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2020 Patron's Address

The Honourable Margaret Beazley AC QC

Governor of New South Wales

Aboriginal Australians and the Common Law

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Governor of New South Wales

ABORIGINAL AUSTRALIANS AND THE COMMON LAW**

1. Bujari gamarruwa. Mudgingal. Babana. Gamarada. Gadigal.[1] I acknowledge the Gadigal people of the Eora Nation, on whose lands I am meeting with you this evening and acknowledge their elders past, present and emerging.

2. The title of this lecture, *Aboriginal Australians and the Common Law* is ambitious in its potential breadth and depth. My aim in this lecture is to provide an historical exposition of what has occurred in the common law to date. Indeed, as Governor of New South Wales, it is not appropriate to do more. It has certainly been challenging but at the same time, rewarding.

3. The rightful place of Aboriginal Australians in this country is a topic in which all Australians are, or are becoming, increasingly invested.[2] However, relationship without understanding and investment without knowledge has a hollow ring. Indeed 4 decades after the end of World War II, the President of the Federal Republic of Germany said: 'Anyone who closes his eyes to the past is blind to the present. Whoever refuses to remember the inhumanity is prone to the risks of re-infection.'[3]

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*The Honourable Margaret Beazley AC QC is 39th Governor of New South Wales, commencing her term on 2 May 2019. Prior to her appointment as Governor, Her Excellency served as a Judge of the NSW Court of Appeal from 1996 and as the first female President of the Court from 2013-2019.

**With thanks to my Research Assistant Elizabeth Chapman.

[1] Translation: 'Good day, men, women and friends/comrades'.

[2] As a result of the 1967 referendum, and the amendment of s 51(xxvi) and the removal of s 127, there is now no express reference to Aboriginal Australians in the Australian constitution, although s 51(xxvi) in its present form is a general power to pass laws deemed necessary benefitting the people of any race: see *Commonwealth v Tasmania* (1983) 158 CLR 1, 273 (Deane J), 242-5 (Brennan J); *Koowarta v Bjelke-Peterson* (1982) 153 CLR 168, 187 (Gibbs CJ), 242 (Murphy J); *WA v Commonwealth* (1995) 183 CLR 373, 460-462 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ) ('*Native Title Act* Case'); *Kartinyeri v Commonwealth* (1998) 195 CLR 337, 365 (Gaudron J) and 411 (Kirby J) ('*Hindmarsh Island Bridge Case'*).

[3] Richard von Weizsäcker, 'Ceremony Commemorating the 40th Anniversary of the End of the War in Europe and of National-Socialist Tyranny' (Speech, i8 May 1985) speech made at Bundestag, Bonn.

4. Because the topic is large and there is a wealth of academic commentary, particularly on *Mabo*[4] and native title law jurisprudence, I have chosen to confine my remarks to 3 issues:

    a. **19th century Aboriginal interaction with the common law**;

    b. **Aboriginal Identity**; and

    c. **Sovereignty**.

5. In doing so, it is necessary to navigate (necessarily selectively) over 230 years of legislative and curial history.

6. There are some historical facts which puts tonight's topic, especially that of sovereignty, into perspective. First, Captain Cook's instructions from the Lords of the Admiralty were, 'with the Consent of the Natives to take possession of Convenient Situations in the Country in the Name of the King of Great Britain'.[5] On 23 August, 1770, having sailed 1800 miles along the east coast of Australia, Cook claimed possession 'of the whole of the East coast from latitude 38 degrees south in the name of the King'.[6]

7. On 25 April 1787 Governor Phillip received his *Draught Instructions* from King George III, in which Phillip was directed to '…endeavour by every possible means to open an intercourse with the natives, and to conciliate their

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[4] *Mabo v Queensland (No 2)* (1992) 175 CLR 1 ('*Mabo*').

[5] Cook's instructions for the *Endeavour's* voyage included 'to observe the Genius, Temper, Disposition and Number of the Natives, if there be any and endeavour by all proper means to cultivate a Friendship and Alliance with them, making them presents of such Trifles as they may Value inviting them to Traffick, and Shewing them every kind of Civility and Regard; taking Care however not to suffer yourself to be suprized by them, but to be always upon your guard against any Accidents. 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' in *Secret Instructions to Lieutenant Cook* <https://www.foundingdocs.gov.au/resources/transcripts/nsw1_doc_1768.pdf>.

[6] 'Having satisfied myself of the great probability of a passage, thro' which I intend going with the ship, and therefore may land no more upon this eastern coast of New Holland, and on the western side I can make no new discovery the honour of which belongs to Dutch navigators; but the eastern coast from the latitude of 38 [degrees] South down to this place I am confident was never seen or visited by an European before us and notwithstand[ing] I had in the name of His Majesty taken possession of several places upon the coast, I now once more hoisted English colours and in the name of His Majesty King George the Third took possession of the whole eastern coast from the above latitude down to this place by the name of New South Wales.' James Cook, *Endeavour Journal* (1770).

affections, enjoining all our subjects to live in amity and kindness with them'.[7] Although arriving in Botany Bay on 18 January 1788, and then Sydney Cove on 26 January, Phillip did not proclaim the Colony of New South Wales until 7 February 1788 in a ceremony performed by Judge-Advocate David Collins at Sydney Cove.[8]

8. That brings me swiftly to the doctrine of *terra nullius*, literally 'nobody's land'. It is apparent from Cook's journal and Phillip's instructions that the literal meaning of *terra nullius* never applied to Australia. Indeed, its literal meaning never really operated as a principle of international law. Rather, throughout the 16th to 18th centuries the term *terra nullius* was little used. To the extent used by historians, philosophers and lawyers it had two distinct meanings. [9]

9. The first meaning referred to land devoid of human possession, morally considered to be 'free for the taking' – strictly referring to the ownership of real estate.[10] This version of *terra nullius* is associated with writers such as Emerich de Vattel and Samuel Purchas, whose vision of the Aboriginal populations was that they *'*ranged', rather than 'inhabited…unmanned wild Countrey*'*.[11] And further, that cultivating land in a manner recognisable by European cultures was a requisite feature of any claim to ownership.[12]

10. The second referred to land without a sovereign, without political organisation, recognisable systems of authority or legal codes.[13] It is this sense which became incorporated into Australian law. In *Cooper v Stuart,*[14] the question was whether the English law of perpetuities was part of the law of New South Wales. That depended on how English law was introduced into New South

[7] Captain Arthur Philip, *Draught Instructions* (1787) composed by Lord Sydney.
[8] Lieutenant Colonel David Collins, 'Chapter 1: The Arrival of the Fleet at Botany Bay' in *An Account of the English Colony in New South Wales: From its first settlement in January 1788 to August 1801* (1802).
[9] Daniel K Richter, 'The strange career of *Terra Nullius*', in Bain Attwood and Tom Griffiths (eds) *Frontier, Race, Nation: Henry Reynolds and Australian History*, 160.
[10] Ibid, 162.
[11] Ibid, 161.
[12] Emerich de Vattel, *The Law of Nations* (1760).
[13] Ibid, 162.
[14] *Cooper v Stuart* (1889) 14 App Cas 286.

Wales, which in turn depended upon whether the colony had been acquired by conquest, cession or settlement.

