WHITE PICKET FENCES: RECOGNIZING ABORIGINAL PROPERTY RIGHTS IN AUSTRALIA'S PSYCHOLOGICAL *TERRA NULLIUS*

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> "To accept one's past — one's history — is not the same thing as drowning in it; it is learning how to use it. An invented past can never be used; it cracks and crumbles under the pressures of life like clay in a season of drought."
>
> James Baldwin, *The Fire Next Time*[1]

DIFFERENT CONCEPTIONS OF PROPERTY

On January 22, 1997, the front page of the *Sydney Morning Herald* had news of a tragic fire in Melbourne. The photographs showed flames licking a house, charred bicycles, and men fighting to save property.[2] The newspapers were able to play an angle that evoked sympathy from Australians. The loss of property was emphasized in its human elements. On the left of the news of the fire was another news item. It was headed, "Aborigines Set Strong Demands for Wik Talks."[3] The "Wik talks" were the latest battleground in the fight by Aboriginal people for the recognition of their property rights by the laws, institutions and consciousness of the Australian people.

The media covered the Wik case from a politically loaded perspective. The *Sydney Morning Herald* ran another headline declaring that the Wik decision was "A Decision for Chaos." It printed a photograph of a farmer, a Mr. Fraser, looking forlornly down at his land under the headline "Family's Land Dream Turns into Nightmare." Mr. Fraser's reaction was one of bewilderment:[4]

> I can't believe these judges made that decision. It's not a decision. I can't see that we have made very much progress. We are obviously going through another period of indecision and I am not sure how much of that sort of punishment people can take.

The newspaper coverage highlighted three *contemporary* perceptions in the public consciousness:

- The loss of property — houses, bicycles, cars — is seen as a tragedy when (white) people lose their homes, but when Aboriginal people lose a property right, it does not have a human aspect to it.
- Aboriginal people, in getting recognition of a property right, are seen as gaining something (making "strong demands") rather than being recognized for something they already have that should be protected.
- Aboriginal property interests are seen as threatening the interests of white property owners. The two cannot coexist. Recognition of Aboriginal rights leads to "uncertainty" and "indecision."

These three perceptions — that there is no human aspect to Aboriginal property rights, that Aborigines are getting something for nothing, and that white property interests are more valuable than black ones — are not just played out in the headlines of Sydney newspapers.

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[1] J. Baldwin, *The Fire Next Time* (New York: Vintage International, 1962) 81.

[2] "Night of Terror as Bushfires Spread" *Sydney Morning Herald* (22 January 1997) 1.

[3] "Aborigines Set Strong Demands for Wik Talks" *Sydney Morning Herald* (22 January 1997) 1.

[4] "Family's Land Dream Turns Into Nightmare" *Sydney Morning Herald* (24 December 1996) 1.

These contemporary perceptions assist in the rewriting and revising of Australia's historical treatment of indigenous peoples, allowing a sanitized, temporal reimagination. Their influence can be found pervasively throughout the history of colonized Australia, starting from the day that the British declared Australia was theirs on the basis of a legal fiction: that the land was *terra nullius* — vacant.

The way Australians perceive Aboriginal land rights reveals much about their perception of their own history and their sense of self. For most Australians, the right to own property and to have property interests protected is a central and essential part of their legal system. For Aborigines, Australian law has operated to deny property rights, acknowledge them sparingly, and then extinguish them again; it has been a tool of oppression and colonization. For a society in which all members were supposed to be equal under the law, an analysis of the way in which property rights have been treated with such different standards shows the dual system of laws that has operated in Australia since 1788 — one system for white Australia, the other for black.

THE DOCTRINE OF *TERRA NULLIUS*

The British claimed Australia on the basis that it was *terra nullius* — vacant and/or without a sovereign.[5] This claim ignored the international standards of the time, failing to recognize the sovereignty of indigenous Australians and Aboriginal customary laws, including property laws.[6] Instead of admitting the land was invaded, the British used the doctrine of *terra nullius* to create a myth that the land was "settled."[7] This myth was institutionalized in the legal system. This legal fiction was well suited to the aims of a colony that sought to expand its frontiers and establish a lucrative pastoral industry. It was fed by Eurocentric notions of property use, influenced by the Lockean concept of mixing labor with the soil. The lack of fences, public buildings and hard agricultural power of labor encouraged interpretations that the Aborigines were nomadic with no significant attachment to their land. Since land use was so radically different between the two cultures, Europeans dismissed indigenous use and relations to the land as wasteful, trivial and primitive. Even from the earliest days of the colony, the British saw themselves as being in competition with the indigenous inhabitants for land.

