 Professor Reynolds challenges this assertion, arguing in his most recent work that large swathes of northern Australia still have not been effectively controlled: Henry Reynolds, *Truth-Telling: History, Sovereignty and the Uluru Statement* (NewSouth Publishing, 2021).

capacity exists outside the imported Anglo-Australian legal system, it means that for any number of independent Indigenous societies an internal form of limited, yet inherent, autonomy existed within these respective societies – the Wiradjuri, the Yolngu, the Noongar, the Warlpiri, the Gugu Badhun and so on. This was undeniably recognised for the Yolngu in *Milirrpum*.¹¹⁶ And it was expressed more broadly in the leading judgment in *Yorta Yorta* that the New Holland societies amounted to ‘normative systems’ and that many retain this normative capacity to the present day. With every positive determination of native title, the Australian legal system recognises this continuing normative capacity in these Indigenous societies.

Lastly, in the wake of *Mabo [No 2]*, it has become commonplace for Australian jurists to again default to the euphemistic language of ‘settlement’, although no longer prefaced with ‘peaceful’. There is an obvious disinclination for Australian judges to gaze unflinchingly at the ‘conflagration of oppression and conflict’ which caused the dispossession, degradation and devastation of the Australian Indigenous peoples and left the ‘national legacy of unutterable shame’ spoken of by Justices Deane and Gaudron.¹¹⁷ There is also the continued judicial pretense – one, however, that *was* adopted by Justice Brennan in *Mabo [No 2]* – that these Indigenous persons became full British subjects when the reach of the common law extended to them and thereafter protected them. It is a horrible fiction to pretend that these Indigenous inhabitants came under the protective aegis of the common law when that Crown purported to assume a radical title over their territories and then unilaterally proceed to take their traditional titles to their land without any other protective common law principles applied to them. No more cogent example can be given but the circumstance that the Anglo-Australian common law permitted their native titles to be stripped from these Indigenous peoples with neither process nor compensation until the passage of the *Racial Discrimination Act 1975* (Cth). No less an authority than the 1992 *Mabo [No 2]* decision itself says so.¹¹⁸

Their ambiguity as subjects of the Crown was very evident in the early colonial jurisprudence of the New South Wales Supreme Court, culminating in the 1836 decision of *R v Jack Congo Murrell*.¹¹⁹ It re-surfaced in 2020 with the differing judicial responses in the *Love v Commonwealth* (*‘Love/Thoms’*) decision¹²⁰ as to whether an Indigenous Australian can be ‘alien’ to the Australian political community despite not being an Australian citizen. The seven High Court Justices wrote seven separate judgments, with a remarkable schism developing between the minority of Kiefel, CJ and Gageler and Keane JJ, and the majority of Bell, Nettle, Gordon and Edelman JJ, the majority authorising Justice Bell to write: ‘although we express our reasoning differently, we agree that Aboriginal Australians (understood according to the tripartite test in *Mabo [No 2]*) are not within the reach of the

116 *Milirrpum* (n 83) 268.

117 *Mabo [No 2]* (n 1) 104 (Deane and Gaudron JJ).

118 The dissentient Dawson J joined with the majority of Mason CJ, and McHugh and Brennan JJ to determine the issue 4:3.

119 (1836) 1 Legge 72.

120 *Love/Thoms* (n 10).

“aliens” power conferred by s 51(xix) of the *Constitution*’.¹²¹ Professor George Williams understatedly noted the split decision reflected the ‘profound uncertainty about the place of Aboriginal people in our nation’.¹²²

Although expressed differently each member of the majority accepted the habitation of the Indigenous peoples of Australia in their respective *countries* prior to European colonisation. Justice Gordon stated, ‘the deeper truth’ was that ‘the Indigenous peoples of Australia are the first peoples of this country’.¹²³ Nettle J went further still, finding in the Imperial constitutional law a fundamental duty to protect Indigenous societies, speaking of ‘the Crown’s unique obligation of protection to Australian Aboriginal societies and their members’.¹²⁴

Despite the obvious discomfort of the minority judges, this is not any ‘judicial recognition’ of Indigenous persons in the formal constitutional arrangements. However, a majority of the High Court has now accepted this ‘deeper truth’ as an irrevocable constitutional fact. Neither alien nor citizen, they remain unseizable by the Australian state. There may not be any formal acknowledgment of Indigenous societies in the text of the *Australian Constitution*, but they now have an undeniable place, an indelible embossment on every page of this foundational document that does not acknowledge their existence.