11. It was the latter that the Privy Council considered was the position with New South Wales, which their Lordships said was:

> '…a tract of territory practically unoccupied, without settled inhabitants or settled law, at the time when it was peacefully annexed to the British dominions.'[15]

12. Thus, English law was introduced into the colony from the outset, as expounded by Blackstone, in accordance with the 'silent operation of constitutional principles' of 'the law of England'. Their Lordships continued:

> 'In so far as it is reasonably applicable to the circumstances of the Colony, the law of England must prevail until it is abrogated or modified, either by ordinance or statute.'[16]

13. A significant feature of acquisition by settlement was that land vested in the Crown from the time of first settlement in 1788, as the Supreme Court of New South Wales held in 1847 in *AG v Brown.*[17] These principles of *The Law of Nations* underlie the development of the common law in Australia.[18] As Brennan J said in *Mabo,* this

> 'enlarged notion of terra nullius was equated with Crown ownership of the lands therein because… there was 'no other proprietor of such lands''.[19]

14. In determining whether native title was part of the common law of Australia, Brennan J considered that there was 'a choice of legal principle to be made', either to apply existing authority, or to overrule it, 'discarding the distinction

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[15] *Cooper v Stuart* (1889) 14 App Cas 286.
[16] *Cooper v Stuart* (1889) 14 App Cas 286 (Lord Watson). In the result, the law of perpetuities was held not to have been incorporated into the law of NSW.
[17] (1847) 1 Legge 312 at 316: As possession of New South Wales had been taken in the name of the Sovereign, 'the waste lands of this Colony are, and ever have been from the time of its first settlement in 1788, in the Crown' .
[18] *Randwick Corporation v Rutledge* (1959) 102 CLR 54 at 71; *Wade v New South Wales Rutile Mining Co Pty Ltd* (1969) 121 CLR 177 at 197; *New South Wales v Commonwealth* ('*The Seas and Submerged Lands Case*') (1975) 135 CLR 337 at 438-439; *Mabo* (1992) 175 CLR 1, 32 (Brennan J). In *Mabo*, Brennan J explained that 'international law recognised conquest, cession, and occupation of territory that was terra nullius as three of the effective ways of acquiring sovereignty. No other way [was] presently relevant.'
[19] *Mabo* (1992) 175 CLR 1, 40 (Brennan J).

between inhabited colonies that were terra nullius and those that were not'. In the result, *Mabo* established that the common law of Australia recognised native title, which, however, did not impinge upon the radical title[20] of the Crown.[21]

I 19TH CENTURY CASES

15. As a 'settled' colony, questions of jurisdiction in respect of the Aboriginal population arose almost immediately.[22] There were language difficulties and few interpreters. Importantly, Aboriginal persons were not permitted to give evidence.[23]

16. In 1799, Thomas Hewitt, charged with the murder of Willie Cuthie, an Aboriginal man, was acquitted by the court on the basis that Cuthie's widow was 'incapacitated from giving such testimony as could be admissible in law to affect that life of the prisoner as he was by the court'.[24] In 1805, Judge

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[20] See, eg, Blackburn J's explanation of Radical Title in *Milirrpum v Nabalco* (1971) FLR 141, 265 , that it is 'a pure legal estate, to which beneficial rights may or may not be attached… qualified by a right of beneficial user which may not assume definite forms analogous to estates'.

[21] Shaunnagh Dorsett argues that *Mabo,* rather than 'weakening the jurisdictional hold of the common law', reinforced it. Dorsett adds, with further reference to *Walker v NSW* (1995) 69 ALJR 111, 'the Court does not open the way for a new relationship with indigenous normative or legal systems. Rather it re-institutionalises the place of the common law as the pre-eminent legal system in Australia and re-declares the right of the common law to determine its own jurisdiction and its relationship with other normative orders or jurisdictions', in 'Since Time Immemorial: A story of common law jurisdiction, native title and the Case of Tanistry' (2002) 26(1) *Melbourne University Law Review* 3.

[22] Lieutenant Colonel David Collins, *Chapter 1: The Arrival of the Fleet at Botany Bay* in 'An Account of the English Colony in New South Wales: From its first settlement in January 1788 to August 1801' (1802).

[23] In 1843, the British Parliament passed the *Colonial Evidence Act 6 & 7* VIC c 22 (IMP) allowing colonies to overturn British law to admit unsworn testimony in proceedings. This was taken up in Western Australia (*Aborigines, Evidence without an Oath* (1841) 4 & 5 Vict. no 22) and South Australia (*Aborigines' Evidence Act* (1844) 7 & 8 Vict. No 8). In New South Wales, Bills for this purpose were drafted as early as 1838, only to be denied by the Colonial Office in 1839. It was not until James Stephen, then Under Secretary in the Colonial Office, drafted a *Colonial Evidence Act* for passage in British Parliament in1843 that the Act was passed. However, it was not until 1876 that the NSW Legislative Council passed an Aboriginal Evidence Act for the then colony, rejecting to pass such an Act in 1844 and 1849. See: Russell Smandych 'Contemplating the Testimony of 'Others': James Stephen, the Colonial Office and The Fate of Aboriginal Evidence Acts Circa 1839-1849' (2004) *Australian Journal of Legal History* 11.

[24] *R v Hewitt* [1799] NSWSupC 2. This problem remained for many years. See, eg, *R v Hatherly and Jackie* [1822] NSWSupC 10. Despite the co-accused giving confessions to their murder of John McDonald, the keeper of the government tobacco store in Newcastle, the Court returned a verdict of not guilty as there was no other proof against the prisoners than their own declaration, which was inadmissible before the Court.

Advocate Richard Atkins refused to permit evidence from an Aboriginal person on the basis that 'evidence of persons not bound by any moral or religious tye can never be considered or construed as legal evidence'.[25]

17. Not even proficiency in English was sufficient for an Aboriginal person to give evidence, as Daniel MowWatty[26] found to his disadvantage. Indeed, he suffered a double whammy. Having lived most of his life amongst the white population, it was held he was amenable to the jurisdiction of the Criminal Court.[27] As recorded in the Sydney Gazette of 28 September 1816, MowWatty was described as a 'morally and culturally liminal man',[28] liminal meaning 'transitional' or 'initial stage of a process' and thus was considered to have 'a clear and conscious discrimination between good and evil'.[29]

18. There was a sad and ironic ending to MowWatty's life. Having been brought up since infancy by Richard Partridge, the then colony's hangman, he was found guilty of rape and was hung on the 1 November 1816, a fate that was duly recorded in Governor Macquarie's diary.

19. The Attorney General was insistent that English law applied to all persons regardless of their language proficiency. However, the early judges took a different view. Dowling J, concerned that English law required that a person brought before the court was entitled to know the law under which they were being tried, attempted to ensure that the 'spirit and the letter of the English law' was not departed from.

20. Aboriginal prisoners often found themselves remanded in custody until an interpreter could be found.[30] This could mean many months in custody as

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[25] Judge-Advocate Atkins 'Opinion on the Treatment of Natives' 20 July 1805, in *Historical Records of Australia. Series 1, Governors' Despatches to and from England,* Volume 5, July 1804-August 1806, 502-504.
[26] *R v MowWatty* [1816] NSWLR 2.
[27] Charged with the rape of a 15 year old girl, he was tried in the Court of Criminal Jurisdiction presided over by Garling AJA with a jury of six.
[28] Lisa Ford and Brent Salter, 'From Pluralism to Territorial Sovereignty: The 1816 Trial of Mow-watty in the Superior Court of New South Wales' *Indigenous Law Journal* 7(1) (2008) 67, 73.
[29] *Sydney Gazette*, 28 September 1816.
[30] See, eg, *R v Jacky* [1843] (Port Phillip Gazette, 18 October 1843), *R v Kirrup* [1845] NSWKR (Port Phillip Patriot 17 January, 17 March 1845; Port Phillip Gazette 21 May, 23 July, 23 August, 19 November 1845); *R v Billy* [1840] NSWSupC 78; *R v Wombarty* [1837] (Sydney Gazette, 1837); *R v*

Devil Devil, charged with aggravated assault of a white man, Jeremiah Buffy, found out in 1825 when he was remanded in custody for 7 months.[31]

21. In the 1835 trial of Mickey and Muscle,[32] Burton J expressed the matter in these terms:

> '… the English culprit stands on very different grounds from the native black. The former knows something of the law under which he is tried – understands every word that is said, objects – cross-examines – calls his exculpatory evidences – and avails himself of manifold circumstances and finesses, of which the latter is utterly ignorant… there stands the savage – the mute – helpless spectator of a scene in which his life is at stake.'[33]

Despite Burton J's doubt, Mickey was convicted by the jury for rape of a female servant and sentenced to death, the second execution of an Indigenous person in New South Wales.