Aborigines had a complex relationship to the pastoralists. From the start, indigenous rights to land conflicted with the colonial agenda. Yet the farmers needed Aborigines to support the system by providing their cheap or slave labor. Aboriginal reserves were supported by farmers who wanted this pool of labor confined and supervised nearby.[8] The creation of early reserves was recognized as a compromise for stolen land. Reserves were given on benevolent terms rather than on rights-based terms, and indigenous rights would eventually be overrun by lust for land, eradicated through lack of legal recognition and through a failure by the trustees to provide protection for the few interests that Aboriginal people still had. Squatters tried to exclude Aborigines from their own land, continuing to take and claim reserve land. Ironically, Australia's pastoral industry could not have carried on without the labor of Aborigines, especially during the gold rush. The faithfulness of Aboriginal people to pastoral leases on their traditional land made them loyal workers. It was here that dual occupancy emerged as an ideal arrangement, with farmers allowing indigenous people to remain on pastoral leases in return for a pool of cheap labor, though only token wages were paid or rations given to indigenous workers.

Governments and churches were supposed to represent and protect Aboriginal interests but were ineffective since their agenda (concerned with

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[5] *Cooper* v. *Stuart* (1889) 14 AC 285 held that the British claim to sovereignty over Australia was justified on the basis that it was an uninhabited territory. Blackstone stated that where land was acquired by settlement, British law prevailed. See W. Blackstone, *Commentaries on the Laws of England* (Chicago: University of Chicago Press, 1979). The view was that the British had annexed parts of Australia in 1788, 1824, 1829 and 1879. The Crown had become both absolute and beneficial owner of the land. Aborigines had no property interests.

[6] An advisory opinion of the International Court of Justice held that international law did not permit territory inhabited by indigenous people to be treated as vacant: *Advisory Opinion on Western Sahara* [1975] ICJR at 39; cited in *Mabo et al* v. *Queensland* (No. 2) 175 CLR 1 at 40.

[7] B. Elder, *Blood on the Wattle: Massacres and Maltreatment of Australian Aborigines since 1788* (Frenchs Forest: Child & Associates, 1988); J. Roberts, *Massacres to Mining: The Colonization of Aboriginal Australia* (Melbourne: Dove Communications, 1981). Australian history books have portrayed the British invasion of Australia as a "peaceful settlement," denying the massacres and injustices suffered by indigenous peoples as a result of the European lust for land. History was painted by the victors and they created an image that the settlers arrived and the Aborigines quietly retreated. It is still controversial to promote the idea in schools that Australia has a bloody past. The use of the word "invasion" was avoided because of its perceived political implications. Instead, notions of "discovery" are used to describe the manner in which white men trekked over craggy mountain ranges. Aboriginal guides can expect as much recognition for helping these "explorers" and "discoverers" as the sherpas who assisted Sir Edmund Hilary.

[8] H. Goodall, *Invasion to Embassy: Land in Aboriginal Politics in New South Wales, 1770-1972* (Sydney: Allen and Unwin, 1996) 92.

assimilating and Christianizing indigenous peoples) was so different from the agenda of the Aboriginal community (concerned with reclaiming land and maintaining cultural practices). The subsequent statutory body designed to protect indigenous interests in New South Wales, the Aborigines Protection Board, also failed to act in the best interests of the Aboriginal people. The Board sold off Aboriginal land to fund its policy of removing children.[9] It also leased Aboriginal land for its own revenues, interrupting the successful leases of Aboriginal farmers to lease lands to white farmers.[10] Even today, land becomes alienated for the use of pastoral leases, urban development and mining opportunities, diminishing the rights of Aboriginal people to stay on traditional lands.[11]

The loss of traditional land was crippling to Aboriginal communities. Only ancestral land was of value to Aboriginal people. One clan's land did not have spiritual and cultural significance to another Aboriginal community. In this way, Aboriginal attachment to land was non-transferable. Not only were Aboriginal communities less capable of surviving in unfamiliar territory, but religious life was seriously impaired or lost. Traditional aspects of Aboriginal culture were destroyed when groups were massacred, had their children taken away, or were removed from ancestral lands, since oral traditions could not be passed down to younger generations. Missionaries did not allow Aboriginal people to use their own languages or practice their ceremonies and attempted to convince Aboriginal people that Aboriginal culture and custom were pagan. Similarly, language and culture could not be exercised or expressed on government reserves.

