LA4026

RESEARCH DISSERTATION A

JOANNE KEUNE *

HONOURS SUPERVISOR: JAMIE FELLOWS

HONOURS COORDINATOR: TOM MIDDLETON

DUE DATE: 9 DECEMBER 2016

THE STOLEN NATION

* Undergraduate student, James Cook University.

Prolegomenon

In 2014, I sat in my Land Law class listening to a lecture on the acquisition of Australia by the British. My lecturer explained that according to 18th Century English Jurist Blackstone, there were three ways that a colony could be acquired: 1. Cession (a treaty); 2. Conquest; or 3. Settlement. However the person went on to say that a new 4th category—that of 'peaceful settlement of inhabited land'—was a valid way to acquire title. I asked which Aboriginal or Torres Strait Islander people the person had spoken with in order to reach this conclusion? My question was ignored. The history and law of the last 228 years has largely been a 'white-wash' involving massacres, stolen wages, stolen generations, black deaths in custody, the worst health statistics on every level, the highest percentage of prisoners, and those incarcerated with mental health problems… and now …the treatment of Indigenous children in juvenile detention centres.
I write this as a privileged[1] white female growing up in Townsville. I feel fortunate to have listened first hand, as an 'I-witness'[2] to the traditional stories, customs and lore of the Wulgurukaba, Bindal and the 12 tribes that comprise the Girringun and TSI people. My mainstream family will attest that I have argued all my life against fearist[3] attitudes and stereotypes directed at Indigenous people. I am embarrassed that I come from one of only two federal Government electorates that voted 'NO' to the 1967 referendum to give Indigenous people the vote in Australia. I am proud that individuals associated with James Cook University encouraged Koiki Mabo to fight for the rights of the Murray Island people. This thesis is a culmination of thoughts, and questions that I have had for many years in relation to the validity of the dominant view, and indeed legal view, that

[1] Privileged not only in the sense of being fortunate in Australia that my soul was born into white skin (because Indigenous people experience hegemonic treatment every single day – but also in that I, as an Australian, like all Australians – can study law later in life, with the Government fronting the payment. To study law at Berkeley University in the U.S. would have cost me $450,000, at JCU it is $45,000 – pay later. We may not have a 'bill of rights' – but we have more rights in 'free' health and education than any American.

[2] John Morton (2002) *I witnessing I the witness*, The Asia Pacific Journal of Anthropology, 3:2, 89, 91.

[3] Please note the word 'racism' will not be used in this thesis. There is only one race – the Human Race. According to Microbiologist Michael Hakjiargyrou- the term "race" is used incorrectly, and thus it is fear that causes humans negative reactions to those who are different from themselves. Race is a social concept not a scientific one. Our single race is independent of geographic origin, ethnicity, culture, colour of skin or shape of eyes – we all share a single phenotype, the same or similar observable anatomical features and behaviour. Data shows that the DNA of any two human beings is 99.9 percent identical; we all share the same set of genes, scientifically validating the existence of a single biological human race and one origin for all human beings. In short, we are all brothers and sisters. Michael Hadjiargyrou, Microbiologist, Chair of the Department of Life Sciences at the New York Institute of Technology. Live Sciences' Expert Voices: Op-Ed & Insights.. See also Frank Brennan, 'Contours and prospects for Indigenous recognition in the Australian Constitution and why it matters' (2016) 90 *Alternative Law Journal* 340, 340. See; comments by Patrick Dodson and Mark Leibler "outdated notion of race", Expert Panel on Constitution Recognition of Indigenous Australians, Recognising Aboriginal and TORRES STRAIT ISLANDERSs Peoples in the Constitution, Report, January 2012 ; 'out-dated notion of race' – Australian Human Rights Commission Social Justice and Native Title Report released on the 2nd December 2016,58.

Australia was peacefully settled. It is arguable that in a legal sense, Australia was invaded, and the traditional owners' sovereignty was dominated. Australia prides itself on giving everyone 'a fair go,' it should be for all people – especially the first Australians. I hope that the legal evidence, presented in this thesis is accessible, and inspires human empathy and compassion.

Abstract

The history wars of Australia's colonisation have been lost – by the Indigenous people of Australia. However, the High Court's Mabo (No 2) decision has now resulted in over 228 successful determinations and further awaiting decision. This enormous collection of customary law, prima facie evidences that at the time of colonisation the Aboriginal and TSI people had their own form of sovereignty, which has never been ceded. The Australian legal system is on shaky sovereignty pillars, awaiting the next High Court or International Court of Justice case that legally recognises Indigenous sovereignty in Australia. This thesis examines the legal authority for which sovereignty was declared over Australia and its original inhabitants. In addition, I suggest legal reform toward the healing and unification of the people of Australia.

I INTRODUCTION

The law stands for truth and justice.[4] The law exists to provide protection for its people, especially the most vulnerable. In the context of Indigenous Australians, the law has failed to protect the most vulnerable citizens and in fact, it has worked to imprison countless Indigenous people over the many decades since colonisation. The Aboriginal and Torres Strait Islander (TSI)[5] people are the most incarcerated, per percent of the Australian population, in the world.[6] On almost every social and economic scale indicator in Australia the Indigenous people are the most disadvantaged.[7] Australia still remains the only Commonwealth nation that has not signed a treaty with its traditional owners.[8] For 238 years Indigenous people have patiently witnessed changing hypocritical policies, broken promises, high commissions, meeting and reports that lead no-where and the establishment and disbandment of important governing ATSI organisations.[9] This thesis argues that the foundation of the 'settlement' of Australia is built on an unlawful acquisition calling into question the claim that sovereignty was lawfully acquired firstly by the British.

Although not central to the legal argument of this thesis, it is asserted that the catalyst for Australia's Indigenous people's acute suffering, is the loss of their land.[10] The common

[4] Heinrich Rommen, The Natural Law: A study in Legal and Social Philosophy trans Thomas R Hanley (B. Herder Book Co., 1947, reprinted 1959) 5.
[5] Apologies. I was going to save words and use TORRES STRAIT ISLANDERS – but I have decided despite my apology it seems disrespectful, so I am changing it back, regardless of word count.
[6] Harry Blagg, Crime, *Aboriginality and the Decolonisation of Justice*, (Hawkins Press, 2008) p1.
[7] A Australian Institute of Health and Welfare, 'The health and welfare of Australia's Aboriginal and TORRES STRAIT ISLANDERS peoples 2015' (Research Report No IHW 147, Australian Institute of Health and Welfare, 2015). Homelessness rate for Indigenous people 14 times higher than non-Indigenous people; the age-standardised rate of hospitalisations for assault was 14 times higher for Indigenous people than non; 27 % of adult prisoner population; 2012-13 labour force participation in non-remote areas =61%; only 1% of University students in 2013 were Indigenous; For 2012-13 31% of 15-24 yr. old Indigenous young people are unemployed; in 2011 two-thirds 68% of Indigenous people earn less than $600 a week; 2012/13 47 % of Indigenous people said they did not have money to pay for basic living expenses 2 weeks prior to the survey,23 % reported they went without food; 50% less home ownership; 2102-13 Indigenous children 7 times more likely to receive child protection services; 2012 live born singleton babies twice as likely to be of low birth weight; 2012 one third of indigenous adults assessed as having high or very high psychological distress(2.7 times as likely as non-indigenous); 2012-13 48 % of Indigenous people reported that either they or a relative had been removed from their natural family; 34% of Indigenous adults in remote areas had high blood pressure, only 13% in non-indigenous; Indigenous people aged 15 and over were 1.6 times more likely to be underweight; 25 % of Indigenous adults had abnormal total cholesterol levels;
[8] George Williams, 'Does true reconciliation require a treaty?' (2014) 9(10) *Indigenous Law Bulletin* 1.
[9] Dawn Casey, The Mabo High Court judgment: Was it the agent for change and recognition? (Speech delivered at Mabo Oration, Anti-Discrimination Commission Queensland, Brisbane, 10 August 2015).
[10] Report of the UK Parliamentary Select Committee on Aboriginal Tribes (British Settlements) (Aborigines Protection Society, 1837); Jane Fletcher, Deputy Director, Office of Treaty Settlements of New Zealand, ,

law, legislature and ever changing political policies[11] have 'dispossessed Aboriginal and TSI, making them the most disadvantaged in Australian Society'[12], or 'beggars in their own land'.[13]

A *Research questions*

The three primary questions addressed in this thesis are:

> 1. By what legal authority did the British Crown assert to acquire valid title over New Holland?
>
> 2. By what legal authority did the British Crown claim sovereignty over the Indigenous people of Australia?
>
> 3. What constitutional or other legal reforms should be implemented so that Indigenous people can finally be recognised and incorporated into the Australian constitutional framework?

In relation to the first question, it is proposed that the British Crown did not acquire valid title, of New Holland in International law. The landmark case of *Mabo v Queensland (No 2)* has identified that the mode of acquisition of Australia is 'settled.'[14] It is far from settled. The first question involves a brief analysis as to the elements required for a 'settled' acquisition. It is clear from the evidence that this mode is incorrect, and there exists a defect in title. However, if the Indigenous people of Australia will not accept that they were 'conquered' (which they were not), than it remains that Australia's mode of acquisition cannot legally be found in the Imperial modes of acquisition. The legal definition of invasion, based on the evidence is far more apt as the mode of acquisition that the British used to take possession of Indigenous inhabitants long possessed lands. Australian jurisprudence now acknowledges Indigenous Native Title to the land, recognising customary law so why not the sovereignty of the people?

The question of sovereignty is a critical issue, to those who are told they lost it. Post *Mabo (No 2)* cases have clearly stated that the issue of Indigenous sovereignty is 'non-justiciable', 'unquestionable'. One can understand that British sovereignty is the base of

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Speaking at the United Nations Economic and Social Council, Permanent Forum on Indigenous Issues, Eleventh Session, 7th May 2012, 1sst and 2nd meetings.

[11] Jessica Kitch, 'Constitutional Recognition: Recognising the Flaw in Indigenous Affairs?' (2014) 8(15) *Indigenous Law Bulletin*.

[12] *Native Title Act 1993* (Cth).

[13] Noel Pearson, *Up from the Mission* (McPherson's Printing Group, 2009) 55.

[14] (1992) 175 CLR 1 ('*Mabo (No 2)*'.

the entire Australian legal system, so to question it undermines the Judges very existence. But is there really a threat to the Australian legal system? So what is sovereignty? Why is it a changing concept? The enormous quantity of evidence amassed for 228 Native Title claims, proves prima facie that Indigenous sovereignty existed at the time of acquisition. However, the courts have yet to confirm this. Why? And what does the inevitable legal recognition of Indigenous sovereignty mean for Australia?

The research indicates that the majority of Indigenous Australians do not seek an independent nation, only recognition, incorporation and programs that work. I share the views of Pearson[15] and Reynolds,[16] that the Australian legal system which is based on the British common law, for all of its flaws, is a highly developed, ethically based system that ultimately aims for equitable justice.[17] We do not need to re-create the wheel, and as stated by Justice Brennan in *Mabo(No2)*'Australian law can legitimately develop independent of English precedents.'[18] Australia already has a unique system of property law – this will simply develop further as the 'colonists carry with them only so much of the English law as is applicable to their new situation and to the condition of the infant colony.[19] Australia is also a signatory on numerous United Nations declarations[20] and must recognise International precedent occurring in Indigenous sovereignty claims. There is no need for Australia to be taken to the International Court of Justice. Australia has the legislative ability to ensure that the rightful recognition and reform occurs to avoid negative human rights global attention.