22. In 1829, in *R v Ballard*[34] the Supreme Court ruled it had no jurisdiction where only Aboriginals were involved. Ballard had killed another Aboriginal. The Attorney General twice sought the opinion of the Court on the question of jurisdiction, first of Forbes CJ and then of the Full Court. Forbes CJ sitting alone, in similar terms to what had been said in *MowWatty*,[35] said he could perceive of circumstances where an indigenous person would be amenable to English law, if for example, the person lived with the town and 'by such residence, had placed himself within the protection of the municipal law'.[36] However, if a dispute arose within a tribe and the matter had been decided by the custom of the tribe, namely by battle, as had been the custom in ancient England, then the matter would not be 'cognisable by our law'.

Boatman or Jackass and Bulleye (1832) NSW Sel Cas (Dowling) 6 and *R v* Sandy [1839] NSWSupC 61.

[31] As Chief Justice Stephen is quoted in *R v Devil Devil* [1835] NSWSupC 23, upon ordering the prisoner be remanded, 'the want of an interpreter is much needed, for justice cannot be said to have fair play between the European and the aborigine, til their language is comprehended'.

[32] *R v Mickey and Muscle* [1835] NSWSupC 5.

[33] Burton J continued: 'The laws of England decree that the prisoner shall have the benefit of every doubt; so would the spirit of the same laws degree that the foreign barbarian prisoner should have the benefit of that doubt, even in a double, in a treble degree. In this case there I not only doubt; but I also say, inseparable doubt' in *R v Mickey and Muscle* [1835] NSWSupC 5.

[34] [1829] NSWSupC 26.

[35] [1816] NSWLR 2.

[36] *Sydney Gazette*, 23 April 1929.

23. On the hearing before the Full Court, Forbes CJ reiterated that he knew

> '…of no principle of municipal or national law, which shall subject the inhabitants of a newly found country, to the operation of the laws of the finders, in matters of dispute, injury, or aggression between themselves.'[37]

24. He also doubted that there was any advantage in grafting British institutions upon the 'natural system which savages have adopted for their own government' and to which they adhered rigidly.[38] However, he adhered to the already settled position that this rule did not apply in respect of interactions between the English and Aboriginal populations. Dowling J was also of the view that the indigenous people owed no fealty to the British system of law 'and over whom we have no natural claim of acknowledgement or supremacy'.[39]

25. *Ballard* is to be contrasted with the 1836 decision of *R v Murrell*[40], where the Supreme Court held it had jurisdiction over all people, with no distinction in respect of disputes solely between Aboriginal persons.

26. When the matter came before the Full Court Murrell's barrister, Sydney Stephen (the brother of Chief Justice Alfred Stephen)[41] challenged the accepted basis of English occupation- as being neither by conquest, cession or settlement of a deserted, uncultivated land. Rather, he argued that the Aboriginal population had customs of their own and that [the English] 'had come to reside among them, therefore in point of strictness and analogy to our law, we were bound to obey their laws, not they to obey ours.'[42]

27. Further, relying on the principle that those subject to the law were to be afforded its protection, he argued that the Aboriginal population, 'were not

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[37] Forbes CJ in Dowling, *Proceedings of the Supreme Court*, Vol 22 (13 June 1829) 2/3205.
[38] Forbes CJ in Dowling, *Proceedings of the Supreme Court*, Vol 22 (13 June 1829) 2/3205.
[39] Dowling, *Proceedings of the Supreme Court*, Vol 22, 2/3205, 13 June 1829.
[40] (1836) 1 Legge 72.
[41] On 17 December 1842, Sydney Stephen was struck off the rolls of the Supreme Court of Van Diemen's Land for suing for his fees as a barrister (*Re Stephen; Fisher v Thorne* [1842] Port Philip Gazette, 5 September 1842). Stephen continued to practice as an attorney in Sydney, appealing the Supreme Court's decision successfully to the Privy Council in 1847. The Supreme Court's striking off order was rescinded in *Re Stephen* [1847] JCPC 42 (29th March 1847).
[42] *Sydney Gazette*, 23 February 1836.

bound by laws which did not at the same time afford protection', given that they were 'not admitted witnesses in Courts of Justice, they could not claim any civil rights, they could not obtain recovery of, or compensation for, [their] those lands'.[43]

28. Alternatively, he argued that if amenable to English law, Murrell was still subject to customary law and thus liable to double punishment at the hands of the victim's family.

29. Although Forbes CJ had initially maintained the position he took in *R v Ballard,*[44] all arguments were rejected by the Full Court, on the basis that the Aboriginals were not a sovereign people; that the English had taken possession of the land so that English common and statutory law applied in accordance with Blackstone's principles; and that that the Supreme Court had been invested with jurisdiction by the *Australian Courts Act 1829* [45] over all civil and criminal matters whatsoever.[46]

30. Trials raised the types of question which continue to vex modern criminal trials, including pleas of autrefois acquit, the sufficient particularity of the charge in the indictment, the weight of circumstantial evidence and whether there was a case to go to the jury. All of these issues arose in the 1838 trial of Charles Kilmeister and 6 others[47] for what was recognised in the judgment of Burton J as the massacre of Aboriginal persons at Myall Lakes. Found guilty, the 7 defendants were sentenced to death by hanging.[48]

31. In 1841 sitting in the District of Port Phillip, Willis J did not consider himself bound by *Murrell*. In *Bonjon*,[49] Willis J examined the history of the settlement

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[43] *Sydney Gazette,* 23 February 1836.
[44] Forbes CJ, when sitting alone, had stated that 'acts of violence committed by the natives against each other, even if it amounted to death… were subject to the custom of their own laws' in *R v Murrell and Bummaree* (1836) 1 Legge 72; *Australian,* 9 February 1836 (Forbes CJ).
[45] 9 Geo. 4 c 83.
[46] *R v Murrell and Bummaree* (1836) 1 Legge 72 (Forbes CJ, Dowling and Burton JJ) (11 April 1836).
[47] *R v Kilmeister* (No 2) [1838] NSW SupC 110.
[48] The trial of 4 other defendants did not proceed, it is said due partly to public hostility and partly because of the purported inability to instruct a young Aboriginal man, Davey, who was 'nineteen years of age, can speak English, and… might be sufficiently instructed so as to become a competent witness' (Sydney Herald, 7 December 1838) as to the meaning of giving evidence under oath. See: *R v Kilmeister* (No 2) [1838] NSW SupC 110.
[49] *R v Bonjon* (1841) in *Port Philip Patriot* (18 April 1841).

of New South Wales, reviewed the relevant principles of the law of nations, quoting extensively from de Vattel, and referred to the address of the British Commons to the King, in 1834, in which it was stated that 'it might be presumed the native inhabitants of any land have an incontrovertible right to their own soil and a sacred right which seems not to have been understood'.