Land did become claimable under land rights legislation passed in certain Australian states and territories. The first[12] was the *Aboriginal Land Rights (NT) Act, 1976*. New South Wales eventually passed the *Aboriginal Land Rights (NSW) Act, 1983*. It was passed with the *Retrospective Validation of Revocations (NSW) Act, 1983*.[13] The *Retrospective Validation of Revocations (NSW) Act, 1983*, validated reserve land illegally taken from Aboriginal people totaling over 25,000 acres. When the NSW government passed the *Aboriginal Land Rights (NSW) Act, 1983*, it was handing over 6,000 acres while removing hopes of regaining the 25,000 that had been lost through the illegal actions of the Lands Department. These acts, while granting land, did not recognize a title by right. In *Milirrpum* v. *Nabalco Party Ltd. (The Gove Land Rights Case)*[14] Justice Blackburn held that given Australia was settled rather than conquered, its common law did not recognize native title. This legal fiction reinforced the general historical perceptions that Australia was *terra nullius*, a settled country, and that any property given to indigenous peoples was a benevolent act. These legal perceptions were finally destroyed in *Mabo et al* v. *Queensland* (No. 2) (the *Mabo* case).[15]

THE MABO DECISION

In 1992, the *Mabo* case defined native title as a right that exists when an indigenous community can show that:

(i) there is a continuing association with the land (shown by the Aboriginal community); and
(ii) no explicit act of the government, federal or state, has extinguished that title (extinguishment to be shown by the government).

The answer to these two separate questions will determine whether native title still exists.

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[9] The policy had begun in 1912 even though the legislative power wasn't conferred until 1915. The Board was diminishing indigenous property rights to pursue this policy even when the policy itself was legally unauthorized.

[10] The Aborigines exhibited continued resistance to the policies of the Aborigines Protection Board and the actions the legislative body took to diminish the amount of Aboriginal land held on trust. The Board sold off land to white farmers and terminated the leases of Aboriginal farmers. In 1927 a petition was signed by Aboriginal people that demanded full citizenship rights and land as an economic base. The Aborigines Protection Board insisted that Aborigines were incompetent to run their own affairs and that they had, in theory, full citizenship rights (except access to alcohol). The Protection Board argued that equality of citizenship existed since Aborigines had the franchise. In reality, Aboriginal people were denied public benefits and restricted from public places. Many country towns passed Council regulations that prevented the access of Aboriginal people to community facilities (usually on the pretense of health issues) and imposed curfews after dark to restrict the movement of Aboriginal people.

[11] This is traced below in the last part entitled "Continuing Dispossession."

[12] Legislation was passed in South Australia to allow the Pitjantjantjara special control over their traditional land. This legislation was exceptional in that it was far more generous than subsequent legislation but was also linked especially to traditional lands, which land rights legislations never were.

[13] This latter legislation was passed to rectify the mistake made by the Lands Department when disposing of land that made up Aboriginal reserves. It was discovered that the Crown land had been vested in the Protection Board until 1969, not the Lands Department. This made all revocations of Crown land by the Lands Department invalid.

[14] (1971) 17 FLR 141.

[15] (1992) 175 CLR 1.

The High Court also held that native title:

(a) exists in the manner in which it is defined by the Aboriginal community, i.e., the laws and customs of the community will determine the parameters of the native title;
(b) is held communally; and
(c) can be extinguished by
    (i) *legislation* that has a *clear and plain intent* to extinguish native title;[16] or
    (ii) intent shown by the legislature or the executive that would contradict the common law.[17]

The majority of the Court found that compensation was not payable under common law[18] for extinguishment.

Radical title was vested in the Crown of the "discovering" nation — or the subsequent independent government — but the indigenous people retained the right of occupancy although they could dispose of their interest in the land to the Crown.

The recognition of native title is not just a moral issue but rather one of equality. Even when indigenous rights are recognized under the law, they may be valued less than the property rights that vest in individuals. Indigenous property needs to be valued as non-indigenous property is valued; and native title needs to be conceptualized as a valuable property right, like all other property rights. Joseph Singer notes that "(p)roperty is a set of social relations among human beings."[19] The legal definition of those relationships confers or withholds power over others. Failure to assign protective property rights leaves people at risk, vulnerable to the will of others. Property rights held by indigenous Australians had no status under law and now have an uncertain legal status — uncertain because so many areas are left unclear in the *Mabo* case, and uncertain because the legislative has sought to limit the scope of the legal decision and to extinguish certain native title rights. Property rights, central to the English legal system, are protected tenaciously. Given this tendency of the law, it would seem that future interpretations of indigenous property should acknowledge the vulnerability of the group to the abuse of power by the majority. Broad interpretations and protections need to be applied to counter that imbalance of power.

One of the most distinguishing features of native title is that it finds its source in the culture of indigenous Australians. No other cultural groups in Australia can fulfill the legal requirements to claim native title. The unique relationship that indigenous people have with the land inevitably leads to a unique property right, a historical claim based on a cultural attachment to the land. And it is to this distinguishing feature that reasons for the opposition to the right were directed.

By comparing these property rights with native title, it is clear that it is the *source* of the use of land (i.e., custom), rather than the *nature* of the interest in land that is the differentiating factor between native title and other types of property rights. Native title is not a product of common law; it is only recognized by it and thus different in its *source* from other property rights. But it is a property interest by *nature* and therefore is not necessarily distinguishable from other interests.