This leads to the final substantive part of the thesis. Unfortunately, we cannot re-create the past. If Cook had signed a treaty it is possible that the injustice that has been caused

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[15] Noel Pearson, The concept of Native Title at Common Law, Australian Humanities review www.australianhumanitiesreview.org/archive/Issue-March-1997/pearson.html; see also F C Hutley, 'The Legal Traditions of Australia Contrasted with Those of the United States'(1981) 55 *Alternative Law Journal* 63, 69.

[16] Henry Reynolds, *Aboriginal Sovereignty: Reflection on Race, state and Nation* (Allen & Unwin, 1996); David Ritter, 'The 'Rejection of Terra Nullius' in Mabo (2): A Critical Analysis' (1996) 18(5) *Sydney Law Review* 5, 28-29.

[17] Noel Pearson, 'The concept of Native Title at Common Law' [1997] *Australian Humanities Review*.

[18] Mabo (2) p29.

[19] William Blackstone, Commentaries on the Laws of England (University of Chicago Press 1979)Book the first, 105.

[20] Relevant instruments Including but not limited to: The Universal declaration of Human Rights; The International Convention on the Elimination of All forms of Racial Discrimination; Convention on the Prevention and Punishment of the Crime of Genocide; Convention on the Political Rights of Women; Convention on the Elimination of all forms of Discrimination against Women; Convention on the Rights of the Child; Convention on the Reduction of Statelessness; Resolution on Permanent Sovereignty over Natural Resources; International Covenant on Civil and Political Rights, International Covenant on Economic, Social and Cultural Rights.

to the Indigenous people might have been avoided. But Cook did not follow protocol, so Australia must develop a treaty now with the First Australians. The third section of this thesis addresses practical legal reform toward recognising Indigenous sovereignty and customary law and the ways in which this can be integrated into our current excellent legal system toward addressing the numerous 'gaps' that exist between dispossessed black people and privileged white people.

B Mabo (No 2) *and the difference between 'title' and 'sovereignty'*

In June 1992, the High Court handed down its most controversial and significant decision for Indigenous land rights, and in the process, rejected 'terra nullius'[21] by recognising that Indigenous people of the Murray Islands were entitled, 'as against the whole world, to possession, occupation, use and enjoyment of the lands of the Murray Island'.[22] This decision recognised that a form of native title existed under the common law of Australia, while maintaining 'radical or sovereign'[23] title with the crown. The decision overturned previous property law precedent.[24] The *Mabo (No2)* decision recognised an allodial Indigenous title to land, a prerogative that is 'proprietary' in nature, but failed to address the parallel presumption of Indigenous sovereignty.[25] In fact Justice Brennan presented a paradox when he admitted that Australian law is a 'prisoner to its own history', yet also stated that Australian law would stand unto itself, regardless of 'contemporary notions of justice and human rights' if their adoption threatened to fracture the 'skeleton of principles which give our law its shape and internal consistency'.[26] A paradox, because on the one hand the High Court was overturning the major legal precedent that New Holland was uninhabited and thus 'settled', while at the same time stating that Justice and Human rights came second to legal principle. How and why is this justified?

In *Mabo (No 2)* Justice Brennan alluded to the fact that the principle of 'settlement of an uninhabited territory', only allowed the law (i.e. the sovereign power) to be brought to New South Wales by a prerogative of the Imperial Parliament and not the power of the

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[21] David Ritter, 'The 'Rejection of Terra Nullius' in Mabo: A Critical Analysis,' (1996) Vol 18:5, *Sydney Law Review* p5. Ritter argues that the 'rejection of terra nullius' was not necessary, as this was an International doctrine and used as a scapegoat to explain why traditional Aboriginal rights to land had never been recognised under the Australian common law, as a way of maintaining the good name of the Australian legal system.
[22] *Mabo (No 2)* (1992) 107 ALR 1, 128.
[23] Samantha Hepburn, *Principles of Property Law* (Cavendish Publishing, 2nd ed, 2001) 43.
[24] *Mabo (No 2)* (1992) 107 ALR 1, 128.
[25] Ibid 31.
[26] Ibid 29.

Governor of New South Wales. The Legislative Council in New South Wales was not established until 1823, however Brennan J concluded that this uncertainty did not need to be 'questioned at this time' [27] but in doing so, he certainly left open the possibility of such an argument being raised in the future. Indeed, the failure of *Mabo(No. 2)* to address the question of the legitimacy of the mode of acquisition leads one to question if the avoidance is because there exists a defect in the title? [28]

1 *Legal authority for the British Crown to acquire valid title Over New Holland*

There is no succinct Imperial legal authority that the British Empire can claim that was used in their acquisition of New Holland in 1770. To date Australian law states that the mode of acquisition of New Holland is 'settlement' via 'occupation.' This was first confirmed in *Cooper v Stuart* in 1889,[29] and again by Gibbs and Aickin JJ in *Coe v Commonwealth*.[30] The precedent was confirmed in *Mabo (No 2)* that the Murray Islands were 'settled', when Brennan J, stated they were not acquired by the other three modes that of 'conquest or by cession.'[31]

The International Court of Justice (ICJ) is the principal judicial organ of the United Nations (UN). Since 1947 the court has been used to settle International territorial disputes by States seeking sovereignty or to affirm pre-existing sovereignty over that territory. In 1928, the ICJ applied the doctrine of *inter-temporal law* which maintains that cases must be assessed by laws at the time of acquisition, not now.[32]

Section four will more closely analyse territorial dispute decisions of the International Court of Justice. The British arrival in New Holland in 1770 must be put into context to understand the historical and legal significance to determine whether the law used to justify the acquisition of New Holland was valid.

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[27] Ibid 37.
[28] William Blackstone, *Commentaries on the Laws of England* (University of Chicago Press 1979, first published 1765-69) 2.
[29] [1889] UKPC 1, 291.
[30] (1979) 24 ALR 118, 122.
[31] *Mabo (No 2)* (1992) 107 ALR 1, 25 (Brennan J).
[32] *Island of Palmus Case (Netherlands v United States of America)* (Award) [1932] Hague Court Reports 2d 83, 840. this doctrine was also confirmed in; Sir Gerald Fitzmaurice, 'The Law and Procedure of the International Court of Justice' 30 BRITISH YEARBOOK OF INTERNATIONAL LAW 5(1953) also the case of Sovereignty, Indonesia v Malaysia[2002] ICJ Rep 625, n 582[135].

2 *The law of Nations before 1770*

The British legal system is based on principles dating back to Roman times and Emperor Justinian's great legal code.[33] By 1770, when Cook arrived[34] in New Holland, a complex system, of the 'law of nations' was well established, governing the British and other ambitious Empires over the acquisition of new territories.[35] The 'law of nations' was based on a long history of theology and jurisprudence that was expressly written by theologians like Francisco de Vitoria in 1537, Hugo Grotius in 1625, Christian von Wolff in 1749 , Emmirch de Vattel in 1760 and then William Blackstone who was the first to document the history of English law in 1765.[36] By 1770 the law was substantial in its consideration of old world Christian beliefs that justified stealing the lands of 'infidels'[37] or natives who 'wandered over lands held in common'.[38] In 1550 the case of de Las Casas v Sepulveda was heard before fourteen judges,[39] In his decision Pope Paul III, was quoted*:*

> [T]he said Indians and all other people who may later be discovered by Christians, are by no means to be deprived of their liberty or the possession of their property, even though they be outside the faith of Jesus Christ; and that they may and should, freely and legitimately, enjoy their liberty and the possession of their property; nor should they be in any way enslaved; should the contrary happen, it shall be null and of no effect.[40]

The British Empire was well equipped and experienced in acquiring new territories; they had 'settled' the Bermuda Islands in 1609; Barbados in 1624; conquered Jamaica in 1655; they had 'chartered' the East India Company in 1600; 'settled' Plymouth in 1620 and Massachusetts in 1629, by 1760 King George II had died. King George III was dealing

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[33] William Buckland, *A text book of Roman Law, from Augustus to Justinian* (Cambridge University Press, 3rd ed, 1968) 7.
[34] K G McIntryre, *The Secret Discovery of Australia; Portuguese discoveries 200 years before Captain Cook* (Souvenir Press, 1977). Primary schools in Australia need to correct the mistake that cook 'discovered' Australia The First documented exploration by Europeans was Dutch navigator Willem Janszoon in 1606, 164 years before Cook.
[35] Blackstone, above n 19.
[36] Francisco de Vitoria, *De Indis et de Jure Belli Reflectiones* (On the Indians and the Law of War), The Classics of International Law Series (Oceana, 1964); Hugo Grotius, On the law of War and Peace (Ocean, Reprint, 1964 Ed., 1625); Christian von Wolff, The Law of Nations (Clarendon Press (Reprint 1934), 1748); Emmerich de Vattel, *The Law of Nations*(*or the principles of the Law of Nature applied to the conduct and Affairs of Nations and Sovereig*ns)(London,1758) 308; Blackstone, above n 19.
[37] Vitoria, above n 36, 32.
[38] Grotius, above n 36, 11.
[39] Lewis Hanke, *All Mankind is One: a study of the disputation between Barolome de Las Casas and Juan Gines de Sepulveda on the intellectual and religious capacity of the American Indians* (Northern Illinois University Press, 1974).
[40] Felix Cohen, *The Spanish Origin of Indian Rights in the Law of the United States* (1942) 31 *Georgetown Law Journal* 1, 108, 12.

with the Treaty of Paris and the American Revolution as the 13 colonies fought for American Independence. [41]

In 1763 King George III, developed the imperial constitutional law principles, or colonial law, [42] when he wrote the Royal Proclamation of 1763. This document aimed to govern British possessions in North America. The preamble stated:

> [T]he several Nations or Tribes of Indians with whom We are connected, and who live under our protection, shall not be molested or disturbed in the possession of such parts of our dominions and territories, as, not having been ceded to or purchased by Us, are reserved to them or any of them, as their Hunting Grounds.[43]

The principles were adhered to with the occupation of Northern America where treaties were entered into with the Native Americans. Why then did the First fleet not obey the same proclamation when they reached New Holland, and develop treaties with the Aboriginal people they found there, as directed by King George III?

It was, however, the English philosopher and Lawyer William Blackstone who has had the most influence on Australian common law, and the mode of acquisition employed by the British on the colonisation of Australia. Blackstone published the Commentaries on the laws of England between 1765 and 1769. Blackstone was the first to document the history of English Law,[44] and acknowledged the 'right of property' as that which 'engages the affections of mankind' and their right to 'despotic dominion' in 'exclusion of any other in the universe.'[45]

Property law is the oldest law in the world.[46] In Blackstone's first book he recognises Roman law and the 'principles of universal law' when he famously wrote:

> Plantations or colonies, in distant countries, are either such where the lands are claimed by right of occupancy only, by finding them desart and uncultivated, and peopling them from the mother-country' or where, when already cultivated, they have been either gained by conquest, or ceded to us

[41] William Woodward, *An Outline History of the British Empire from 1500 to 1926* (Cambridge Press, 1926) 1-3.
[42] Brian Slattery, *The Land Rights of Indigenous Canadian Peoples, as affected by the Crown's Acquisition of their Territories* (Oxford University, 1979) 35. Also Paul Babie, 'Sovereignty as Governance: An organising theme for Australian Property Law' [2013] *University of New South Wales Law Journal* 43.
[43] Royal Proclamation. 1 Geo III (2 October 1763).
[44] David Walker, *the Oxford Companion to Law* (Oxford University Press, 1980), 137.
[45] Blackstone, above n 19, 104.
[46] Buckland, above n 33, 3.