Abandoning the fallacious proposition that the Indigenous peoples of Australia were ‘sovereign’-less, these congruent legal-historical principles are thus proposed:

- British sovereignty did not instantly sweep across New South Wales in 1788 and the balance of New Holland in 1824 or 1829, but proceeded incrementally as Great Britain took effective control of the mainland and Van Diemen’s Land.
- By a process of domination, during the period 1788–1900, an external territorial sovereignty was secured and perfected (such that this external sovereignty is now inviolable and unchallengeable under the Act of State doctrine).
- The Indigenous population of New Holland did not become full subjects of the Crown in 1788, 1824 or 1829 but did acquire the status of ‘protected non-subjects’, as the British took effective control, and the common law was extended to these Indigenous societies and their territories. The common law extended to these Indigenous peoples but did not protect them. As the acquisition by the Crown of the radical title in their territories advanced it created an over-arching fiduciary duty in the Crown to protect these non-subjects, their societies and their *countries*.

121 Ibid 192 [81] (Bell J).

122 George Williams, ‘Racism Was Built into the System’, *The Australian* (Sydney, 19 February 2020) 12.

123 *Love/Thoms* (n 10) 260 [289] (Gordon J).

124 Ibid 256 [276] (Nettle J). Justice Nettle has iterated this view more recently in *Chetcuti v Commonwealth* (2020) 385 ALR 1, 10 [39] (Nettle J). No other member of the Court adopted this position with Keane J specifically denying any such ‘unique obligation’ or any ‘special protection’: *Love/Thoms* (n 10) 216 [162]. Justice Toohey first raised the concept of a fiduciary duty being owed to Aboriginal peoples by the Crown in *Mabo [No 2]*, adopting the North American jurisprudence, particularly that of *Cherokee Nation* (n 97).

- The dominant British sovereignty did not overwhelm the normative systems of the Indigenous societies of New Holland, their self-governance or their societal structures. These societies retained an inherent ‘internal’ sovereignty. It is to these Indigenous ‘nations’ to which these persons remain subject.
- Indigenous laws and customs survived the assertions of sovereignty by the British and residua of inherent Indigenous normative systems, as sources of other ‘law’, are now re-emerging in the jural landscape in the native title era.¹²⁵
- The manifold Indigenous laws and customs and their residua of internal sovereignty are not yet accepted in the formal Australian constitutional framework and these Indigenous ‘sovereignties’ are yet to be accounted for within that framework.

While there is much to confront, as Dame Sian Elias counselled, there is little need to catastrophise. The constitutional discourse in Australia is presently in a state of a particular vulnerability – or of opportunity, according to one’s want. With the passage of the *Australia Acts* in 1986, the source of the *Australian Constitution* is no longer the Imperial Parliament. In withdrawing the Imperial underpinning however, the question of what exactly is the source of the modern Australian ‘sovereignty’ (that term here used more broadly than territorial sovereignty) is seemingly now an acute one. The present-day challenge for Australian jurisprudence is to condemn the implausible and broken orthodox legal theory of territorial sovereignty, to which it has tenaciously clung (to one version or another of the false narratives) for over two centuries, and to incorporate the residua of these Indigenous sovereignties into the formal constitutional framework. On this point, it is notable that the 2017 Uluru Statement from the Heart expressly states that these Indigenous sovereignties have ‘never been ceded or extinguished’ and that they co-exist with the sovereignty of the Crown. Likewise, the Barunga Agreement, a Memorandum of Understanding struck between the four statutory land councils under the *Aboriginal Land Rights Act 1976* (Cth) and the Chief Minister of the Northern Territory in June 2018, acknowledges that Aboriginal peoples ‘were the first owners and occupiers’ of the lands and waters of what is now known as the Northern Territory, that these peoples were ‘self-governing’ and they ‘never ceded sovereignty of their land, seas and waters’.¹²⁶

V CONCLUSION

We have explored the fundamental principles underpinning the British acquisitions of territorial sovereignty of the Australian territories in the late 18th and early 19th centuries exposed to the light by the *Mabo [No 2]* decision. In answering the most basal issue of whether the Indigenous societies possessed sovereignty at

¹²⁵ This is not a challenge any Act of State, rather to state a consequence of the acquisition.