Native title recognized a legitimate property right in the Australian system that had been ignored until the *Mabo* case. Native title has been perceived as a new type of property right. This perception of uniqueness is correct inasmuch as the parameter of the right is derived from the traditional practice and interest. But there are several aspects about the "unique" nature of native title that could be applied in other areas of law that would make concepts of property more flexible. Advocates of indigenous rights should emphasize the ways in which native title is not a radical divergence from existing property rights, but is in many ways analogous to already recognized and uncontroversial property rights, such as easements.

Given the fact that native title shares these characteristics with other property rights, the recognition of native title as a legitimate property right in 1992 raises two issues: why had recognition taken so long, and why was it so controversial?

Modern Australia is a country built on the land of its indigenous people — land that was stolen in vicious and deceitful actions, land that made a country rich through pastoral and mining industries. It is no surprise that farmers and miners have been the most vehement

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[16] The grant of a fee simple interest by the Crown will extinguish native title, as per *Fejo* v. *Northern Territory* [1998] HCA 58. The High Court also stated that where native title rights are extinguished, they can not be resuscitated.

[17] Justice Brennan argued that McHugh, Brennan and Mason said that it was not wrongful to extinguish native title this way. Deane and Gaudron said that if this was the case, then it was done wrongfully and it would give rise to compensation.

[18] A right to compensation was found by virtue of s.7 of the *Racial Discrimination Act, 1975 (Cth)*. That section prohibits the deprivation of property on the basis of race. The Court found (by a 4:3 majority) that any extinguishment after the Act was passed breached s. 7. Repealing the Act would eradicate the need to pay compensation.

[19] J. Singer, "Sovereignty and Property" (1991) 86 Northwestern University Law Review 41.

opponents to the recognition of native title rights. Both groups have actively lobbied using often blatantly false propaganda to have the *Mabo* decision overturned by the legislature, making no effort to hide the political nature of their resistance to the recognition of native title interests. Advocates for mining and pastoral interests have resorted to scare tactics that have misled and frightened Australians who were led to believe that Aboriginal statehood was the real goal and that the High Court's decision made freehold land vulnerable to claims. Lobbyists and mining companies fed into this ignorance by warning that the *Mabo* decision could lead to the confiscation of private property (freehold title), an underhanded lie easily dismissed by a reading of the law. Self-interested groups have characterized the recognition of native title as the giving of indigenous people an interest in land for free, thus feeding on the racist prejudices of sectors of the Australian population who remain ignorant of the barbarities of their own history and conveniently fail to recall the enormous theft of land that their country, even their own homes, are built on. For example, Hugh Morgan stated: "As far the campaigners are concerned, they have made it crystal clear that their endeavours, extending over two generations, will only be concluded when a separate, sovereign Aboriginal state is carved out of Australia. We can reasonably predict that this Aboriginal state will have all the trappings of sovereignty, but will rely almost entirely on subvention from Australia and its continuing existence."[20]

Resistance to the recognition of native title rights also comes from a confusion of the issues of sovereignty and property, a confusion that also occurs within the indigenous community. In the *Mabo* case the High Court stated that the issue of indigenous sovereignty was not an issue that could be considered by the domestic courts of Australia. The Court has clearly stated in both the *Mabo* case and *Coe* v. *Commonwealth of Australia and the Government of the United Kingdom of Great Britain and Northern Ireland* that the issue of Aboriginal sovereignty needs to be heard by an international forum. They claim that domestic courts do not have the jurisdiction to hear this issue.

The Keating government sought to clarify interests, secure title, regulate procedures and set up a tribunal system to hear claims under the *Native Title Act, 1993 (Cth)*.[21] On June 30, 1993, before the *Native Title Act, 1993 (Cth)* became law, the Wik and Thayorre peoples made a native title claim on the Cape York Peninsula. In 1996, Justice Drummond in the Federal Court made a decision that the claim of the Wik and Thayorre Peoples could not succeed over the claimed areas as they were subjected to pastoral leases. He considered that the grant of a pastoral lease extinguished native title rights.[22]

The plaintiffs appealed to the High Court, which declared that native title can only be extinguished by a written law or an act of the government that shows a clear and plain intention to extinguish.[23] The Queensland lease did not show such an intention. Pastoral leases did not give exclusive possession to the pastoralists; the grant of a pastoral lease did not extinguish native title interests. Native title could coexist with a pastoral lease, but if the interests of the landholders conflicted, the native title interests would be subordinated; in other words, the nature of the native title right (e.g., performance of a ceremony) must in no way conflict with the purposes of the lease (e.g., farming or grazing).[24]

The Court held that a native title holder cannot exclude the holder of a pastoral lease from the area covered by the pastoral lease or restrict pastoralists from using the lease area for pastoral purposes. Nor can a native title holder interfere with the pastoralist's ability to use land and water on their leasehold, the pastoralist's privacy, or the pastoralist's right to build fences or make other improvements to the land. Whenever there is a conflict between the use under the lease by the pastoralist and the indigenous people's native title interest, the interest of the farmer will always trump.[25] Pastoralists do not even pay for the infringement or extinguishment of native title interests. Any compensation is payable by the Crown.