> by treaties. And both these rights are founded upon the law of nature, or at least upon that of nations.[47]

It is this quote that was analysed in the legal proceedings of Australia. The term 'desart', also used by Vattel, referred at that time to 'an uninhabited land', not a 'desert'. This term was misinterpreted in 1889 by the Privy Council in *Cooper v Stuart*, the first case in New Holland to address acquisition when Lord Watson wrote:

> The often-quoted observation of Sir William Blackstone appear [to] have a direct bearing upon the present case: He says 'It hath been held that, if an uninhabited country be discovered and planted by English subjects, all the English laws then in being, which are the birth right of every citizen. [48]

The Privy Council continued their deliberations:

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.[49]

The section of Blackstone referred to regarded unoccupied territories. From afar in England, the Privy Council, expressly recognised the original inhabitants, yet manipulated Blackstone's legal authority to justify their acquisition by introducing an enlarged acquisition mode, that of 'practically unoccupied' 'without settled inhabitants or law'. This is a complete misinterpretation of Blackstone's writings, which never identified 'settled by occupancy' as ever being a mode of acquisition available to an inhabited territory. It is the legal classification or mode in which a territory was colonised that determines the power and ultimately the sovereignty of the colony that is reviewed in Section IV.

3 *Cook disobeys 'secret instructions'*

In 1768 Cook was sent by His Majesty King George III to Tahiti in the HMB Endeavour. The Lords of the Admiralty gave to Cook, his *Secret Additional Instructions*.[50] The written directions from King George III stated:

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[47] Blackstone, above n 19, 104.
[48] *Cooper v Stuart* (1889) AC 286 (PC) 291 (Watson LJ).
[49] Ibid 291-292.
[50] Reynolds, above n 16, 294.

> You are also with the *Consent of the Natives* to take Possession of Convenient Situations in the Country in the Name of the King of Great Britain: *Or*, if you find the Country uninhabited take possession for his majesty by setting up proper Marks and Inscriptions, as first discoverers and possessors.[51]

There was never consent of the natives, nor the recommendation that the inhabitants should be treated with 'distinguished humanity' and considered 'Lords of the Country'.[52] The 'communal holdings' as defined by Wolfe, were never surrendered. There was never 'consent' or a treaty discussed. It is interesting to note the words 'Or' if you find the country uninhabited'. New Holland was clearly inhabited and Cook stated it himself in his journal when he wrote:

> That he saw on all the adjacent lands and Islands a great number of smooks, a certain sign that they are inhabited, and we have daily seen smooks on every part of the coast we have lately been upon.[53]

The fact that New Holland was inhabited meant Cook had to either declare war on the people or develop a treaty, which most often came with compensation. Thus, the existing Law of Nations as set out by the leading theologians of the time, was well established and known by all in power and completely disregarded.

4 *No discovery so - how did Cook acquire title?*

In August 1770, Cook conducted a 15 minute ceremony, and raised a British Flag and claimed 'possession' based on 'discovery' of the eastern shore from 38 degrees south of the entire Eastern Coast to New South Wales'. In his journal Cook even referred to landing on the Eastern side of New Holland, and not being able to lay claim to new discovery 'the honour of which belongs to the Dutch navigators'.[54]

Cook took 'possession' originally based on 'discovery', which Cook knew was incorrect. Not since the 16th century has it been possible to argue that a mere discovery, coupled with an intention eventually to occupy, is sufficient to create a title.[55]

On the 4 July 1776, the United States of America was founded creating a new independent sovereignty, thus resulting in this loss of this land and prisoner refuge as a British colony.

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[51] Ibid. Reynolds outlines the Secret Additional Instructions to Lieutenant James Cook, 30 July 1768.
[52] Ibid. James Doyle, 14th Earl of Morton and President of Royal Society who promoted Cooks journey and provided a long list of 'hints offered' to those on the Endeavour.
[53] National Library of Australia, *Cook's Endeavour Journal: The inside story* (National Library of Australia, 2006).
[54] Ibid.
[55] R Y Jennings, *The Acquisition of Territory in International Law* (Manchester University Press, 1963) 4.

Joseph Banks appeared before the House of Commons Committee on Transportation in 1786 and was questioned specifically on the weapons and defence abilities of the natives of New Holland :

Committee	Is the coast in General or the particular part you have mentioned much inhabited?
Banks	There are very few Inhabitants.
Committee	Are they of peaceable or hostile Disposition?
Banks	Though they seemed inclined to Hostilities they did not appear at all to be feared. We never saw more than 30 or 40 together…
Committee	Do you think that 500 men being put on shore there would meet with that Obstruction from the Natives which might prevent them settling there?
Banks	Certainly not – from experience I have had of the Natives of another part of the same coast I am inclined to believe that they would speedily abandon the country to the newcomers.
Committee	Were the Natives armed and in what Manner?
Banks	They were armed with spears headed with fish bones but none of them we saw in Botany Bay appeared at all formidable.[56]

It is clear from this documented evidence that the British knew that they had the superior fire power and greater numbers than the natives. The select committee did not question Banks on the health of the natives, their religion or what sort of compensation, consent or treaty, Banks thought the natives might want, as was required by the law of nations at the time. Quite to the contrary, the British queried Banks on threat numbers and warfare capability.

When Captain Phillip arrived in Sydney Cove in 1788, aboard the HMS Sirius, he hoisted the Union Flag and lay claim to a territory and sovereignty that was twice the size claimed by Cook initially and one of the largest territorial acquisitions in human history.[57] This acquisition by International law doctrines was claimed by occupation rather than conquest.[58]

[56] Henry Reynolds, *Aboriginal Sovereignty: Reflection on Race, state and Nation* (Allen & Unwin, 1996) x.
[57] Evatt, Elizabeth, The Acquisition of Territory in Australia and New Zealand' in Charles Henry Alexandrwicz (ed), *Studies in the History of Nations* (Martinus Nijhoff, 1970) 16, 27.
[58] Mabo (No 2) (1992) 175 ALR 1, 32-33 (Brennan J).

(a) Occupation

The form of acquisition for New Holland, referred to as 'occupation' comes from the Roman law of *occupatio.* Morris Cohen maintained that private property is based on the right of the original discoverer and the occupant. Possession was protected unless 'somebody has a better claim than the possessor'.[59] In the case of inhabited territories, natives living tribally were not regarded at this time as a State.[60] The British saw the Indigenous people as 'savages', 'barbarous' 'the least-instructed portion of the human race in all the arts of social life'.[61] The question of lawful 'title' to be obtained from the inhabitants was possibly not considered because the British believed, or possibly intended,[62] that the natives would become extinct.[63] To achieve 'occupation' it meant actually occupying the land.[64]

Cook and Phillip, performed the *factum* (act) and the *animus occupandi* (intention to occupy) but were without the ability to effectively control the vast territory they claimed. The law of nations at the time might have recognised this occupation as an inchoate right only against other competing territorial nations to occupy the rest of the nation within a reasonable time.[65]

The vastness of Australia predicated that occupation was difficult. Indeed it was not until September 1824 that John Oxley established a temporary settlement at Redcliffe, in Queensland, some 40 years after the territorial claim of the East Coast of Australia. Tribes like the Yadhaigana and Wuthathi people living on the Northern Cape have never been truly 'occupied' by 'settlers'. In fact in 1918, the Cowal Creek Aboriginal group received the praise of Government officials for 'autonomously' creating a self-sufficient community with their own self-elected council and community police.[66] This land mass,

[59] Morris R Cohen, 'Property and Sovereignty' [1927] 8 *Cornell Law Review* 27.
[60] Jennings, above n 55, 20.
[61] Report of the UK Parliamentary Select Committee on Aboriginal Tribes (British Settlements) (Aborigines Protection Society, 1837)
[62] Not said lightly. There is a disjunct between the Monarchies instructions and what actually happened in New Holland. Were orders simply disobeyed ? Or was it a cover up ?
[63] M 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 ed, first published 1926) 29.
[64] Emmerich deVattel, *The Law of Nations (or the Principles of the Law of Nature Applied to the Conduct and Affairs of Nations and Sovereigns)* (London, 1758) 308.
[65] Daniel Lavery, (2015) *The British acquisition of New Holland: a residuum of allodial sovereignties* ? PhD thesis, James Cook University.
[66] N Sharp, *Footprints Along the Cape York Sand beaches* (Aboriginal Studies Press, 1992) 85.

like a lot of Australia was hardly 'occupied' by the British in order to claim the territory as 'settled'.

The *Frontier Land case* stated that where possession is adverse, the simple display of acts of sovereignty by the stronger power is not enough, and there must be 'peaceable' possession to enable a state to take title of the territory.[67] If the original sovereign keeps their claim alive by protest than the title is not good and unlawful. [68]

(b) Conquered

Imperial law held that conquest was a legitimate mode of acquiring a new territory. [69] The British did not declare war on the native people, although evidence now indicates that is what they did. See Appendix A for the list of massacres by the European descendants that are only now being revealed.

Indigenous peoples never felt 'conquered' themselves.[70] As hard as Imperial Rule and hegemonic power have attempted to 'wipe out' the 'dying race', they have not succeeded.[71] The cultures of the Australian Aboriginal people and Torres Strait Islander people represent two of the most resilient, patient and deeply morally based cultures on the planet.[72]

(c) Invasion

The definition of 'invade' is '(of an armed force) to enter (a country or region) so as to subjugate or occupy it.[73] Occupation is defined in Article 42 of the Annex to the Hague Convention IV of 1907:'Territory is considered occupied when it is actually placed under control of the hostile army'.[74] The United Nations assessed the behaviour of the United States when it 'invaded' Iraq in 2003, against the protests of the Iraqi people. The UN did not justify the invasion, but rather 'proved that it is possible for an invasion to be illegal,

[67] Frontier Land Case (1959) ICJ Reports, 209, 277.
[68] Jennings, above n 55, 23.
[69] Lavery, above n 65, 15.
[70] Henry Reynolds, *Aborigines and Settlers The Australian Experience 1788-1939* (Cassell Australia, 1972) 9.
[71] Ibid.
[72] I-witness – as a cultural traveller, one has only begun one's exploration of the planet, but exploration of 34 countries especially those with diverse cultures i.e. India, China, Indonesia, Egypt, Nepal, Thailand, Mexico, Argentina, Brazil, Chile, Palmyrus, Greece, Spain, Switzerland and more…. Everywhere I am asked about the Aboriginal and TORRES STRAIT ISLANDERS people and culture… they have an authenticity rarely seen.
[73] Oxford Dictionary (definitions of 'subjugate', 'invade', and 'occupy').
[74] *Hague Convention IV of 1907*, opened for signature 18 October 1907, entered into force 26 January 1910, 187 CTS 227, art 42.

but the subsequent occupation to receive UN support'.[75] The legal status of an invasion is aggressive war and it is a crime against humanity. [76] If, in 2003 the United States and Britain could legitimise an invasion, than the chance of any retribution against the British for invading New Holland seems unlikely.