32. Willis J also referred to correspondence between John Batman and the Colonial Secretary in London in 1835, which described the Aboriginal population as being 'neither devoid of intelligence nor destitute of capacity' and 'of a superior race to any natives which I have ever seen'. In so doing, Willis J described the Aboriginal population as having 'laws and usages of their own'.

33. Willis J undertook a comparative historical and legal examination of other jurisdictions, including where there had been treaty arrangements, noting that where treaties had been entered into, land had not been taken without compensation but had been subject to negotiation. Examining the statute of 9 Geo IV, Willis J observed that there was nothing in that Act, nor in any other law of which he was aware 'that makes the Aborigines subject to our colonial code'. Noting that s 24 of the statute 9 Geo IV 'declared that the laws of England shall be applied to the administration of justice so far as circumstances will admit', Willis J stated that was 'very different from declaring that the Aborigines shall, as among themselves, be amenable to British law'.

34. Willis J set out lengthy passages from the *1837 Aborigines Report* of the British Select Committee relating to the indigenous peoples of the various British Colonies. This report is steeped in Christian humanitarian ideology, distinguishing savage natives from European civilised society. Nonetheless, it stated that 'the native inhabitants of any land have an incontrovertible right to their own soil, a plain and sacred right… which seems not to have been understood.[50]

[50] The report continued: 'Europeans have entered their borders uninvited, and when there, have not only acted as if they were the undoubted lords of the soil, but have punished the natives as aggressors if they have evinced a disposition to live in their own country' in *The Aborigines Report*

35. Willis J considered that under the statute 9 Geo IV, English law being only necessary 'for the protection and due regulation of intercourse' between the English and Aboriginal populations, he was 'strongly led to infer that the [Aboriginal population] must be considered and dealt with… as distinct, though dependant tribes governed among themselves by their own rude laws and customs.'[51] This, in effect, was a reference to the notion of a 'domestic dependent nation', to which I will refer. The prosecutor subsequently declined to proceed with the case. Willis was sternly rebuked by Chief Justice Dowling, on the basis that *Murrell* had settled the question of jurisdiction, which, he said would have been reinforced had *Bonjon* gone on appeal. This view of the law was subsequently accepted by Governor Gipps and the British Government.[52]

36. The notion of a 'domestic dependent nation' was explained in the United States jurisprudence of the first half of the 19th century relating to Indian claims to sovereignty.[53] In essence that principle recognised that a native people were entitled to possession and use of their land and to exercise de facto rights of sovereignty, subject to the ultimate dominion of the discoverer.

37. Willis J's views were not idiosyncratic. In 1841, James Stephen, who was described in *Mabo* as 'probably the most knowledgeable of all the 19th century permanent heads of the Imperial Colonial Office', noted a communication from the South Australian Colonial Office that '[i]t is an important and unexpected fact that these Tribes had proprietary rights in the Soil – that is, in particular sections of it which were clearly defined or well understood before the occupation of their country'.[54]

38. The issues to which I have referred - language, interpreters, and ability to give evidence - all have their analogues in the 20th century case law. In

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(1837) 'A Case Study in the Slow Change of Colonial Social Relations' Michael D Blackstock *The Canadian Journal of Native Studies XX*, 1 (2000) 67, 79.
[51] *R v Bonjon* (1841) in *Port Philip Patriot* (18 April 1841).
[52] Correspondence in *British Parliamentary Papers* Vol 8, 143-146.
[53] *Cherokee Nation v State of Georgia* (1831) 5 Pet 1**;** *Worcester v Georgia* (1832) 21 US 515; *Johnson & Graham's Lessee v McIntosh* (1823) 21 US 543, upheld in *Williams v Lee* (1959) 358 US 217; see also the Canadian perspective in *R v Sioui* [1990] 1 R.C.S. 1025.
[54] *Mabo* (1992) 175 CLR 1, 53 (Deane and Gaudron JJ).

microcosm, these questions can be found in the decade between 1951 and 1960 in decisions of the Supreme Court of the Northern Territory, in the judgments of Justice Kriewaldt.

39. Justice Kriewaldt was credited by the ALRC with 'introducing a degree of cultural sensitivity into the criminal law by taking account of the local circumstances.'[55] Kriewaldt J's understanding of the language difficulties encountered by Aboriginal Australians in the court system and his approach to sentencing was the basis upon which the Law Reform Commission made its comment.

40. Kriewaldt J's judgments reflected his avowedly assimilationist philosophy.[56] Although he sought to protect Aboriginal Australians from the unjust application of the law, a superior 'Christianised' stance pervaded his judgments, apparent in relation to his approach to evidence, interpreters, penalty, which very much depended on the degree of an Aboriginal defendant's 'civilisation' and Aboriginal identity.

41. Perhaps the most striking was his approach to the quality of Aboriginal evidence.

42. The *Evidence Ordinance (No 2) 1939 (NT)* s 9A[57] provided that non-Christians, including Aboriginals, could give unsworn evidence after being warned to tell the truth, but with the qualification in relation to Aboriginal witnesses that the jury could determine what weight to give to the evidence.[58]

43. In the absence of a 'spiritual sanction' or 'higher tribunal' to act as an encouragement to truth telling, Kriewaldt J's directions to the jury downgraded the credibility of evidence given by Aboriginal witnesses. The jury direction in

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[55] *Recognition of Aboriginal Customary Law* [1986] ALRC 31 at [423].
[56] Uncontentious as that is the stated basis of many of his judgments. See, eg, *Minor* (1992) 105 FLR 180; 59 A Crim R 227; *Munungurr v The Queen* (1994) 4 NTLR 63; *Miyatatawuy* (1996) 6 NTLR 44; *Anderson* (1951–1976) NTJ 240 (1954) at 248–249.Heather Douglas, 'Justice Kriewaldt, Aboriginal Identity and the Criminal Law' (2002) 26 *Criminal Law Journal* 204.
[57] *Evidence Ordinance 1939* (NT) s9A was repealed by the *Oaths Ordinance 1967* (NT).
[58] *Evidence Ordinance 1939* (NT) s 9A(5).

the trial of 3 white defendants charged with assaulting a number of Aboriginal people with stockwhips, makes the point:

> 'Over and above the fact that evidence is given by natives, regard shall be had to the fact that evidence is unsworn …one should think twice before one decides to accept the evidence of natives'.[59]

44. Kriewaldt J considered that 'generally speaking [an Aboriginal's] intellect is of a comparatively low standard'.'[60] He was prepared to accept that Aboriginals had a 'native shrewdness'[61] but expressed difficulty in understanding 'the processes of the native mind'.[62] In one case his Honour attributed the reluctance of a young Aboriginal person to give evidence against her father charged with her sexual assault, to her Aboriginal blood, which he calculated to be five eighths.[63] The young person would not have been the first victim of a sexual assault, especially in the secretive atmosphere of the 1950's, who was reluctant to give evidence against a father or other relative.

II IDENTITY: AM I *ABORIGINAL*?

45. Although the titular theme of this paper is *Aboriginal Australians and the Common Law*, the constitutional[64] and legislative paradigm has significantly controlled the interface of Aboriginal Australians and the law. Until *Mabo* and *Love & Thoms*[65] Aboriginal identity depended significantly upon the large volume of ordinances enacted by the Australian states and territories.