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[20] H. Morgan, "The Dangers of Aboriginal Sovereignty" *News Weekly* (29 August 1992) 13.

[21] The *Native Title Act, 1993 (Cth)* and the National Native Title Tribunal have been subject to criticism from all parties involved with the native title process. Criticism is primarily aimed at the lethargy of the system and the unworkability if the Act: Aboriginal and Torres Strait Islander Commission, *Proposed Amendments to the Native Title Act 1993: Issues for Indigenous Peoples* (Canberra: Australian Government Publishing Service, 1996); Commonwealth of Australia, *Towards a More Workable Native Title Act: an Outline of Proposed Amendments* (Canberra: Australian Government Publishing Service, 1996).

[22] *Wik Peoples* v. *The State of Queensland; The Thayorre People* v. *The State of Queensland*. Federal Court. Matter No. QC 104 of 1993 Fed. No. 39/96.

[23] *Wik Peoples* v. *The State of Queensland & Ors; The Thayorre People* v. *The State of Queensland & Ors*. High Court. Matter No. B8 of 1996.

[24] The Court did not decide whether the Wik and Thayorre people had an interest in that they had sought to have affirmed. That issue was reverted to the lower Court.

[25] In *Eaton* v. *Yanner; ex parte Eaton* (unreported, 27 February 1998), the Queensland Court of Appeal in a 2-1 decision held that native title rights were extinguished by the enactment of fauna conservation legislation, since it is inconsistent with any right the owner has to take fauna from the land. Application for leave to the High Court has already been filed.

The legal interests of farmers remain unchanged. There is no impact on the value of the pastoral lease. Financial institutions base their loans on the property's capacity to carry stock (its ability to generate income), the equipment owned by the pastoralists, and improvements to the land. These matters were unaffected by the decision in the *Wik* case. It was only the pastoralists' *perception* of their property rights that changed. In fact, coexistence of the native title interest and the leasehold interest reflect arrangements informally created by pastoralists who allowed indigenous people access to traditional sites and whose properties had supported communities of indigenous people by using them as a pool of cheap labor.

As with the result in the *Mabo* case, the decision in the *Wik* case ignited public hysteria that was further fueled by the deceitful misrepresentations of industry and government. Government propaganda scared farmers by telling them that Aborigines could claim their land.

CONTINUED DISPOSSESSION

The Howard government's[26] response to the *Wik* case was laid out in their proposal to implement a "Ten Point Plan." This plan sought to extinguish native title interests by converting the leasehold interest into a freehold interest — a windfall to the farmers since they would gain freehold title of land they currently held as leasehold. The cost of conversion and any compensation that would become payable due to an extinguishment of native title was to be covered by the public purse. Indigenous peoples would lose, even if compensation was payable. If the native title interest was the right to enter the land and perform a ceremony, the monetary amount payable for the extinguishment of that right would fail to compensate for the substance of the right being extinguished. Such compensation would be a percentage of the property value and thus would only nominally account for cultural and religious practices being lost. Aboriginal people would have preferred to have keep their property interest.

The Federal Government tried to gain popular support for its Ten Point Plan by portraying pastoral leases as small, family run farms. In reality, the pastoral industry is dominated by big individual and corporate farmers.[27] Cheryl Kernot, then leader of the Democrats, noted that "a search of register of members of Federal Parliament reveals no fewer than 20 members and nine senators, representing the Liberal, National, One Nation and Labor parties, have interests in farming, grazing or pastoral activities."[28] Along with those members of Parliament are some of Australia's richest individuals: Mrs. Janet Holmes a'Court, Mr. Kerry Packer and Mr. Rupert Murdoch. Foreign-controlled corporations also have rural landholdings of more than seven million hectares.[29]

With this windfall at stake, it was little wonder that the mining and pastoral industries have pushed the Liberal government to take an inflexible line with the proposed bill. Senator Herron, the Minister for Aboriginal Affairs, stated his commitment clearly:

> The backbone of this country, I'm proud to say, are the pastoralists. I have no doubt the wisdom they will bring to the judgment they deliver, in the development of policy, will be to the betterment of this country as a whole ... I'm quite proud of the fact there are so many pastoralists on our side, in both the Liberal Party and the National Party....[30]

The bill that contained the Ten Point Plan reflected the extent to which Aboriginal stakeholders had been dismissed by the Prime Minister and his supporters. The bill was revised in the Upper House to allow Aboriginal people the right to negotiate. The Howard government rejected the amended bill and tried again three months later to get the Senate to pass it in its original form. The government's uncompromising line and its rhetoric of business uncertainty ignored the fact that there have been successfully negotiated agreements between

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[26] Elected in 1996.