5 *Summary*

The original claim of acquisition based on discovery is legally recognised as incorrect, Cook did not 'discover' New Holland, he, himself gave credit to the Dutch. According to the Law of Nations 'occupation' could only occur with an uninhabited country. 'Practically unoccupied',(an oxymoron), still required the modes of cessation or conquering which involved treaties, compensation and recognition of existing rights. *Mabo (No2)* states Australia was 'settled by occupation,' however the elements of 'occupation' as a mode of acquisition of a new territory were not met. Firstly, the approximate 3.5 million square kilometres claimed in 1788 was not actually 'occupied'. There were an estimated 30,000 Aboriginal and TSI people occupying New Holland in 1788, while only 1500 arrived with the first fleet. Secondly, the Indigenous people of New Holland had stronger 'possession' of New Holland, more numbers and they wandered the entire land. Thus, the Indigenous people had a 'better possessory title' than the colonial asylum seekers.[77] Lastly, Imperial colonial law indicated that possession could not be 'adverse' or 'non-peaceful'. The next section of this thesis highlights that Indigenous people have been protesting, at the invasion of their land since 1770. There is no evidence from 246 years to prove that the acquisition has in any way been peaceful.

The law details the mode of territorial acquisition but the law appears to be 'indifferent as to how the acquisition is accomplished.' [78]

'We beat you, deal with it. Invaded or settled it doesn't matter… We won.[79]

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[75] Daniel Matthews, *International Law, Invasion, and Occupation* (29 April 2008, Daniel Matthews Blog) <http://www.danielmathews.info/articles/occupation.pdf> 1.
[76] Ibid 2.
[77] The author has learnt in 4 years, that there is no room for humour, however the hypocrisy of the Australian Governments asylum policies and law stand in stark contrast to the way in which only a few hundred years before the British empire arrived and brought with them English common law. For those who have been to England – one could aptly call the First Fleet asylum seekers 1. - In that they were escaping the treacheries of the cold, over-crowed England and 2. In that the majority of the arrivals were convicts escaping bad conditions.
[78] Jennings, above n 55, 8.
[79] The Independent, Jess Staufenberg, Email response from public to News article, *Was Australia invaded or settled? University defends stance*, (31st March 2016) *www.independent.co.uk › News › World › Australasia*

So says mainstream Australia, unless your mother was taken as a baby from her family. Thus, if it 'doesn't matter' why doesn't Australia admit that the British invaded New Holland? The next section explores the complexity of sovereignty and why the recognition of Indigenous sovereignty is important.

II LEGAL AUTHORITY TO CLAIM SOVEREIGNTY OVER INDIGENOUS PEOPLE

A *What is sovereignty?*

Sovereignty '[connotes] supreme power and authority over some set of persons, things and events within a territory'.[80]

Wittgenstien states that '[w]hen one shows someone the King in chess and says 'this is the King', this does not tell him the use of this piece unless he already knows the rules of the game.'[81] Wittgenstein's quote is an apt analogy to the claim of sovereignty over the Aboriginal and Torres Strait Island peoples because the game came with more than a thousand years of written laws unknown to Indigenous Australians.[82]

In *Mabo (No 2)*, Brennan J admitted that the Meriam people of the Torres Strait would have known nothing of the events in Westminster and Brisbane with the *Coast Islands Act 1879* (Imp), which immediately affected the annexation of the Murray Islands, ultimately vesting the Crown with absolute ownership of legal possession and power to confer title to the Crown of the land of the Murray Islands.

Mabo (No 2) also admitted that:

> Possession is a conclusion of English law, a law alien to indigenous inhabitants before annexation. Therefore, before annexation the Meriam people would not have been in possession.[83]

One must question this supremacy attitude. All because the Meriam people were not aware of English law, did that translate that 50,000 years of possession was irrelevant ?

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[80] Trisha Mann (ed) *Australian Law Dictionary* (Oxford University Press, 2nd ed, 2013) 672 (definition of 'sovereignty').
[81] Ludwig Wittgenstein, *Philosophische Untersuchungen* (Blackwell Publishing, 1953).
[82] E.g. the Treaty of Windsor was signed in 1175, this was at the time of the Norman invasion of Ireland, even then the treaty left the Irish King with negotiated territories and that the Irish could 'enjoy their lands and liberties so long as they remained faithful to the Kings of England. Shame such a treaty was not pursued with the Indigenous Australians when the English invaded Australia in 1778.
[83] *Mabo and Others v State of Queensland (No 2)* (1992) 107 ALR 1 *('Mabo(No2)')*116.

B *Sovereignty – External/ Internal*

There are two basic types of sovereignty – Internal and External. Internal sovereignty can be divided under the form of government which exists. An example of this is in the United States where Native American tribes were referred to as 'domestic dependent nations'[84] in a trilogy of cases[85] between 1823 and 1832. External sovereignty is recognised *inter se* by other nation states which is indivisible.[86] What this means is that as stated in *Mabo (No.2)* emphatically, *per curiam*, that 'the Crown's acquisition of sovereignty over the several parts of Australia cannot be challenged in an Australian municipal court'.[87]

The concept of sovereignty was highlighted in the 1648 Treaty of Westphalia, between the Holy Roman Emperor and the King of France giving sovereignty to the French King.[88] Although Sovereignty is a legal doctrine,[89] it is not law;[90] it is based on the facts of the establishment of a State.[91]

As the said 'father' of International law, German jurist Lassa Oppenheim stated:

> The formation of a new State is… a matter of fact and not of law. It is through recognition, which is a matter of law, that such a new State becomes a subject of International Law. As soon as recognition is given, the new State's territory is recognized as the territory of a subject of international law, *and it matters not how this territory was acquired before recognition.*[92]

A survey conducted by the National Congress of Australia's First People in July 2011, found that the three most important policy areas for Indigenous people were health, education and sovereignty.[93] The recently released Joint Select Committee on Constitutional Recognition of Aboriginal and TSI people's, devoted an entire Chapter to

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[84] *Cherokee Nation v.Georgia*, 30 U.S.5 Pet.1 1(1831).
[85] *Johnson v. M'Intosh* 21 U.S.(8 Wheat.)543 (1823) *Cherokee Nation v.Georgia*, 30 U.S.5 Pet.1 1(1831); Worcester v.Georgia,31 U.S.(6 Pet.) 515 (1832)
[86] *Island of Palmus Case* (Netherlands/United States of America) (Award of 4 April 1928, RIAA, Vol.II (1949), pp.839,868.
[87] Mabo(2) … p.2.
[88] Hohn H Jackson, 'Sovereignty-modern: a new approach to an outdated concept' (2003) 97(4) *The American Journal of International Law* 782, 786.
[89] Ibid 787.
[90] Stephen D Krasner, *Sovereignty: Organized Hypocrisy* (Princeton University Press, 1999) 9. There he refers to four main ways that sovereignty has been used: domestic sovereignty; interdependence sovereignty; international sovereignty; and Westphalian sovereignty.
[91] Jennings, above n 55, 8.
[92] Ibid.
[93] Recognising Aboriginal and TORRES STRAIT ISLANDERS People in the Constitution: Report of the Expert Panel.

Sovereignty and stated that '[a] almost every consultation, Aboriginal and TSI participants raised issues of sovereignty, contending that sovereignty was never ceded, relinquished or validly extinguished'.[94]

C *Act of State Doctrine*

Sovereignty may not be law but it is part of the Act of State Doctrine, which dictates that once the new state is 'recognised', certain acts done by those states can no longer be challenged. This means that every sovereign state respects the independence of every other sovereign state, and the International courts will not sit in judgment of another governments acts done within its own territory, making it very difficult to challenge.

Many International law scholars[95] have claimed that International law has not only 'legitimised colonialism' but has also instituted doctrines and mechanisms to make claims by Indigenous people for colonial reparations very difficult, if not impossible.[96]

D *The Common Law*

When the British Empire claimed the territory of New Holland, they also claimed sovereignty over New Holland which meant that the laws of England came with it. The common law is based on 'judge-made law', thus judges can 'discover not invent' the law based on the individual facts of the case, and precedent cases before it.[97] This makes it a flexible and normative system incorporating the objective analysis of the 'reasonable person' and what they would or should do. The common law is also a form of customary law.[98] The changing nature of the common law is why there is so much potential for the two systems to work together, as the next section will highlight. It is held that customary law and common law are based on the same normative principles, and thus the common law must recognise customary law as being central to Indigenous sovereignty.

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[94] Final Report, *Joint Select Committee on Constitutional Recognition of Aboriginal and TORRES STRAIT ISLANDERS Peoples* (Cth) June 2015, 69.
[95] Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press, 2005) 3.
[96] Colonial Reparations means the movement for the condemnation, the reconciliation, the apologies and the compensations of colonialism.
[97] Haig Patapan, *Australian Federalism: an Innovation in Constitutionalism, The Ashgate Research Companion to Federalism no 27* (Ashgate, 2009) 493.
[98] McIntyre, above n 34, 24.

1 *The Early Cases*

The early legal cases of Australia are testament to the Indigenous people's ongoing protests that they have never given up their sovereignty.[99] Indigenous people have been protesting long before mainstream Australia became aware of land rights and the 'Tent Embassy' at Parliament house in 1972.[100] The early cases also represent the 'governments' changing policies and common law precedents to justify their own position at the time.

The Rule of Law for Indigenous people in 1797 was breached when, Governor Hunter declared Aboriginal people a danger and sent out armed parties to ' pacify' them. By 1816 Governor Macquarie had made a martial law-style proclamation. He banned Aboriginal meetings, language, the carrying of hunting weapons, abolished their own system of punishments, and entitled settlers and the military troops to use Force of arms; on Aboriginal people carrying hand -made weapons or unarmed groups of six or more.[101] The case of *R v Dirty Dick* in 1829 involved an Aboriginal man who was accused of murdering another 'wild savage'. Chief Justice Forbes and Dowling J wrote:

> I am not aware that British laws have been applied to the aboriginal natives in transactions solely between themselves, whether of contract, tort or crime. Indeed it appears to me that it is a wise principle to abstain in this Colony, as has been done in the North American British Colonies, with the institutions of the natives which, upon experience will be found to rest upon principles of natural justice.[102]

The Justices let the Aboriginal prisoner go because they did not believe they had the requisite jurisdiction to hear the matter.

The 1831 case of *R v Jack Congo Murrell* involved two Aboriginal men being convicted in the New South Wales Supreme Court for the murder of two indigenous men in Parramatta. Murrell appealed the decision with his counsel claiming that New South Wales was a *suis generis* colony, that it was not acquired by discovery and occupation and that the Aboriginal people had their own native lores and customs, and thus the NSW

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[99] For a full chronological list of Aboriginal and T.I. protests from 1900-1969) go to Creative Spirits at https://www.creativespirits.info/aboriginalculture/history/aboriginal-history-timeline

[100] S. Robinson, The Aboriginal Embassy: An account of the Protsts of 1972. www.kooriweb.org/foley/reources/pdfs/27.pdf

[101] Johnston 1991 (2) 13) - or book The Law of the coloniers.