¹²⁶ See Northern Territory Treaty Commission, *Treaty Discussion Paper* (Discussion Paper, 30 June 2020) 9.

the time of the British assertions in 1788, 1824 and 1829, the ‘Aborigines’ of New Holland were regarded by Imperial and colonial authorities as being ‘backward peoples’ so low on the scale of civilised society that any property rights or any sovereignty they might possess could be disregarded. The eugenicist answer given in the Anglo-Australian jurisprudence by the Privy Council in *Cooper v Stuart* was that these Indigenous territories were ‘practically unoccupied’, without settled inhabitants or settled law, and ‘peacefully annexed’.¹²⁷

However, freed from the Imperial yoke, the High Court of Australia in *Mabo [No 2]*¹²⁸ determined that the British Crown, upon its assertions of territorial sovereignty in New Holland/Australia, acquired a paramount radical title to these territories, not an absolute title as previously asserted. Allodial ‘native title’, sourced in the traditional laws and customs of the Indigenous societies, both survived the assertions of the British sovereignty and was capable of being recognised by the Anglo-Australian common law. The High Court uncovered this latent ‘native title’, and, far from regarding continental Australia as being a jural vacuum, it discovered a multiplicity of Indigenous laws, customs and legal systems in this most ancient of landscapes. Repudiating the Imperial narrative of *Cooper v Stuart*, it held that these Indigenous peoples had laws and customs in a defined territory, and far from the ‘peaceful’ annexation scenario, their territories had been violently appropriated in a ‘conflagration of oppression and conflict’.¹²⁹ The end of the ‘disremembering’ had begun. But *Mabo [No 2]* also revealed the Occupation of Backward Peoples doctrine with its enlarged notion of terra nullius concerning ‘backward peoples’, unconvincingly claimed to be sourced in the international law circa 1800, as the keystone of the present orthodox theory of territorial sovereignty and the foundation stone of the modern Australian nation state.

In *Yorta Yorta*, the High Court illuminated the intersection of normative systems and its ramifications to the historical circumstances surrounding the acquisition of the Australian territories. Their Honours’ ‘jurisprudential analysis’ explored some of the constitutional questions left unanswered in *Mabo [No 2]*, permitting another vision of how the Indigenous territories of New Holland were purportedly brought under the constitutional umbrella of the Imperial Crown. New Holland was not ‘sovereign’-less, in fact or in the international law, and a renovated legal-historical sovereignty narrative is proposed. British sovereignty did not instantly sweep across ‘New South Wales’ in 1788 and the balance of Australia in 1824 or 1829, but incrementally as Great Britain took effective control of the mainland and Van Diemen’s Land. By a process of domination, during the period 1788–1900, an external sovereignty was secured and perfected and is now unchallengeable. The common law was extended to these Indigenous societies and their territories in the same piecemeal manner. Incrementally, too, the Indigenous population did not become subjects of the Crown in 1788, 1824 or 1829, but became ‘protected non-subjects’ as Great Britain took effective control of their territories.

127 *Cooper v Stuart* (n 41) 291.

128 *Mabo [No 2]* (n 1).

129 *Mabo [No 2]* (n 1) 104 (Deane and Gaudron JJ).

The dominant British sovereignty subjugated – but did not extinguish – the normative systems of these Indigenous societies, their self-governance or their societal structures. These societies retained an inherent ‘internal’ sovereignty. Indigenous laws and customs survived the assertions of sovereignty by the British and residua of inherent Indigenous normative systems, as sources of other ‘law’, are now – in this era of native title – re-emerging in that jural landscape. The over 450 determinations of native title under the *NT Act* have exposed a vast network of other non-Anglo-Australian *Laws* in the jural landscape. Critically, the Indigenous laws and customs and their residua of internal sovereignty are not within the formal Australian constitutional framework and these Indigenous ‘sovereignties’ need to be accounted for within that framework.