[27] "Richest of Rich are Wik Winners" *Sydney Morning Herald* (10 May 1997) noted that "The biggest corporate landholders are the Adelaide based S. Kidman and Co with 11.7 million hectares. Then comes the AMP Society owned Stanbroke Pastoral Co., the Elders-owned Australian Agricultural Co., and the Foster family's north Australian Pastoral Co. with six million hectares."

[28] "Conflict of Interest? So What?" *Sydney Morning Herald* (10 May 1997) noted the conflicts of interest: "Mr. Hugh McLachlan — cousin of defense Minister, Mr. Ian McLachlan — Mr. Don McDonald, the National Party president, control tracts of land under pastoral leasehold agreements." Between them the two men control seven million hectares. "Mr. McLachlan is Australia's biggest private landowner, with 4.7 million hectares and Ian McLachlan is one of Australia's largest wool producers." At least three ministers in the Queensland government hold extensive pastoral leases. Former Director of the National Farmers Federation, Nick Farley acknowledged that "The value of pastoral properties will increase and it is therefore a windfall profit for individuals paid for by the taxpayers."

[29] "Richest of Rich are Wik Winners" *Sydney Morning Herald* (10 May 1997).

[30] *Ibid.*

indigenous communities with native title interests and mining or pastoral companies.[31]

The Prime Minister continued to push an approach informed by the ideologies of white Australian nationalism and the doctrine of *terra nullius*. This link to the ideologies of the past is evident in the words of Hugh Morgan:

> When we look back, however, over the period since Sir Robert Menzies retired, just over 25 years ago, and observe how, bit by bit, the language of cultural despair has been adopted by Ministers of the Crown; how the politics of guilt have become the bi-partisan stock in trade of Government and Opposition; how vast tracts of land have been allocated to Aborigines, on the basis of race and descent, under unique terms (terms which effectively take land out of the Australian economy); it is impossible to avoid the conclusion that very powerful forces are at work in our hearts and minds. We seem to have lost our self-respect, and we have certainly lost our admiration for the pioneers who came here from Europe over a century ago and developed this land.[32]

Morgan plays a clever semantic trick here. By claiming that land claimed by Aboriginal Australians have been "allocated" on the "basis of race and descent," he is decontextualizing the principle behind the land rights movement and the legal basis of the *Mabo* and *Wik* cases (that Aboriginal people had legitimate property interests in land that were illegally ignored). Without this context, Morgan portrays the rights of indigenous peoples as being "something for nothing," made even more abhorrent by the fact that it is a windfall based on race (ironically, race was the reason why the land was lost in the first place, since Aboriginal property rights were not afforded the same legal recognition as the property rights of other Australians). Morgan seeks to block any objection to his reasoning by raising the alarm that talk of the historical context is only the "politics of guilt." It is in this rhetorical, semantic play that many Australians can find comfort. It is a retelling of their history that romanticizes the "pioneers who came here from Europe." Morgan thus creates an historical and a psychological *terra nullius*.

The non-recognition of Aboriginal property rights has two ideological strands:

(1) the notion of national identity; and
(2) competition for economic resources and profit.

The first leads to a denial of the presence of indigenous people and a failure to recognize their pre-existing property rights. As "other" to the national image, indigenous peoples draw resentment and envy that they might control rich resources. Similarly, economic motivations, not without racist undertones, perpetuate a sense of envy and resentment as Aborigines are perceived as "getting something for nothing." These ideologies combine to form a mixture of forces that perpetually deny the recognition of the property rights of Aboriginal people.

On the day that the Senate voted the changes to the Ten Point Plan Bill, New South Wales suffered from a spate of serious bushfires. Before Christmas, a severe fire threatened homes at Bangor, on the southern outskirts of Sydney. The newspaper headlines blazed, "I've lost everything. We have no house."[33] Impatience with the failure of the Ten Point Plan to pass even affected the Labor Party,[34] providing further evidence of the fact that Australians view this native title right as "getting something for nothing" and expendable.[35] While it is easy to lament the loss of property in a fire, it seemed impossible for sectors of Australia's dominant culture to see a human aspect, let alone a moral or a legal aspect, in the loss of a property interest held by an indigenous person if it is linked to traditional title. These interests

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[31] For example, the negotiation of the Century Zinc mine in the Gulf of Carpentaria in March, amid the claims that the Wik decision would prove disastrous for Australian business. "Native Title's $1Bn Victory" *Sydney Morning Herald* (28 March 1997). See also I. Manning, *Native Title, Mining, and Mineral Exploration* (Canberra: National Institute of Economic Industry and Research, 1997). Similarly, the Cape York Land Council announced a deal between traditional owners and the Chevron Corporation that will allow a gas pipeline to be constructed from Papua New Guinea to Australia. "Mining Giant puts Squeeze on Senate" *Sydney Morning Herald* (26 November 1997).