[102] T D Castles and Bruce Kercher (eds), *Dowlings Select Cases 1828-1844: Decisions of the Supreme Court of New South Wales* (The Francis Forbes Society for Australian Legal History, 2005) 3.

Supreme court did not have jurisdiction. In an unreported version, Burton J is recorded as stating:

> Although it is granted that the Aboriginal natives of New Holland are entitled to be regarded by Civilized nations as a free and independent people, and are entitled to the possession of those rights which as such are valuable to them, yet the various tribes had not attained at the first settlement of the English people amongst them to such a position in point of numbers and civilisation and to such a form of Government and laws, as to be entitled to be recognised as so many sovereign states governed by laws of their own.[103]

Initially the colonial courts did not believe they had jurisdiction over the indigenous people who had their own 'institutions' or systems of punishment and lore that they adhered to. Is this not recognition of Indigenous sovereignty? However, this policy changed when Indigenous people began to defend their land by attacking the colonisers.

On July 1, 1834, the Member for Weymout, Mr Buxton spoke of the condition of the Aboriginal people :

> In every British Colony, without exception, the aboriginal inhabitants had greatly decreased, and still continue rapidly to dwindle away. This was the case in Australia … British Brandy and gunpowder had done their work in thinning the natives. …The introduction of civilisation, therefore, instead of proving a blessing, had proved a curse to the Aborigines of the different countries, into which we have carried what we called the blessing of civilisation. [104]

In 1835, John Batman, a pioneering grazier, businessman and explorer created a controversy when he attempted to sign the Batman's Treaty directly with Wurundjeri elders for the purchase of land at Port Phillip.[105] Governor Bourke at the time declared the treaty 'void and of no affect as against the rights of the Crown,' and then declared any person on 'vacant land of the crown' without authorization as trespassers.[106] In 1840 a select Committee of the House of Commons sent direction to all Governors in Australia and New Zealand that English law superseded Aboriginal customary law.[107]

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[103] John Hockey, 'Settlement and Sovereignty' in Peter Hanks and Bryan Keon-Cohen(eds), *Aborigines and the Law: Essays in Memory of Elizabeth Eggleston* (George Allen and Unwin, 1984) 1, 4.
[104] House of Commons, 1 July 1834, 1061-2.
[105] National Archives of Australia, *Governor Bourke's Proclamation 1835 (UK)* (8 Decmeber 2016) National Archives of Australia <http://www.foundingdocs.gov.au/item.asp dID=42&aID=8&pID=73>.
[106] Ibid.
[107] United Kingdom, *The Law of Australia: Aboriginal Customary Law: Recognition of Aboriginal Customary Law: UK*, Parliament, report of the House of Commons Select Committee on Aborigines (British Settlements), Parl Paper No 425 (1837) 35.

By 1841, the decision of *Murrell* was being challenged by the *Bonjon* decision. This case also involved the alleged killing of an Aboriginal man by another Aboriginal man. Justice Willis confirmed that NSW was *sui generis* when he stated that;

> The New South Wales colony stands on a different footing from some others, for it was neither an unoccupied place, nor was it obtained by right of conquest and driving out the natives, nor by treaties'.[108]

Up until the 1840s it appears that the colonisers attempted to leave the Aboriginal people to their own devices, and many retreated from the settlements. Around this time the question, as to whether the Aboriginal people were British subjects or not began to arise. In 1837 Lord Glenelg, Secretary of the State for the Colonies wrote that:

> The natives… must be considered as subjects of the Queen … to regard them as aliens, with whom a war can exist, and against whom Her Majesty's troops may exercise belligerent right, is to deny that protection to which they derive the highest possible claim from the Sovereignty, which has been assumed over the whole of their ancient possessions.[109]

'Protection' clearly at this time had a very different meaning than today, or maybe not a lot has really changed.

In 1847, in the case of *Attorney-General (NSW) v Brown* Chief Justice, Sir Alfred Stephen declared:

> The territory of New South Wales, and eventually the whole of the vast island of which it forms a part, have been taken possession of by British subjects in the name of the sovereign. They belong, therefore, to the British Crown.'[110]

Back in England, the law of nations was greatly developing in recognition of Indigenous people's rights. In 1875, while a frontier blood bath was occurring in New Holland, the Pacific Islanders Act was endorsed. Queen Victoria in Article 7 *Saving the Rights of Tribes* stated:

> Nothing here in or in any such Order on council contained shall extend or be construed to extend to invest Her majesty with any claim or title whatsoever to dominion or sovereignty over any such islands or places as aforesaid, or to derogate from the rights of the tribes or people inhabiting such islands or places, or of chiefs or rulers thereof, to such sovereignty or dominion, and at copy of every

[108] John Hockey, 'Settlement and Sovereignty' in Peter Hanks and Bryan Keon-Cohen(eds), Aborigines and the Law: Essays in Memory of Elizabeth Eggleston(George Allen and Unwin, 1984)1,4.
[109] Lavery, above n 65, 119.
[110] *Attorney-General (NSW) v Brown* (1847) 1 Legge 316.

such Order in council shall be laid before each House of Parliament within thirty days after the issue thereof.[111]

In this Act, Queen Victoria expressly recognised the sovereignty of Aboriginal Nations and Peoples. However, the requirement that the colonies table the Act in each house of Parliament was predictably never done. Just as King George's instructions to Cook were disobeyed the frontier colonisers with a convict mentality; were a rule unto their own, too far away to be monitored, although some humanitarians tried in vain.[112]

It must be remembered that the 'Australian Constitution is still an appendix to an Act of the Imperial Parliament.'[113] Queen Elizabeth II is still the official head of State of Australia[114], and thus still has' carriage of all responsibility for all past decisions made by all former members of the crown'[115], especially in the case where her colonial leaders did not follow express orders.

2 *Contemporary cases*

The next major case to deal with sovereignty was Wriadjuri man Paul Coe in *Coe v Commonwealth* where he claimed in his statement that the Wiradjuri were a 'sovereign nation of people'.[116] He also sought orders for compensation and reparations and claimed genocide had occurred.[117] The statement of claim was struck out due to improper purpose.[118] However, the case expressly recognised Aboriginal sovereignty 'whereas it was occupied by the sovereign Aboriginal nation.'[119]

E *Internal Sovereignty*

1 *Customary Law*

The reason that the discussion of customary law is so important is that the *Mabo (No 2)* decision separated the recognition of Native Title from native sovereignty.[120] However,

[111] *Pacific Islands Protection Act 1875* (Imp) art 7.
[112] Henry Reynolds, *This Whispering in our Hearts* (Allen & Unwin, 1998) 251.
[113] Frank Brennan, 'Contours and prospects for Indigenous recognition in the Australian Constitution and why it matters' (2016) 90 *Alternative Law Journal* 340, 342.
[114] Australian Referendum 1999 – People voted no to a Republic and Australian head of state.
[115] Michael Anderson, 'Queen Victoria: Crown owns nothing, Aborigines sovereign', Goodooga, Northwest NSW, 2012 treatyrepulic.net/content/queen-victoria-crown-owns-nothing-aborigines-sovereign
[116] *Coe* (1979)53 ALR 403, 405.
[117] Ibid 25 and 27.
[118] Ibid. At 22 at 56 where *Williams v Spautz* [1992] HCA 34 is the majority decision on proceedings brought for an improper purpose.
[119] *Coe* (1979)53 ALR 403, 404.
[120] For a full discussion of 'primary' and 'secondary' right and anthropological study see Peter Sutton's chapter in native Title in Australia – An Ethnographical Perspective'

to be successful with a Native Title claim[121], the applicant group must establish that traditional laws and customs since the arrival of the British, are 'presently acknowledged and traditional customs presently observed', and have not been interrupted since the acquisition of Australia. The colonisers justified their claim of 'uninhabited' with their presumptuous assessment, that the Indigenous people had no 'settled law'.

As stated so succinctly by Justice Blackburn of the Supreme Court of the Northern Territory in 1971, in the case of *Milirrpum* upon hearing the Yirrkala people's evidence observed:

> 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… 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.[122]

Blackburn J acknowledges 'a government of laws', confirming that customary law existed for the Yirrkala people. Justice Blackburn, however, could not move past the common law idea that Australia was peacefully settled and thus the Milirrpum and Yolgnu people from Cape Gove, were informed they could have no proprietary interest in their land.[123]

If sovereignty is expressed as the power, the law that comes with a 'state', than the complex system of lore being collected by Native Title determinations proves that when the British arrived, even though they saw the natives as 'backward' and 'lawless', they entered on a land ruled by native lore. Two sovereign nations separated only by degree.

2 *Post Mabo(2) – Indigenous Sovereignty recognition increases.*

The largest body of evidence to prove Indigenous sovereignty are the more than 228 Native Title successful determinations. The Age Newspaper claimed that for the *Yorta Yorta* case, the evidence occupied fifteen meters of shelf space.[124]

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[121] *Native Title Act 1993* (Cth) s 223(1) has defined 'native title' and 'native title rights and interest' to mean: ….the communal, group or individual rights and interests of Aboriginal peoples or TORRES STRAIT ISLANDERSs 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 ISLANDERSs; and (b) The Aboriginal peoples or TORRES STRAIT ISLANDERSs, by those laws and customs, have a connection with the land or waters; and (c) The right s and interests are recognized by the common law of Australia.

[122] *Millirrpum v Nabisco Pty Ltd* (1971) 17 FLR 141, 267.

[123] Chris Davies, *Property Law Guidebook* (Oxford University Press, 2012) 9.

[124] Aileen Moreton, Sovereign Subjects (Allen & Unwin, 2007).

To have a successful Native Title determination,[125] Indigenous people must go to great lengths, some of them for 18 years to prove that these rights and interests existed prior to the change in sovereignty, and still exist today.[126] Regardless of whether the common law recognises native title or not, Indigenous groups still follow their own 'lore' that clearly identifies which family groups and tribes have title to which land.[127] Now over 228 successful determinations have legally proven the existence of Aboriginal laws before the arrival of British sovereignty. This in itself is the proof of existing Indigenous sovereignty in 1788 and still today. It remains that Indigenous sovereignty has never been ceded.