46. In his 1986 paper, McCorquodale[66] reported on his analysis of 700 different legislative instruments, producing 67 different classifications, descriptions or

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[59] Chambers (Unreported, NT Sup Ct, Kriewaldt J, 15 December 1955).
[60] *Wally* (1951- 1976) NTJ 21 (1951), 23.
[61] *Dowling v North Australian Development Co Pty Ltd* (Supreme Court of the Northern Territory, Kriewaldt J, 28 April 1960), 70.
[62] *Jangala* (Supreme Court of the Northern Territory, Kriewaldt J, 1 May 1956).
[63] *Kunoth* (1951-1976) NTJ 420 (1957). The victim, Rosie Kunoth, played the role of Jedda in the Australian film of that name.
[64] *Constitution* s 51 (xxvi) gave the Commonwealth government legislative power other than for the 'aboriginal race in any state'; until its repeal by referendum in 1967, s 127 'aboriginal natives' were not to be counted in reckoning the numbers of the people of Australia.
[65] *Love & Thoms v Commonwealth* [2020] HCA 3; *Love v Commonwealth* (2020) 94 ALJR 198.
[66] John McCorquodale, 'The Legal Classification of Race in Australia' (1986) 10 *Aboriginal History* 1, 9.

definitions of an Aboriginal person between 1788 and 1986, which he grouped under 6 main headings: anthropometric or racial identification; territorial habitation affiliation or attachment; blood or lineal grouping, including descent; subjective identification; exclusionary and other; and Torres Strait Islanders.[67]

47. Stated generally, the ordinances reflected white protectionism and assimilationist policies. Many ordinances described an Aboriginal person in what might be described as 'quantitative notions of Aboriginality', with inclusion or exclusion as an Aboriginal depending upon the subject matter of the ordinance. In other instruments, identity was permitted to be determined by mere observation, including judicial observation or by administrative discretion. The legislative language, especially that of the 19th century could be jarring. For example, the *Masters and Servants Statute 1864* (Vic) did not apply to 'any native or any savage or any uncivilized tribe'.[68]

48. Different states had different bases upon which Aboriginal Australians were recognised as or as not being Aboriginal:[69] in Western Australia 'civilized Aboriginals' were recognised in its population count. In Victoria and Tasmania, 'half castes'[70] were recognised as part of their populations.

49. From 1936[71] to 1960,[72] in Western Australia, a 'Native' was a full blood Aboriginal person or a person who was 'greater than one-fourth of the original full blood'. 'Quadroons'[73] were not subject to the legislation if they were under 21 and did not associate with or 'live substantially after the manner of

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[67] Ibid.
[68] *Masters and Servants Statute 1864* (Vic).
[69] The most common term in Federal legislation was 'aboriginal native of Australia': *Commonwealth Franchise Act 1902*; *Aboriginal Affairs (Arrangements with the States) Act 1973*.
[70] The last 'full-blood' Aboriginal Australians in Tasmania died in 1860 (male) and 1876 (female): John McCorquodale, 'The Legal Classification of Race in Australia' (1986) 10 *Aboriginal History* 1.
[71] *Aborigines Act Amendment Act 1936* (WA).
[72] *Native Welfare Amendment Act 1960* (WA).
[73] Language found in the legal vernacular in various circumstances. See, eg, Alfred Deakin's advice on the *Excise Tariff Act 1902* (Cth), that 'quadroons may reasonably be considered as white labour; persons in whom the blood of a coloured race predominates should not. Half castes are on the border line, but in view of the affirmative and restrictive language of the provision, … half castes should not [be considered as white labour]' (Opinions of the Attorney's General, *Opinion No 57*).

natives'[74] but could be classified as a 'Native' by order of a magistrate, or at their own request.

50. For any person with less than 'quadroon blood', born prior to 31 December 1936, only an express application under the Act, approved by the Minister, enabled a claim to 'Native' status. In the *Native Welfare Act 1963* (WA) the definition of 'native' excluded 'quarter-castes'.[75]

51. In the *Native Administration Act Amendment Act 1954* (WA) a person could be deemed to be no longer a native if he had served as a member of the armed forces outside the Commonwealth or for at least 6 months within Australia and was entitled to an honourable discharge.[76]

52. As McCorquodale points out[77]

> 'within and between States definitions of 'Aborigine' operated differently at different levels of subject matter and advancing either in beneficence or in control'. Thus, 'half castes might be put on the same footing with 'full bloods' for some purposes (testimony and liquor) but not others (reserves, guardianship of children).'[78]

53. McCorquodale found only two cases in 180 years where an Aboriginal person challenged their legal status under the varying legislative provisions[79] relating to Aboriginal identity, although there were a number of challenges by Europeans charged with liquor offences. In *Branch v Sceats*[80] Mr Sceats successfully appealed his conviction for the supply of liquor to Bond, who was the son of a 'full blood' and a half-caste mother. It was held that 'aboriginal natives' under s 48 of the *Liquor Act 1898* only applied to 'full bloods' and that 'any trace of white blood' would invalidate a claim to being Aboriginal.[81] An acquittal followed.

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[74] *Aborigines Act Amendment Act 1936* (WA) ss 2(e)(b)(i)-(iii).
[75] *Native Welfare Act 1963* (WA) s 4(a)-(b).
[76] *Native Administration Act Amendment Act 1954* (WA) s 3(2).
[77] John McCorquodale, 'The Legal Classification of Race in Australia' (1986) 10 *Aboriginal History* 1, 12.
[78] Ibid, 15.
[79] One successfully, the other not, in 1961 and 1962. See *McCorquodale* 'The Legal Classification of Race in Australia' (1986) 10 *Aboriginal History* 1.
[80] *Branch v Sceats* (1903) 20 WN (NSW) 41.
[81] Ibid, 42.

54. Until 1964, it was an offence to supply liquor in the Northern Territory to an Aboriginal person.[82] Up to 1953, albeit that 'half-caste' was a defined term, the *Aboriginals Ordinance* permitted that the Court could decide by personal inspection whether a person was or was not a 'half-caste'.[83] The Chief Protector of Aborigines could also deem a person 'not to be a half caste', and if legally married to a person of substantially European descent, a female half-caste was no longer considered to be 'Aboriginal' under the Ordinance.[84]

55. Under the *Welfare Ordinance 1953* (which commenced in 1957), the legislative language changed from 'half caste' to 'wards'.[85] Despite the apparent neutrality of its language, the ordinance was directed to the Aboriginal population of the Territory.[86] This was borne out when administrative action taken under the Ordinance resulted in a block declaration by the Chief Protector that 15,211 persons, all Aboriginal, were 'wards'.[87] Only a small number of transient aliens and a few others were excepted.[88]

56. Renowned artist Albert Namatjira, in his prosecution for illegally supplying liquor to Henoch Raberaba, a 'ward' under the *Welfare Ordinance (NT)*,[89] unsuccessfully challenged the validity of the *Ordinance* and the declaration, made by the Chief Protector in circumstances where no person subject to the declaration had been given a right to be heard.