[32] H. Morgan, "The Dangers of Aboriginal Sovereignty" *News Weekly* (29 August 1992) 13.

[33] "I've Lost Everything. We've No House" *Sydney Morning Herald* (3 December 1997).

[34] The Queensland leader of the Labor Party stated that the federal Labor Party should pass the 10 Point Plan "so we can get on with our lives." It is clear that his "we" does not include indigenous Australians. "Howard Exploits Crack in Labor's Wik Line" *Sydney Morning Herald* (16 January 1998).

[35] Land is not the only thing that Aborigines are seen to get for nothing. Any kind of assistance attaches this rhetoric and resentment. Pauline Hanson, Member of the House of Representatives, stated: "I talk about the exact opposite — the privileges Aboriginals enjoy over other Australians. I have done research on the benefits available only to Aboriginals and challenge anyone to tell me how the Aboriginals are disadvantaged when they can obtain three and five percent housing loans denied to non-Aboriginals." Reported in *Hansard*, 10 September 1996.

are seen as countering progress and going against the best economic interests of Australia.

Aboriginal leaders had stated that a constitutional challenge to the amendments to the *Native Title Act* contained in the Ten Point Plan, on the grounds that legislation that extinguished the rights of indigenous peoples, was not a valid use of the race power in section 51(xxvi) of the Constitution;[36] such exercises, it was argued, had to be beneficial. Alternatively, the *Native Title Act*, as it would come to exist after the proposed amendments were made, would be such a "manifest abuse" of the race power that the Court should strike it down. Some light was shed on the outcome of such a challenge by the High Court in *Kartinyeri* v. *The Commonwealth*.[37] The plaintiffs had sought to have a legislative act of the government declared unconstitutional. After a dispute over a development site that the plaintiff had claimed was sacred to her, the government sought to settle the matter by passing an act, the *Hindmarsh Island Bridge Act 1997 (Cth)*, that would repeal the application of heritage protection laws to the plaintiff. The plaintiff argued, *inter alia*, that when Australians voted in the 1967 referendum to extend the race power (section 51[xxvi]) to include the power to make laws concerning Aboriginal people, it was with the understanding that the power would be used to benefit indigenous peoples. Because the *Hindmarsh Island Bridge Act* was passed under the race power and was an act that deprived indigenous peoples of a right, the Act was unconstitutional. The Court rejected the plaintiff's arguments by majority of 5-1.[38] The majority held that the power to make laws also contains the power to repeal them. Justice Gaudron and Justices Gummow and Hayne in their judgements implied the possible existence of a supervisory jurisdiction of the court to prevent "manifest abuse" of the race power. Justice Kirby in dissent held that the race power could not support discriminatory legislation. This decision was seen as a victory by the Howard Government, who saw constitutional challenges to amending legislation that extinguished native title rights as much harder to mount.

Three days after the decision in the *Hindmarsh* case was handed down, Howard's Ten Point Plan bill was debated for a second time. It was amended in the Senate (again by one vote) on the April 4, 1998. Some concessions were made: the registration test was loosened to include indigenous people who were forcibly removed by government legislation and unable to maintain connections to their land; some aspects of the Act were made subject to the *Racial Discrimination Act, 1975 (Cth)* ; a proposed sunset clause to set a limitation period for the launching of all native title claims was removed; and a limited right to negotiate in relation to mining and pastoral land was retained, but without the requirement of "good faith" negotiations or an independent arbitral body. This time the bill passed, becoming the *Native Title Amendment Act* (1998).

There is already evidence of the disempowerment of Aboriginal people by the effects, real and psychological, of the new native title framework. The Jawoyn people surrendered native title rights over horticultural land in the Northern Territory in exchange for two renal dialysis machines and an alcohol rehabilitation center,[39] services that other Australians would consider a basic right. Aboriginal people are operating in a political climate in which they perceive that they have to trade one basic right for another.