In *Mabo [No 2]*, the reservation expressed in recognising the doctrine of native title in the jurisprudence after such a lengthy period was that the common law of Australia was not free to adopt rules that accord with contemporary notions if such rules ‘would fracture the skeleton of principle which gives the body of our law its shape and internal consistency’.¹³⁰ The question may relevantly be asked whether re-considering the issue of Indigenous sovereignties and submitting that a residuum of sovereignty inures in these Indigenous societies, after such a lengthy hiatus, might potentially fracture some skeletal principle of the Australian legal system. The answer is that the orthodox sovereignty theory which underpins the Australian system is already broken beyond coherence and it lacks authority. Additionally, it is not contemporary notions of the common law which are at play but the inter-temporal rules of international law of the relevant epoch. Far from fracturing the Australian legal system, it may be that the present state of Australian constitutionalism is under such gathering pressures, not yet recognised as being acute, that the only way forward is a reconfiguration of relationship between the Indigenous peoples and the Australian nation state. Far from fracturing the basic law, the acceptance of a coherent and credible alternative theory may be remedial and can recreate and cement it into the future.

The modern Canadian constitutional framework shows that fractures are by no means inevitable. Australia, like Canada, is a planted British society, and must likewise acknowledge the fact that Indigenous peoples inhabited Australia, ‘living on the land in distinctive societies, with their own practices, traditions and cultures’¹³¹ and reconcile this ‘with the sovereignty of the Crown’¹³² in the modern Australian nation-state. The very reason that a formal Indigenous recognition is found in the modern Canadian constitution is because of a fundamental historical imperative, likewise common to Australia, of sharing a country with pre-existing indigenous peoples. In pretending that the Australian position is not similarly driven, the danger is that the listing theory’s fractures remain untended, and the

130 Ibid 29.

131 See *Hamlet of Baker Lake v Minister of Indian Affairs and Northern Development* (1979) 87 DLR (3rd) 342 (Federal Court of Canada).

132 *R v Van der Peet* [1996] 2 SCR 507, 539 [31] (Lamer CJ for Lamer CJ, La Forest, Sopinka, Gonthier, Cory, Iacobucci and Major JJ).

jurisprudence will continue to limp into the future, clutching at histrionic fictions.¹³³ Australian law remains a prisoner of its history,¹³⁴ yet it need not remain captive to indefensible and eugenicist legal theory. Assertions that the British assumed the territorial sovereignty over the eastern half of New Holland in an instant in early 1788 is a legal falsehood. And it is not a fictional tool which is intended to illuminate, as the law often does, but a naked falsehood with an intent to obscure the past and, potentially, to deceive the present. That Great Britain perfected its sovereignty over continental New Holland by other assertions in 1824 and 1829 are falsehoods likewise without legal or factual foundation. This is the present *story* of Australian territorial sovereignty, and it is a wholly implausible one in the international law.

That these fictions were doggedly defended with a colonial historiography and/or assertion posing as legal reasoning when the Anglo-Australian legal system remained part of the Imperial system is unexceptional.¹³⁵ The law was bound by decisions of courts in the hierarchy of Empire. That they could be presently defended, with the Australian jurisprudence no longer bound to Empire, is doubtful.¹³⁶ The adoption of an alternative renovated theory of sovereignty is neither empty symbolic posturing nor idle intellectual exercise. It has enormous consequences. The most fundamental issue is whether the Australian legal system is to recognise the *fact* of sovereign Indigenous societies inhabiting the territories of New Holland and Van Diemen's Land prior to a permanent European presence. The *Love/Thoms* decision in 2020 appears to answer that question in the affirmative, however slim the majority. It has already recognised that Indigenous peoples inhabited the vast tracts of New Holland, with territories of their own, legal systems, and with rights and interests in their land and waters. The next step, within the constraints of the modern Australian nation state, must be to accept that these small Indigenous societies were composed of rights-bearing human beings who exercised a form of sovereignty in and over their respective *countries*. The challenge for Australian jurisprudence is to abandon the orthodox legal narrative that the Indigenous societies of Australia were and remain 'backward peoples', so low on the scale of civilisation so as not to possess any 'sovereignty', and to construct a historically congruent theory which incorporates the quiescent residua of these Indigenous sovereignties and peoples into a 21st century jurisprudential and constitutional framework.

133 The fractures in the jurisprudence are very obvious in the 2020 *Love/Thoms* (n 10) decision.

134 Brennan J said that 'our law is the prisoner of its history': *Mabo [No 2]* (n 1) 29.

135 The 'legal ingenuity' to disguise the 'rapacity and greed' of which Sir James Stephen spoke is not much in evidence in the Australian circumstances: see Harring (n 49) 21.

136 Brennan J stated that Australian common law 'is not now bound by decisions of courts in the hierarchy of an Empire then concerned with the development of its colonies': *Mabo [No 2]* (n 1) 29.