57. In refusing special leave to appeal, the High Court stated that the bulk declaration of Aboriginal people as 'wards' under the *Ordinance* was valid, despite no notice being given to the individuals, first, because the status of 'ward' was effectively confined to Aboriginals who were 'persons who might be

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[82] *Aboriginals Ordinance 1918-1953* (NT), *Licensing Ordinance 1939-1960 (NT)* s 141.
[83] *Aboriginals Ordinance 1918-1953* (NT) s 60.
[84] *Aboriginals Ordinance 1918-1953* (NT) s 3.
[85] *Welfare Ordinance 1953 (NT)* s 14 (commenced on 13 May 1957).
[86] *Namatjira v Raabe* (1959) 100 CLR 664, 667.
[87] There was a minor amelioration in the *Welfare Ordinance 1953* (NT) in that children could not be removed from their parents 'without a welfare reason', but it was not until 1964 that Aboriginal children came under the general welfare provisions of the *Social Welfare Ordinance 1964* (NT).
[88] Only 6 people fell outside the Ordinance. See John McCorquodale, 'The Legal Classification of Race in Australia' (1986) 10 *Aboriginal History* 1.
[89] *Welfare Ordinance 1953 (NT)* s 14 (commenced on 13 May 1957); *Licensing Ordinance 1939-1960 (NT)* s 141.

regarded as a class in [need of such special care or assistance as provided for in the ordinance]'[90] and secondly, as such administrative declarations could be appealed at any time, there was no infringement of the right to be heard in respect of the administrative action taken by the Chief Protector.

58. For sharing a bottle of rum with his friend (although there was no evidence that Namatjira had directly passed the bottle to Raberaba) Namatjira was sentenced to 6 months hard labour, reduced to 3 months on appeal.[91]

59. In 1971, Mervyn Eades was convicted for failing to register for National Service under the *National Service Act 1951 (Cth).* 'Aboriginal natives' defined to mean 'full blooded', or 'a half-caste', or a person with an 'admixture of aboriginal blood' who 'lives as an Aboriginal native or amongst Aborigines'[92] were exempted from National Service.

60. Eades, although of Aboriginal descent and classified as an Aboriginal under Western Australian legislation, as 'three-eighths' Aboriginal' - was held not to fall within definition of Aboriginal under Commonwealth Legislation,[93] and therefore was convicted for his failure to register for National Service. The reason? He lived in a house, albeit owned by the Native Welfare Department, in an area occupied by 'white' citizens and was generally in regular employment, dressed well, owned a car and travelled to Perth from Geraldton 3 times a year to visit friends and relatives.[94] In effect, he had successfully assimilated.

61. The exemption clause caused a great deal of confusion. There were many examples where young Aboriginal men were variously told to register or not register for National Service. The surrounding confusion was summed up by Vietnam Veteran Glen James, who recalled:

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[90] Ibid, 669-670.
[91] *Albert Namatjira v Gordon Edgar Raabe* (1958) NTJ 608, 618.
[92] Ibid rr 18(a)-(c).
[93] *National Service Act 1951* (Cth) s 18(e); *National Service Regulations 1951* (Cth) r 18.
[94] Ibid, in McCorquodale, 'The Legal Classification of Race in Australia' (1986) 10 *Aboriginal History* 1, 17. See, 'Is Mervyn Eades Black or White' *Australian* (15 December 1971), in NAA, series A2354, item 1968/1, Canberra; NLA, item 1862902, Canberra; NAA, series A1734, item NT1972/23, Canberra.

> 'I was twenty when I got a notice to say I was called up for National Service. Then I got a notice to say I didn't need to go because I was Aboriginal. Then I got a third notice to say I had to go after all. I tell you, that put a damp outlook on the whole thing right from the start. I was going, then I wasn't going and they'd raised this question of Aboriginality right at the start.'[95]

62. At common law, and here I quote Brennan J in *Mabo*, an Aboriginal person, is a person 'of Aboriginal descent, albeit mixed, who identifies as such and who is recognised by the Aboriginal community as Aboriginal.'[96] But that is not the last word. Aboriginal identity remains relevant in a number of statutory contexts, including, eligibility for membership of and election to various councils and previously to the Aboriginal and Torres Strait Islander Commission,[97] and in respect of legislative instruments, including discrimination legislation.

63. In the *Aboriginal and Torres Strait Islander Commission Act 1989,* 'Aboriginal person' was defined as 'a person of the Aboriginal race of Australia'. In *Gibbs v Capewell*[98] Drummond J required, in addition to Aboriginal descent, identification or communal recognition. In *Shaw v Wolf*[99] Merkel J held all three components of 'aboriginality' were necessary to be an Aboriginal person within the definition.

64. On 16 October 1987, Letters Patent were issued establishing the *Royal Commission into Aboriginal Deaths in Custody*. In *AG v Qld*[100] the question arose as to the Commissioner's authority to inquire into the death of a person of partial Aboriginal descent. Three different views were given as to who fell within the terms of reference. Spender J was of the view that 'non-trivial

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[95] Glen James, in Alick Jackomos and Derek Fowell (eds) *Forgotten Heroes: Aborigines at War from the Somme to Vietnam* (Victoria, 1993), 67 in Noah Riseman, 'The Curious Case of Mervyn Eades: National Service, Discrimination and Aboriginal People', *Australian Journal of Politics and History* (2013) 63, 72.
[96] *Mabo* (1992) 175 CLR 1, 70 (Brennan J); See also, *Tasmanian Dams* at 274 (Deane J); *Love & Thoms v Cth* [2020] HCA 3, [23] (Kiefel CJ), [75] (Bell J), [41] (Gageler J); [189] (Keane J); [271] (Nettle J); [366] (Gordon J); [458] (Edelman J).
[97] Dr John Gardiner-Garden, 'Defining Aboriginality in Australia' *Current Issues Brief no 10 2002-03,* Commonwealth Social Policy Group, <https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/Publications_Archive/CIB/cib0203/03Cib10>.
[98] *Gibbs v Capewell* (1995) 54 FCR 503.
[99] *Shaw v Wolf* (1998) 83 FCR 113.
[100] *Attorney-General (Cth) v Queensland* (1990) 25 FCR 125.

descent' was sufficient, but that self-recognition or community acceptance might be of evidentiary value in contested questions. For Jenkinson J 'descent was necessary but not sufficient' and for French J, 'descent' of itself was sufficient, having regard to the context in which the question was being determined.[101]

65. In *Eatock v Bolt*[102] the complainant, a '*fair skinned'* Aboriginal, successfully claimed there had been contravention of the racial vilification provisions of the *Racial Discrimination Act 1975 (Cth)* in newspaper articles that contended that she and people like her were not genuinely Aboriginal and only claimed Aboriginality to obtain benefits solely available to Aboriginal people.

66. After referring to the various tests of Aboriginality in the case law, the court held that genuine self-identification by a person with limited Aboriginal descent could, as a matter of ordinary understanding be regarded as Aboriginal, even without communal acceptance. Given the history of separation of Aboriginal children from their parents, this could occur where a person only latterly discovered their Aboriginality and wished to acknowledge that heritage but had not had the time, the opportunity or the connections to obtain communal acceptance.[103]

A Customary Law

67. The Australian Law Reform Commission's 1986 report on the *Recognition of Aboriginal Customary Law*[104] made recommendations supporting the

[101] *Attorney-General (Cth) v Queensland* (1990) 25 FCR 125.
[102] (2011) 197 FCR 261.
[103] Difficulty arises when the word *Aboriginal* is used in a legal context but without further specification or without an underlying legislative meaning. For example, a testamentary legacy 'for the benefit of Aboriginal women in Victoria' (*Re Bryning* [1976] VR 100), was held not to be confined to full blood Aboriginal women. And having regard to *Mabo* and *Love* one might expect that it would not be so confined today.
[104] ALRC (1986) 31.

recognition of Aboriginal customary laws by existing judicial and administrative authorities, in areas of both procedural and substantive law.[105]