Australian law has an expansive interpretation of a property right. In *WSGAL Party Ltd.* v. *Trade Practices Commission*[40] the Court, in interpreting the acquisition power in section 51(xxxi) of the Australian Constitution,[41] held that the words "for any purpose in which the Parliament has the power to make laws" are not to be read as an exclusive or exhaustive statement of the Parliament's powers to deal with or provide for the involuntary disposition of or transfer of title to an interest in property.[42] For there to be an acquisition of property by the Commonwealth, there must be an acquisition of an interest in property, however slight or insubstantial.[43]

Property is a comprehensive term and extends to every valuable interest. For this reason, section 51(xxxi)

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[36] Section 51(xxvi) states that:

> 51. The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to: ... (xxvi) The people of any race, for whom it is deemed necessary to make special laws. The 1967 Referendum facilitated changes to this section that allowed it to include indigenous Australians.

[37] [1998] HCA 22.

[38] Only Kirby J. dissented. Interestingly, he relied on international standards and Australia's international obligations. Note also that one High Court justice (Justice Callinan) had to excuse himself from hearing the case when it was revealed that he had given advice to the government about the matter before his appointment to the Court.

[39] "Aboriginal Health Care 'Barter' Condemned" *The Age* (21 October 1998).

[40] (1994) ATPR 41-314 at 42,175-42, 177.

[41] Section 51(xxxi):

> 51. The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to: ... (xxxi) The acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has the power to make laws.

[42] At 585 (at 678).

[43] *Ibid.*

has been held not to be confined to acquisitions by the Commonwealth but extends to its agents and "by any other person."[44]

A broad interpretation of what constitutes native title would include all manifestations of indigenous rights to such title. This would mean, in practical terms:

(a) the recognition of *fishing rights* where the elements needed to establish native title can be shown.[45]
(b) the native title to be recognized where mining and pastoral leases have not substantially disrupted the attachment to land. The mere signing of a lease in 1896 that was never executed should not disrupt any attachment that indigenous peoples have with land. The test is whether there is a *clear intent* to stop the native title. Unless the attachment has been disrupted, the clear intention may not be present.

Again, the justification is as much legal as moral. If there is a guarantee of equal protection, all property rights need to be protected in a way that values the right held by the individual, whether that protection is in the form of recognition of the right or in the form of just terms compensation. As Joseph Singer states, "(t)he definition and distribution of property rights create both power and vulnerability...[P]roperty law should protect the vulnerable and control the powerful — not the other way around."[46]

Litigation is currently taking place that will allow the High Court to decide whether native title rights include fishing rights.[47] Property rights have been found to "extend to every species of valuable right and interest including real and personal property, incorporeal hereditaments such as rents and services, rights of way, rights of profit or use in land of another, and choses in action."[48] Rights include "any tangible or intangible thing which the law protects under the name of property."[49] By definition, fishing rights clearly constitute a property right. The broad definition of property rights under Australian law should support a claim that native title rights include fishing rights where those customs are continued and the other tests for native title (continual attachment, no act of extinguishment) are met.

These recent developments concerning Aboriginal property rights in Australia have been frustrating for the Aboriginal community and the advocates and supporters working to protect those rights, as each incremental and piecemeal gain made within the judicial system has been truncated or extinguished by a legislature with a conflicting ideology and agenda. For Australia's indigenous peoples, the legacy of *terra nullius* may have been overturned by the *Mabo* case, but another ideological enemy remains: as long as Australia has a dominant sector that embraces a psychological *terra nullius*, any legal advances are vulnerable to legislative extinguishment. This psychological *terra nullius* allows Australians like John Howard to separate the property rights of indigenous Australians from those of all other Australians. It is a distinction that devalues indigenous property rights (as lacking a human aspect, as gaining something for nothing, as leading to uncertainty and indecision). Until this *terra nullius* is overturned, Aboriginal property rights will remain vulnerable.❑

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[44] *Ibid.* at 586 (at 679). A. Turello, "Extinguishment of Native Title and the Constitutional Requirement of Just Terms" (1993) 3 *Aboriginal Law Bulletin*.

[45] J. Behrendt, "So Long and Thanks For All the Fish" (1995) 20 Alternative Law Journal 11.

[46] Singer, *supra* note 19..

[47] This issue was considered in *Yarmirr* v. *Northern Territory (The Croker Islands case)* [1998] FCA 771. Native title was found to exist over coastal sea in accordance with the *Native Title Act, 1993 (Cth)*. The court rejected the Northern Territory's contention that native title ended at the low watermark, preferring a requirement of common law recognition that corresponded to the nature of the native title rights asserted. Native title rights were shown to exist in this case but did not extend to control of access or resources. The plaintiffs could only travel through or within the area, could hunt, fish and gather for non-commercial purposes, visit places of spiritual and cultural importance and safeguard cultural and spiritual knowledge. Should Justice Olney's findings be overturned in the High Court and extended to exclusive possession, these rights would be lost by the application of the *Native Title Act*.

[48] *Minister of State for the Army* v. *Dalziel* (1944) 68 CLR 261, per Starke J. at 290.

[49] *Ibid.*, per McTiernan J. at 295.