Members of the Yorta Yorta Aboriginal Community v Victoria and Others[128] was the first Native Title Case, since *Mabo (No 2)* to not be determined by the tribunal, possibly due to over 500 parties to the claim so instead was litigated at common law. This case gave the judiciary an opportunity to describe 'fundamental principles' of Native Title.[129] Federal Court Judge Olney J found that 'the tide of history' had washed away people's traditional laws and customs. The case ultimately acknowledged 'the intersection of normative systems' an 'intersection of traditional laws and customs with the common law.'[130] The critical aspect of the decision is that in all cases the judges identified 'fundamental principles', which not only govern Native Title determinations but also become affirmations to recognise native title at common law.[131]

In Indigenous lore, there is no distinction between territorial sovereignty and the acquisition of land.[132] Two sovereign systems clashed, the dominant one based on competing individual rights and hierarchy the other pre-existing sovereignty based on

[125] *Native Title Act 1993* (Cth) s 223(1) has defined 'native title' and 'native title rights and interest' to mean: ….the communal, group or individual rights and interests of Aboriginal peoples or TORRES STRAIT ISLANDERSs 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 ISLANDERSs; and (b) The Aboriginal peoples or TORRES STRAIT ISLANDERSs, by those laws and customs, have a connection with the land or waters; and (c) The right s and interests are recognized by the common law of Australia.
[126] The Barkandji Native Title claim in New South Wales which was determined in June 2015, took 18 years to prove.
[127] Pearson, above n 17.
[128] (2003) 214 CLR 422.
[129] (2003) 214 CLR 422, 441.
[130] (2003) 214 CLR 422, 439 citing *Fejo v Northern Territory* (1998) 195 CLR 96, 128.
[131] Lavery, above n 65, 254.
[132] Ibid.

material egalitarianism and equality.[133] Aboriginal tribal law is in stark contrast to Western focus on the needs of the individual.

3 *External Sovereignty- International law.*

Colonisation and the disadvantage suffered by native sovereign peoples have been at the core of the development of International law.[134] Sumner has identified nine categories that International territorial and sovereignty disputes have relied on to justify their legal claims, they include: treaties, geography, economy, culture, effective control, history, *uti possidetis*,[135] elitism and ideology.[136] In researching the details of these nine categories, the First Australians would find evidence and support in eight areas (minus treaty and *uti possidetis*) for their claims against humanity and the stealing of their land. Cases before the ICJ are referred to the court through a compromise (special agreement) between two or more states, by a treaty provision that commits parties to the court or by the parties' statements of compulsory jurisdiction.[137] If the parties agree, the court can also decide a case under equity principles, *ex aequo et bono*.[138] However, having a dispute case reach the ICJ is difficult and primarily restricted to 'states'.

In May 1997, Mr Robert Thorpe sought declarations before the High Court with Kirby J residing, toward a fiduciary duty owed by the Commonwealth for the Commonwealth to obtain an advisory opinion from the International Court of Justice based on the Genocide Convention Act of 1949, and the Prevention and Punishment of the Crime of Genocide 1948.[139] Interestingly the defendant (the Commonwealth of Australia) filed a summons seeking an order to strike out or permanently stay the proceedings on the grounds that the

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[133] Henry Reynolds, *The other Side of the Frontier* (Penguin, 1981) 69-70. Note: Another reason stated that Indigenous people had no sovereignty was the lack of a "king". The Honourable Justice Bruce Debelle in his article *Aboriginal customary law and the common law*, spoke of the anthropological debate as to whether political authority was vested in Elders or a council of Elders. Regardless, each tribe knows who their senior elders are. It is humour amongst some that 'no no I'm not an elder yet'.

[134] Anghie, above n 95, 2.

[135] *Uti possidetis* is the doctrine under which old administrative boundaries will become international boundaries when a political subdivision achieves independence'. See Bryan A Garner (ed), Black's Law Dictionary (Thompson-Reuters, 7th ed,1999) (definition of '*uti possidetis'*). An example is the external boundaries of the United States after achieving independence

[136] Brian Taylor Sumner, 'Territorial Disputes at the International Court of Justice' (2004) 53(3) *Duke Law Journal* 1779.

[137] International Court of Justice (Statute) Article 38 'The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; by .international custom, as evidence of a general practice accepted as law; c. the general principles of law recognized by civilized nations; d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.'

[138] This is what is equitable and good. See Garner, above n 135, 581 (definition of 'ex aequo et bono')

[139] *Thorpe v Commonwealth (No 3)* (1997) 144 ALR 677, [10].

proceedings lay outside the jurisdiction of the High Court. Thorpe claimed that 'the Commonwealth cannot be trusted to recognise and declare the sovereignty (customary law) of the indigenous peoples in accordance with international law and the laws of other civilised nations'. [140] Like Coe's case in 1979, Thorpe's argument was ultimately set aside on the basis that the legal questions he sought were deemed 'non-justiciable' as the Court had no jurisdiction to hear such matters that involved the act of state doctrine.[141]

In 2015, *Ure v The Commonwealth of Australia*, the court found that no rule existed in customary international law to support an individual claim to sovereignty[142].

However, this denial is slowly changing. The increase in international human rights law has challenged this view. On the 14th December 1962, The UN General Assembly adopted the Resolution on Permanent Sovereignty over Natural Resources (RPSNR).[143] This was adopted to give developed states permanent sovereignty over their natural resources. This gave rise to the recognition of non-state actors[144] and has led to Indigenous communities having possible jurisdiction in International law over their ownership of natural resources and their right to be consulted on the exploitation of sub-soil resources.[145] This recognised that the traditional Westphalian sovereignty is changing from its classical state-centred focus, allowing for non-state actors to be involved in decision making and International Justice.

The RPSNR expresses that 'peoples' can also be beneficiaries of the right to permanent sovereignty.[146] It is interesting to note that the word "peoples" is a word avoided now in documents and legislation. Governments became fearful that this could form the basis of Governments being challenged over their support of multi-national companies' natural resource removal. Governments could be forced to consider utilising natural resources for

[140] Ibid [50].
[141] Ibid [50].
[142] *Cayuga Indians (Great Britain v United States*) (Award) (1926) 6 RIAA 173.
[143] Ricardo Pereira and Orla Gough, 'Permanent Sovereignty over natural resources in the 21st century: Natural Resource Governance and the Right to self-determination of Indigenous Peoples Under International Law' (2013) 13 *Melbourne Journal of International Law* 6.
[144]Can facebook be considered a sovereign power ? Mark Zuckerberg Chairman and CEO of Facebook now has 1.79 billion monthly active users signed up 'followers', commentators are now proposing this as a larger 'population' than the sovereign country of China at 1.393 billion. On Saturday the 19th of November 2016, Zuckerberg addressed APEC (Asia Pacific Economic Cooperation) in Lima Peru, he gave the Keynote address and was followed by H E Xi Jinping, the President of China, Enrique Pena Nieto the President of Mexico and John Key the Prime Minister of New Zealand., President of Columbia and Vietnam. Zuckerberg stated that he sees Facebook not as a 'traditional publisher but as a facilitator of global communication'.
[145] Federico Lenzerini, 'Sovereignty Revisited: International Law and Parallel Sovereignty of Indigenous Peoples (2006) 42 *Texas International Law Journal* 155, 160.
[146] RPSNR, UN Document A/RES/1803, para 1.

the benefit of all of the people.[147] In the case of *Armed Activities on the territory of the Congo Case*, the court expressly recognised that the RPSNR attained the status of customary International law, thereby possibly giving it a legally binding resolution.[148]

Ure referred to *Maloney v The Queen* which highlighted that unless Australia legislates International treaties or conventions into domestic law, they 'cannot be invoked, in this country, so as to authorise a court to alter the meaning of [that] domestic law.'[149] This confirms Brennan's express statement in *Mabo(2)* that domestic law comes before International jurisprudence. NSW chief Justice Spigelman in 1998, warned that due to international human rights jurisprudence, 'Australian common law is threatened with a degree of intellectual isolation that many would find disturbing.[150]

Article 96(1) of the United Nations Charter permits the General Assembly to seek the Court's advisory opinion on 'any legal question' requiring clarification'. [151] However Indigenous tribes who are treated more as 'objects' rather than 'subjects' of an area of land mass, have had difficulty to date achieving *locus standi* in International Courts, as the courts are reluctant to deal with cases which threaten national sovereignty. [152] However with the development of permanent sovereignty over natural resources this opportunity for individual or peoples receiving *locus standi* in the ICJ is promising.

4 *Aboriginal View On Sovereignty*

Bunjulung Wala-Bal Custodian, the lore/lawperson of the 13 tribes and 13 sacred rivers that comprise the Bunjulun Nation was asked what was meant by the Tent Embassy's push in January 2012 for a 'Corroboree for Sovereignty'. The reply was:

> Aboriginal Sovereignty is not about power over others. We don't want to be like the system, to govern over men (government) and end up sitting around-table like white-fellas. What the elders want is for there to be true protocol in the Law. There has been a breaking of the three laws of refraining from lying, stealing and killing, given to us by the three brothers. The shame is every community has broken these Laws. The key to sovereignty is maintaining our culture. Traditional

[147] Antonio Cassese, *International Law* (Oxford International Press, 2nd ed, 2005) 492.
[148] *Armed Activities on the territory of the Congo* (Congo v Uganda)(Judgement)[2005] ICJ Rep 168.
[149] *Maloney v The Queen* [2012] HCA Trans 342, [15] (French CJ).
[150] J Spiegelman, 'Rule f Law: Human Rights Protection'(address to The 50th Anniversary of the Universal Declaration of Human Rights National Conference, Human Rights and Equal Opportunity Commission, Sydney, 10 December 1998).
[151] Gordon Bennett, *Aboriginal rights in International law* (Royal Anthropological Institute, London 1978) 7.
[152] Ibid.

> life is about the custodian's role of caretakers of the rocky outcrops, desert plains and sacred mystical waterways that belong to the people of the Seven Wonders of the World.[153]

Indigenous sovereignty, where a connection with country is at the core, was dominated by British sovereignty. Australians might remember in 1992 when the *Mabo (No 2)* case was won. A fear created by the Media tore through Australia. Victorian Premier Jeff Kennett claimed no 'backyard was safe,' it was a 'doomsday decision'.[154] Sovereignty is not law. There is nothing apparent that will threaten the Australian legal system with any form of penalty, except that which was due in the first place – a treaty, recognition and compensation to the people. The humble Aboriginal and TSI people have always held out the hand of reconciliation.

III POTENTIAL LEGAL REFORMS

'Justice grown out of recognition'
President Barack Obama 2015.[155]

There is contentious debate in Australia, especially amongst Indigenous Australians,[156] as to the options of treaty and/or constitutional recognition. I hold that it is not an option of one or the other, but all of the above and more in order to attempt to institute legal reform that will bring the warranted recognition to the traditional owners of this country.

Indigenous Australians are concerned that Constitutional recognition might deny them of a treaty and/or recognition of their sovereignty which they have never ceded. Constitutional legal advice to the Expert Panel for Constitutional recognition in their 2015 report, affirmed that 'recognition would not preclude the pursuit of the aspirations for recognition of sovereignty and a treaty.[157] The concern was that recognition in the Constitution could be seen as legislative acquiescence of Indigenous sovereignty.[158]

All of the following rudimentary reforms should be included in a long over-due treaty, that is signed on a new date, other than the 26th of January that becomes Australia Day. It is these forms of practical real recognition that must be achieved within this decade.

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[153] Ruth Forsyth, understanding Indigenous sovereignty, Independent Australia, Feb 9th 2012; file:///Volumes/Unittled/Understanding%20Indigenous%20sovereignty.html.
[154] www.abc.net.au/news/2012-06-07/green-refelctions-on -the-mabo-debate/4056156
[155] Obama, Barack, Eulogy (Speech delivered at funeral for Reverend Clementa Pinckney, Charleston, 26 June 2015).
[156] Final Report, Joint Select Committee on Constitutional Recognition of Aboriginal and TORRES STRAIT ISLANDERS Peoples (Cth) June 2015, 85 [7.1]-[7.22].
[157] Ibid 21.
[158] Ibid 18, Advice given by Bret Walker, Constitutional recognition of Indigenous Australians: Opinion, July 2011, 3.