68. The Commission found customary law had only been accepted in a few exceptional and irregular circumstances, on topics relating to land rights[106] customary marriages[107] and child custody. In *R v Neddy Monkey* (1861)[108] Neddy Monkey's wife was deemed to be compellable to give evidence against her husband during his trial for murder, on the basis that the Court could not 'take judicial notice of the religious ceremonies and rites of these people, and cannot, without evidence of their marriage ceremonies, assume the fact of marriage'. 60 years later in *R v Tuckiar* (1934)[109] Tuckiar's wife, Djaparri, was not compelled to give evidence against her husband during his trial for the murder of Police Constable Albert Stewart McColl, in recognition of their marriage according to Aboriginal custom.[110]

69. The *Criminal Law Amendment Ordinance 1939* (NT) distinguished between white persons and Aboriginal persons living in the Northern Territory during the 1950s, creating an environment where customary law was relevant to sentencing in murder cases. For white people found guilty of murder, their ultimate sentence was the death penalty – unless the Monarch exercised the Royal Prerogative of Mercy.[111] For an Aboriginal person, the judge was required to 'receive and consider any evidence which may be tendered as to

[105] Their recommendations addressed aspects of criminal law, for example in creating a partial defence to murder and manslaughter charges where the accused acted in the well-founded belief that their customary law required them to act in a particular manner, as well as in the giving of evidence, distribution of property, child custody, fostering and adoption, traditional hunting and fishing, and sentencing matters. It also recommended a statement of principles to be adopted by the Commonwealth, State and Territory governments, recognising customary law as a dynamic and changing system applying to different Indigenous Australian people.
[106] *Milirrpum v Nabalco* (1971) 17 FLR 141.
[107] *R v Neddy Monkey* (1861) 1 Wyatt & Webb (Vict) 40.
[108] Ibid.
[109] *R v Tuckiar* (Supreme Court of the Northern Territory, Wells J, 3 August 1934,). Tuckiar's conviction for the murder of McColl and death sentence was successfully appealed in *Tuckiar v The King* (1934) 52 CLR 335 on the basis of a misdirection by Wells J.
[110] See Kriewaldt, 'The Application of the Criminal Law to the Aborigines of the Northern Territory of Australia', *Fifteenth Annual Conference of the Australian Universities Law Schools Association*, (August 1960), 20.
[111] *Criminal Law Amendment Ordinance 1939* (NT) s 10.

any relevant native law or custom and its application to the facts of the case'.[112]

70. Justice Kriewaldt in *Jangala,* when sentencing an Aboriginal man convicted of manslaughter for killing his victim by hitting him with a stick, explained his 'duty to impose a more severe sentence than I normally impose for death resulting from fights between natives', on the grounds that 'the accused has by now sufficient knowledge of white law to know that he was acting illegally'.[113]

71. The Royal Commission's recommendations were only partially implemented, with provisions introduced into the *Crimes Act 1914 (Cth)* relating to criminal investigations involving Aboriginal or Torres Strait Islanders[114] and fishing, hunting and gathering rights under the *Native Title Act 1993 (Cth)*.[115] However, the last 34 years has seen judicial acceptance of customary law in circumstances different from *Mabo,*[116] notably in *Wik Peoples v Queensland*[117] relating to pastoral leases and *Yanner v Eaton (No 2)*[118] relating to hunting, where it was held that native title was not extinguished by the *Fauna Conservation Act 1974 (Qld)*.[119]

72. In *Pascoe/Jamilmira*, Ricky Pascoe, a 49 year old Aboriginal man, was convicted of the rape of a 15 year old Aboriginal girl. Pascoe claimed '[s]he is my promised wife. I rights to touch her body' and whilst he knew it was an offence 'called carnal knowledge' he stated 'it's Aboriginal custom, my culture, she is my promised wife'.

73. In the Magistrates Court, Pascoe was sentenced to 13 months imprisonment, which was reduced to 24 hours on appeal, on the basis that the defendant had been acting in accordance with his custom. The Northern Territory Court

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[112] *Criminal Law Amendment Ordinance 1939* (NT) s 8.
[113] *Jangala* (Supreme Court of the Northern Territory, Kriewaldt J, 1 May 1956).
[114] *Crimes Act 1914* (Cth) s 23H.
[115] *Native Title Act 1993* (Cth) s 211.
[116] (1992) 175 CLR 1.
[117] (1996) 187 CLR 1.
[118] (1999) 201 CLR 351.
[119] *Fauna Conservation Act 1974 (Qld)* s 54(1)(a) was held to not extinguish the native title rights or interests relied upon by the man, and therefore does not prohibit or restrict the man, as a native title holder: (1999) 201 CLR 351 (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ).

of Criminal Appeal found this reduction in sentence to be manifestly inadequate. Chief Justice Martin stated

> 'notwithstanding the cultural circumstances surrounding this particular event, the protection given by the law to girls under the age of 16 from sexual intercourse is a value of the wider community which prevails over this section of the Aboriginal community. To hold otherwise would trivialise the law.'[120]

A sentence of 12 months imprisonment, suspended after one month, was imposed. The High Court refused special leave to appeal.[121]

74. In *Bugmy*[122] the High Court approved the dicta of Brennan J in *Neal*[123] which had been expanded upon in *Fernando*[124] that sentencing decisions should recognise that 'social disadvantage… frequently (no matter what the ethnicity of the offender) precedes the crime'. However, in dismissing the appeal of *Munda v WA,* the High Court stated that while it is relevant to consider an offender's circumstances, the same sentencing principles must be applied in every case, irrespective of an offender's identity.

III SOVEREIGNTY

75. I have spent some little time reviewing Aboriginal identity and recognition of customary law, but there are indications that for Aboriginal Australians, sovereignty remains an unresolved issue, as is apparent from the claims of Aboriginal sovereignty made in the second half of the 20th century, both before and after *Mabo*. All claims have failed.

76. In August 1963, the traditional owners of Arnhem land, the Yolngu people, presented to the Federal Parliament the Yirrkala Bark Petitions, in response to the government's sale of 300 square kilometres of land from their reserve on

[120] *Hales v Jamailmira* (2003) 13 NTLR 14 at [26] (Martin CJ).
[121] *Jamilmira v Hales* [2004] HCATrans 18 (13 February 2004).
[122] *Bugmy v R* [2013] HCA 37.
[123] *Neal* (1982) 149 CLR 305, 32 (Brennan J).
[124] *Fernando* (1992) 76 A Crim R 58, [62] (Wood J).

the Gove Peninsula to enable its bauxite deposits to be mined by Nabalco, without any consultation with the Aboriginal community.

77. With their petition to Parliament failing to achieve any recognition of rights to their traditional lands, the Yolngu leaders turned to the Courts, in the case of *Milirrpum v Nabalco Pty Ltd.*[125] Whilst Blackburn J referred to the 'subtle and elaborate system' which evidenced a system of 'government of laws and not of men', his Honour felt compelled by *Cooper v Stuart* to dismiss the claim.[126] Although the claim failed, this case, perhaps more than others, brought attention to traditional connections to the land which ultimately received recognition in *Mabo.*

78. In *Coe*[127] the plaintiff brought his claim 'on behalf of the Aboriginal community and nation of Australia', challenging the 1847 decision of *Brown*[128] to which I have referred and *Cooper v Stuart*[129], pleading that British sovereignty was 'contrary to the existing rights, privileges, interests claims and entitlements of the Aboriginal people'[130]

79. Gibbs CJ (Aickin J agreeing) acknowledged that a challenge to *Milirrpum v Nabalco Pty Ltd* was arguable. Jacobs and Murphy JJ accepted that *Cooper v Stuart* was open to challenge but went further and observed that neither the High Court nor the Privy Council had ever finally determined whether sovereignty had been acquired by settlement or conquest and that the question was justiciable as it might affect Aboriginal rights.[131]

80. However, on one point the four justices were unanimous. Questions of sovereignty

> 'are not matters of municipal law but of the law of nations and are not cognisable in a court exercising jurisdiction under that sovereignty which is sought to be challenged'.