A *Constitutional Recognition / Inclusion*

The Australian Constitution is still an appendix to an *Act of the Imperial Parliament*.'[159] The *Australian Constitution* can be changed by other processes, (although not simply) other than the very difficult requirement of s128 for a referendum and a double majority of states and population.[160]

There are two other methods for constitutional repeal or amendment. Firstly, section 15 of the *Australia Act 1986* (UK)[161] permits the repeal or amendment of the *Statute of Westminster* by an Act of the Commonwealth parliament without the electorate being involved.[162]

Secondly, the *Australian Constitution* under subsections 51 (xxxvii) and (xxxviii) provides that 'matters referred to the Parliament of the Commonwealth by the Parliament or Parliaments of any State or States, but so that the law shall extend only to States by whose Parliaments the matter is referred, or which afterwards adopt the law.'[163] This requires the commitment of all States.

There is diverse academic debate on this matter. Gleeson claims that appeals to the Privy Council were abolished due to the 'messy, gradual and legislative process that ended with the Australia Acts in 1986'.[164] However, the British version of the *Australia Act 1986* (UK), and the *Australian Act* (1986), still include identical section 15's. Brennan's article, written in 2000, fourteen years after the 1986 legislation that 'cut off appeals from the State courts',[165] still proffers the two 'other possibilities'. The case of *Kirmani v Captain Cook Cruises (No 2)*[166] reveals that the High Court retains the power to grant a certificate

[159] Brennan, above n 3, 342.
[160] *Australian Constitution* s 128.
[161] This is the British version of the *Australia Act 1986* (Cth). Section 15(1) This Act or the Statute of Westminster 1931, as amended and in force from time to time, in so far as it is part of the law of the Commonwealth of a State or of a Territory, may be repealed or amended by an Act of the Parliament of the Commonwealth passed at the request or with the concurrence of the Parliaments of all the States, and, subject to subsection (3) below, only in that manner.
[162] Scott Bennet and Sean Brennan, Constitutional Referenda in Australia, Department of the Parliamentary Library, Research Paper No. 2 1999-2000; see also Bennett Scott, The Politics of Constitutional Amendment, Parliament of Australia, Research Paper no. 11 2002-03
[163] Australian Constitution
[164] Murray Gleeson, The Privy Council – An Australian Perspective (Speech delivered at The Anglo-Australasian Lawyers Society, Commercial Bar Association, London 18 June 2008) 2.
[165] Ibid 16.
[166] (1985) 159 CLR 461, 465.

if the case is *inter se,*[167] under section 74 of the Constitution. In *Kirman,*[168] the application was refused and the Judges held that 'such limited purpose as it had, has long since been spent'. [169] However, the judgement in the case noted the 1984 case of *Attorney General v Finch,* where it was described by Justices as 'theoretically [a] possibility'.[170]

The Final Report of the Joint Select Committee on Constitutional Recognition of Aboriginal and TSI Peoples, overwhelmingly makes it clear that the non-recognition of Australia's traditional owners is 'a constitutional fault line,'[171] and that 'constitutional recognition would complete our constitution, rather than change it'.[172] This issue is of such significance to Australia, that such a case would receive full support from the States, and the Australian people as an efficient and effective way to institute a preamble acknowledging Australia's traditional owners, as should have been done in 1898. As the Honourable Jenny Macklin MP said during the bill's second reading:

> It is true that it is rare that a proposed reform of this size strikes such a chord with so many of us across political lines. The consensus in the house reflects the consensus across the Australian community.[173]

The last referendum in 1999 cost Australian tax payers $66,820,894.[174] The addition of a preamble recognising Indigenous Australians should be attempted via the High Court to the Privy Council in this loophole of the law to change the Australian Constitution. A referendum should only ever be held at the time of a Federal election. The Final Report by the Joint Select Committee on Constitutional Recognition of Aboriginal and TSI Peoples, of June 2015 is substantial.[175]

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[167] That is, covenants entered into by all the shareholders between or among themselves.
[168] [1985] 159 CLR 461.
[169] *Kirmani v Captain Cook Cruises (No 2)* [1985] 159 CLR 461, [5].
[170] *Attorney-General v Finch (No2)* [1984] HCA 40, [380].
[171] Joint Select Committee on Constitutional Recognition of Aboriginal and TORRES STRAIT ISLANDERS Peoples, Final Report, June 2015, 9 (Bill Shorten).
[172] Joint Select Committee on Constitutional Recognition of Aboriginal and TORRES STRAIT ISLANDERS Peoples, Final Report, June 2015, 9 (Tony Abbott).
[173] Jenny Macklin's, at the time Minister for Families, Community Services and Indigenous Affairs, speech during the bill's second reading; Joint Select Committee on Constitutional Recognition of Aboriginal and TORRES STRAIT ISLANDERS Peoples, Final Report, June 2015,12.
[174] Australian Electoral commission website ; www.aec.gov.au
[175] Final Report, Joint Select Committee on Constitutional Recognition of Aboriginal and TORRES STRAIT ISLANDERS Peoples (Cth) June 2015.Key Recommendations: R.3:Repeal section 25; R4: Repeal section 51(xxvi) and the retention of a person power so that the Commonwealth government may legislate for Aboriginal and TORRES STRAIT ISLANDERS peoples as per the 1967 referendum result; R.5: That the 3 options, which would retain the persons power, set out as proposed new sections 60A, 80A and 51A & 116A, be considered for referendum; R6: that the Human Rights (Parliamentary Scrutiny) ct 2011 be amended to include the United Nations Declaration on the Rights of Indigenous Peoples in the list of international instruments which comprise the definition of human rights under the Act;R.7: That the

B *Plurality of law and lore*

Historical understanding of the common law and customary law reveals the two are both built on custom.[176] The common law of Australia has evolved based on specific Australian facts and precedents, and has the ability to recognise and incorporate more effectively Aboriginal customary law.

To understand this issue I would like to provide a personal account. Dena Leo, Girramay traditional owner just north of Cardwell, clearly identified the dichotomy of customary lore and the enforcement of white law. Her nephew had beaten up his migloo(white) girlfriend, and as was in accordance with their customary law, the Uncles went to visit the nephew with a little of his own medicine as was ordered by family 'payback' lore, for the nephew to learn that this behaviour is not permitted. The girlfriend then called the police, at which point the uncles and nephew were all arrested and charged with assault. Many elders believe that customary lore, when practised correctly manages their people more effectively. However the Qld Criminal code definition of assault is broad.[177]

All cultures are evolving in their own appropriate time frames.[178] On this matter, Leon Sheleff wrote:

> It is clear that, in the modern world, any approach that sees custom – particularly of another culture – in static terms, dooms that culture to stagnation, and ultimately rejection, by imposing on it a rigidity which is generally by no means inherent in its nature…It is quite possible that tribal customs that seem to be incongruous in the modern age will be gradually eased out by the members of the tribe themselves… Custom is an important source of law

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government hold constitutional conventions as a mechanism for building support for a referendum and engaging a broad cross-section of the community while focussing the debate;R.8:That the convention made of Aboriginal and TORRES STRAIT ISLANDERS delegates be held, with a certain number of those delegates then selected to participate in national conventions; R.9: that a referendum be held on the matter of recognising Aboriginal and TORRES STRAIT ISLANDERS peoples in the Australian Constitution;R.10:that a parliamentary process be established to oversee progress towards a successful referendum.

[176] Greg McIntyre, Aboriginal Customary Law: Can it be recognised? Background Paper No 9, Law Reform Commission of Western Australia, February 2005, 24.

[177] Criminal Code 1899(Qld) s 245.

[178] Steven Rares, Why Magna Carta still Matters, Judicial conference of Australia Colloquium, Adelaide, 9 October 2015. Judge of the Federal Court Steven Rares acknowledged a similar principle during his speech at the Judicial Conference of Australia Colloquium in October 2015 when he relayed the story of his Judicial friend who pointed out that the United States fought its Civil War in the 1860's to abolish slavery, however, it was not until the decision in *Brown v Board of Education,* 347 US 483(1954). *in* 1954, that black children could legally travel with and go to the same schools as white children. Change is slow; we cannot expect it to happen in one generation.

> for all legal systems, particularly for the common law system. An awareness of its flexible nature is essential for its vitality and for the continuing vitality of the culture.[179]

In 1986 the Australian Law Reform Commission (ALRC) recommended that Aboriginal customary law be an element taken into account when sentencing Aboriginal offenders whether in aggravation or mitigation of their sentence. [180] It is another substantial report. To read this progressive report from 30 years ago is disenchanting. I am humbled by the patience of Indigenous people, so many commissions, reports and submissions and thirty years later, little progress. In 1994 the Royal Commission into Aboriginal Deaths in Custody brought about the insertion of 'cultural background' to section 16A of the *Crimes Act 1914* (Cth), requiring Judges to take this when sentencing federal offenders. In 2006 the Commonwealth enacted legislation removing the reference to 'cultural background' adding section (2A) and (2B) stating it must 'not be taken into account ... any form of customary law or cultural practice'. This amendment was contrary to common law principles, and every law reform body or inquiry that had reported on the sentencing of Aboriginal offenders.[181] In September 2012, the Queensland Law society expressed disappointment at the State Governments decision to cut the Murri, Special Circumstances and the Drug courts which were critical to 'diverting vulnerable people from prison'. [182] The Magistrates Court of Queensland's 2010/11 annual report indicated that the 11-year history of the specialist Drug Court alone had saved the cost of resources equivalent to 588 years of actual imprisonment time.[183]

The re-opening of the Murri courts in Queensland in April this year is positive, it is imperative that they are retained and continue to aspire to understand and incorporate customary law into the common law. It costs $66,000 per year to imprison a person and $38,000 to send them to the best University in Queensland.[184] Government must listen to our Elders and support their plans for working with Indigenous youth and prisoners on country.

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[179] Sheleff, L, The Future of Tradition Customary law, Common Law and Legal Pluralism (London: Frank Cass, 2000) 85.
[180] Recognition of Aboriginal Customary Laws (ALRC Report 31)
[181] Yeats\Aboriginal Misc\140807 – Aboriginal Customary Law Paper (KB)
[182] Natalie Graeff, Manager Corporate Communication, Queensland Law Society www.qld.com.au/about_QLS/News_media/media_releases/the_vulnerable_vetoed_in_court_cuts
[183] Natalie Graeff, Manager Corporate Communication, Queensland Law Society www.qld.com.au/about_QLS/News_media/media_releases/the_vulnerable_vetoed_in_court_cuts
[184] Queensland Law Society website. www.qls.com.au

C *Compensation*

'Rights without remedy are not really rights at all'.[185] It was reported in 2012-2013 by the Productivity commission that $30.3 billion was spent on Indigenous affairs. However, what Australians must understand is that this funding is not reaching the pockets of Aboriginal and TSI people. As Pearson noted, and anyone working in Indigenous affairs knows the majority of this funding is going to a 'parasitic industry of government and private-sector players', consultants who fly in, and out and service providers, mostly white workers who have 'colonised the Indigenous landscape'.[186]

Compensation cannot be avoided.[187] When we think of the economic growth in Australia during the mining boom of the 90's and 2000's, one has to ask why were the traditional owners of the land not benefiting from this major growth period?

Native Title has required the legal formation of a Native Title Prescribed Body Corporate which acts as a trustee to manage their native title. Once the determination is made they become a legal Registered Native Title Body Corporate (RNTBC). I propose that the current state 'stamp duty', be converted to a traditional owner tax and that at the sale of every Australian property within the tribal groups boundaries (and this would include non-Native Title claims areas) that the 'land' tax be given to the RNTBC (or a set up trust fund) with that tribes cultural and economic development programs as the beneficiaries. This would be an ongoing tax and separate to the compensation negotiated in the Treaty.

D *Native Title Broadening*

Article 1 of the International Covenant on Economic, Social and Cultural Rights, provides that all human beings have a right to economic development, which is an expression of their right to self-determination. Successful Native Title determinations must have the ability to develop and utilise their land. Koiko Mabo fought 25 years for the right to his land in the Murray Islands, and yet the legislation does not allow his family to plant a carrot, as it is against traditional use.[188] This must be legislatively altered, to allow Indigenous people now being recognised with usufactory rights to be able to also develop their land toward the betterment of their people.

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[185] B Mitchell, Bill, *Townsville Community Legal Service and Legal Educatio*n (Speech delived at the James Cook University Law Degree Refresh Evening, James Cook University, 11 November 2016).
[186] Noel Pearson, 'Remote Control' (2015) May Monthly Magazine, 30-32.
[187] Michael Rigby, 'What is "taxable Australian real property"?' (2016) 45 *Australian Tax Review* 161, 168.
[188] Gail Mabo, July 2016, talking about their land and inability to grow a vegetable garden.

The cases of *Western Australia v Willis*[189] in 2015, and *Rrumburriya Borroloola Claim Group v Northern Territory* in 2016,[190] have widened the use of Native Title land. Western Australia v Willis, here the Full Federal Court dismissed an appeal by the State against a successful 2014 Federal Court decision, where the Pilki people claimed they engaged in commercial and non-commercial use of their resources.

The Rrumurriya Borroloola Claim group claimed the right to use their resources for 'any purpose' based on the argument that previous to sovereignty they had used the land for commercial purposes when they traded with the Macassans of Indonesia. Justice Mansfield did not adopt a 'frozen in time' approach, allowing the people to utilise a variety of resources not just those used at the time of colonisation.[191] This is a huge breakthrough for Indigenous people, moving away from a narrow approach.

This supports the necessity of self-determined economic development for Indigenous Australians, allowing them to work on, maintain and develop their land.

Research suggests that the onus of proof for Native Title seems to be reversed. It should already be a presumption that the land is owned by the traditional owners, and then up to the State to prove how they acquired it. As Paul Keating said, 'this onerous burden of proof has placed an unjust burden on those native title claimants who have suffered the most severe dispossession and social disruption.'[192]

The senior Solicitor in the Redfern Native Title office following the 18 year successful consent determination of the Barkandji people stated that the standard of proof 'seemed to have reached almost a criminal standard of 'beyond reasonable doubt' , that the Barkandji people were required to prove that they had a connection to their land.

Property law maintains the government's legal compulsory acquisition of land, but this comes with the right to seek compensation by the property owner.[193] Indigenous people's ongoing court cases with mining companies could be seen as the care takers, upholding the 'doctrine of waste'. This principle of property law refers to the responsibility that tenants not exploit the land to the extent of deterioration.[194] Again, two normative systems collide. On the one hand, power wielding mining companies with

[189] *Western Australia v Willis* (2015) 239 FCR 175
[190] *Rrumburriya Borrolola Claim Group v Northern Territory* [2016] FCA 776.
[191] Ibid.
[192] Paul Keating, Lowitaja (Speech delivered at the O Donoghue Oration, 31 May 20111, Adelaide).
[193] Samantha J Hepburn, Principles of Property Law, (Cavendish Publishing, 2nd ed, 2001) 4.
[194] Ibid 55.

their economic motivations verse Indigenous traditional land owners spiritual care and maintenance of their land. The human element becomes subordinate to the power of the profit maker. Surely these companies and the government have a duty and responsibility in the use of finite lands toward the overall benefit of all people.

I have been fortunate to visit Casino reserves owned and operated by Native American tribes in the United States. In 2011 there were 460 gambling operations run by 240 tribes with a total annual revenue of $27 billion. [195] It must be acknowledged that their tribal culture and customs involve many gambling games, originally played with bones, thus a natural evolution of their culture. Theses casinos now fund schools, health and economic development projects in the Native American community.

In accordance with the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), Native Title recipients must be allowed the basic right to economic and resource development. Government needs to continue to review and amend oppressive Native Title legislation.

E *Education Legislation*

The time has finally come for Australia to legislate for every primary school (including Catholic) to teach the culture of the tribal area that children reside in. Australian children will be richer for the cultural stories, flora and fauna use of the landscape around them. This thesis calls upon every High School and University to teach the truth that Australia was not 'discovered' or 'peacefully settled'. We can no longer continue to educate our young people improperly. The knowledge and skills of our traditional owners will bring integrity, depth and traditional culture to all Australian people.

IV CONCLUSION

The decision of *Mabo (No 2)* was necessary to bring Australia out of the shackles of its 'prisoner history.' The decision has been the most influential High court decision in Australia that is still being interpreted and determined. The legislation continues to create new common law precedent. So far there have been 228 successful Native Title determinations. Common law in Australia has acknowledged 'I must recognise the system revealed by the evidence as a system of law'. Native Title is the evidence prima facie of a complex system of normative lore that operated in New Holland, forming

[195] NIGC Gaming Revenues (Report). National Indian Gaming Commission, 2011.

Indigenous sovereignty. What does this mean for Australia? My research indicates that Indigenous people of Australia do not want to create a separate state or system of government. Australia's First people celebrate being Australian. The First Australians want recognition, acknowledgement, and the truth to be told. Land compensation is a necessary part of this and in accordance with International law.

This thesis firstly explored Imperial constitutional law and the law of nations in 1770 to understand the way in which the British acquired Title. A brief study of the world's great theologians provided an historical perspective of the development of title acquisition in 1770. The early cases in Australia, such as *Cooper v Stuart*, misinterpreted Vattel and Blackstone's writings of 'desart and uncultivated' lands, and 'savages doomed for extinction' and applied the mode of 'settlement' via occupation.[196] In 1770 occupation was not a mode of acquisition available for land that was inhabited. This mode was then broadened, by the Privy Council to '*practically unoccupied*'.[197] The only mode of the three proposed by Blackstone, that best fits is conquered. Indigenous people maintain they have never been conquered. According to the law of nations at the time of acquisition, Australia was unlawfully acquired. The best legal description as analysed by the ICJ, with the Iraq invasion in 2003, is that of invasion. It appears there would be no legal repercussions for this and the truth of Australia's acquisition would be told, but this might not fit with the English legal narrative of 'peaceful', let alone an intentional invasion.

The second part of this thesis explored the concept of sovereignty. External sovereignty or International law is where the act of state doctrine recognises and protects the 'state'. Indigenous peoples have not been recognised as 'states'. It appears Australia has a history of ignoring International jurisprudence at the 'risk of our own intellectual isolation.'[198] Internal sovereignty represents the customary law of the diverse Indigenous tribes in Australia. An exploration of the early cases indicates that indigenous people have never acquiesced to the new ruling power, and have been in protest for 246 years. The enormous substantial evidence of the Native Title cases to date prove prima facie that Indigenous people possessed the land, and had a customary law system in place. Australian Indigenous people want legal recognition of their sovereignty. It is inevitable,

[196] Blackstone, above n 19, 104.
[197] *Cooper v Stuart* (1889) AC (PC) 286, 291-292.
[198] The Honourable JJ Spiegelman, chief Justice of New south Wales,'Rule f Law: Human Rights Protection'(address to The 50th Anniversary of the Universal Declaration of Human Rights National Confrence, Human Rights an dEQual Opportunity Commission, Sydney, 10 December 1998)

with time that the narrative will become, the sovereign nation of Australia recognises that the British Empire invaded New Holland, a land of sovereign people, the Aboriginal and Torres Strait Islanders. The following reforms were suggested: A. Constitutional Recognition; B. Plurality of lore and law; C. Compensation; D. Native Title Broadening and E. Education legislation.

Developments in the United Nations towards Indigenous people's right to self-determination are widening the options for Indigenous people to present their cases of Empire dominion over sovereign Indigenous people as crimes against humanity. Australia needs to embrace the rumbling of discontent to correct the mistruths and wilful blindness of Australia's 'settlement' narrative.

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VI APPENDIXES

A *Preliminary table of MASSACRES of Indigenous People in Australia*

Name	Date	Location	Deaths	Notes
Cape Grim Massacre	10 February 1828	Cape Grim, Tasmania	30	Four shepherds massacred Aboriginal people.
Convincing Ground massacre	1833-1834	Portland, Victoria	60-200	Massacre of Indigenous Australians following argument between whalers and the Gunditjmara people.
Pinjarra Massacre	28 October 1834	Piinjarra, Western Australia	14-40	Massacre by British colonists against the Pinjarup people. [1]
Waterloo Creek massacre/Slaughter house Creek massacre.	January 1838	Waterloo Creek, NSW	40-70	Clash between mounted police and massacre of Indigenous Australians.
Myall Creek Massacre	10 June 1838	Myall Creek, NSW	27-30	Stockmen consisting of former convicts were roaming the district killing an Aboriginal people they could find. They were mostly old men, women and children slaughtered. After two trials, 11 colonists were found guilty of murder and hanged.
Murdering Gully massacre	1839	Mount Emu Creek, near Camperdown, Victoria	35-40	Massacre of the Djargurd Wurrung people for stealing sheep.
Campaspe Plains Massacre	June 1839	Campaspe Creek, Central Victoria	Up to 40.	Massacre of the Dja Dja Wurrung people due to the Aboriginal resistance agains the invasion and occupation of their lands.
Gippsland	1840-1850	Gippsland,	300-	Reports of up to 16 separate

Massacres		Victoria	1000	massacres contributed to the superiority of British firearms.
Flying Foam Massacre	February-May 1868	Flying Foam Passage, WA	20-150	Massacre of the Jaburara people including children.
Mowla Bluff massacre	1916	Kimberley, Western Australia.	300-400	Massacre of Aboriginal men, women and children who were rounded up and shot and burned.
Forrest River massacre	May-Juy 1926	Kimberley Region of Western Australia	11	Massacre of Indigenous Australians by law enforcement. A royal commission in 1927 determined that 11 people were killed. Charges were brought against two officers, but dismissed for lack of evidence.
Coniston Massacre	14 August-18 October 1928	Coniston, Northern Territory	60-170	Massacre of the Warlpiri, Anmatyerre and Katetye tribes.
Wallaman Falls massacre	Exact date not known 1900-1940	Wallaman falls, North Queensland	"Up to 100"	"Women, children and animals pushed off the top of the falls up to 100 people."[1]
Leap Mountain	1930'3	Near Mackay.	Up to 50	Undocumented story by Gail Mabo(2).

This is an elementary compilation of the massacres that occurred between 1828 and the 1930's.