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[125] *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141.
[126] Following the failure of the claim in *Milirrpum,* the Federal Government established a Commission of Inquiry (The Woodward Royal Commission) to inquire into appropriate ways to recognise Aboriginal land rights in the Northern Territory.
[127] *Coe v Commonwealth (No1)* (1979) 24 ALR 118.
[128] [1847] 1 Legge 312.
[129] (1889) 14 App Cas 288.
[130] *Coe v Commonwealth (No1)* (1979) 24 ALR 118*,* Section 3B of Amended Statement of Claim.
[131] Ibid, 136.

81. This point has remained firm in High Court jurisprudence,[132] including in *Coe (No 2)* and *Mabo*.

82. In *Coe v The Commonwealth (No2)*[133] Mr Coe again sought to agitate the question of Aboriginal sovereignty, a claim which was met with almost peremptory rejection. Mason CJ said that the first C*oe* decision lent 'no support whatsoever to a subsisting Aboriginal claim to sovereignty'.[134] and was likewise emphatic that *Mabo* was 'entirely at odds with the notion that sovereignty adverse to the Crown resides in the Aboriginal people.' [135] Nor did *Mabo* recognise a limited Aboriginal sovereignty in the sense of being a 'domestic dependent nation' entitled to self-government and full rights', which Mason CJ described as another way of putting the sovereignty claim.

83. A different tack was taken in *Walker v State of NSW,*[136] which followed closely after *Mabo.*[137] Walker was charged with a number of crimes, including assault with an intent to commit a felony. As pleaded, the claim was that the States and Commonwealth had no legislative competence in respect of Aboriginal people except at their request and with their consent. In oral argument the point was refined and made case specific, namely, whether customary Aboriginal criminal law had been recognised by the common law in the same way that *Mabo* had recognised customary land tenure.

84. In rejecting the argument, Mason CJ relied on three principles:

    a. the principle of equality before the law.

    b. the principle of statutory interpretation that an enactment applies to all within the territorial reach of the statute. In this regard his

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[132] *New South Wales v The Commonwealth* (1975) 135 CLR 337, 388 (Gibbs J); *Mabo* (1992) 175 CLR 1, 31 (Brennan J); *Coe v The Commonwealth* (1993) 68 ALJR 110**;** *Love & Thoms v Cth* [2020] HCA 3, [266] (Nettle J).
[133] *Coe v The Commonwealth* (1993) 68 ALJR 110.
[134] Ibid, 114.
[135] Ibid, 115.
[136] *Walker v The State of New South Wales* (1994) 182 CLR 45.
[137] (1994) 182 CLR 45.

Honour emphasised that the 'criminal law is universal in its operation'.

c. Noting the early Federation authority *Quan Yick v Hinds*[138] affirming that the general provisions of the criminal law were introduced by the Australian Courts Act 1828[139], Australian criminal law did not accommodate a parallel or alternate system of law operating alongside it.[140]

85. In *Love & Thoms*[141] the appellants' argument, as summarised by Kiefel CJ was that the connection of Aboriginal Australians to the lands and waters of this country was so strong that the 'common law must be taken to have recognised that Aboriginal persons 'belong' to the land'.[142] The appellants propounded a test of Aboriginality analogous to that in *Mabo*. The flaw in the argument, for Kiefel CJ was that this would leave to the elders the determination as to who was a member of the group. Her Honour stated:

> 'To accept this effect would be to attribute to the group the kind of sovereignty that was implicitly rejected by Mabo (No2)… and expressly rejected in subsequent cases'[143]

86. Critically, for her Honour and the other members of the minority, *Mabo* decided that the common law of Australia recognised native title, not Aboriginal sovereignty.

87. In the majority, Nettle J noted that 'Aboriginal persons remain subject to and protected by the system of law in Australia'.[144] Referring to *Yorta Yorta*[145] his Honour considered that 'under the common law of Australia an Aboriginal

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[138] (1905) 2 CLR 345 at 359 ('*Chinese Lottery case*').
[139] 9 Geo IV c 83.
[140] In determining that Australian common law recognised native title, *Mabo* did so on the basis that there was no inconsistency in native title and the underlying radical title vested in the Crown: (1992) 175 CLR 1.
[141] *Love & Thoms v Commonwealth* [2020] HCA 3; *Love v Commonwealth* (2020) 94 ALJR 198.
[142] *Love & Thoms v Commonwealth* [2020] HCA 3, [22] (Kiefel CJ); *Love v Commonwealth* (2020) 94 ALJR 198, [21] (Kiefel CJ).
[143] *Love & Thoms v Commonwealth* [2020] HCA 3, [25] (Kiefel CJ); (2020) 94 ALJR 198, [25] (Kiefel CJ).
[144] *Love & Thoms v Commonwealth* [2020] HCA 3, [267] (Nettle J); (2020) 94 ALJR 198, [267] (Nettle J).
[145] *Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, 455.

society retains an identifiable existence so long as its members are 'continuously united in their acknowledgement and observance of a body of law and customs'.[146] As it was the authority of the elders to determine membership of the group, 'a status recognised at the 'intersection of traditional laws and customs with the common law',[147] (observations made in Fejo and in Yorta Yorta in the context of native title) 'that status [was] necessarily inconsistent with alienage'.[148]

88. As can be seen from the approaches of Kiefel CJ and Nettle J, the compass pointed in opposite directions from the identical starting point: non-recognition of Aboriginal sovereignty on the one hand, the protection afforded by the common law, on the other.

A Stolen generation cases

92. Civil claims by the Stolen Generation and those displaced from family gave rise to another line of cases. Most have foundered. Legal impediments, including identifying the correct defendant, one of the matters on which *Cubillo* failed,[149] evidentiary impediments, expiry of limitation periods, causation, psychological and cultural impediments have been significant. The impact of these impediments was measured in the Commonwealth Attorney-General's 2009 Report *A Strategic Framework for Access to Justice in the Federal Civil Justice System* which found 'Indigenous Australians were the group most likely to take no action in response to legal events, 50.9 percent compared with 32 percent for non-indigenous people.'[150]

93. *State of South Australia v Lampard-Trevorrow*[151] is an exception. The case arose out of arrangements made by the Aboriginal parents of their 13 month old baby to be taken to hospital by a relative, only for the baby to be fostered

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[146] *Love & Thoms v Commonwealth* [2020] HCA 3, [270] (Nettle J); (2020) 94 ALJR 198, [270] (Nettle J).
[147] *Fejo v Northern Territory* 195 CLR 96 at 128 [46]; [1998] CLR 58; *Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, 455.
[148] *Love & Thoms v Commonwealth* [2020] HCA 3, [271]-[272] (Nettle J); (2020) 94 ALJR 198, [271]-[272] (Nettle J).
[149] *Cubillo v Commonwealth* (2000) 103 FCR 1.
[150] Randall Kune, 'The Stolen Generations in Court: Explaining the Lack of Widespread Successful Litigation by Members of the Stolen Generation' [2011] *Tasmania Law Review* 2.
[151] [2010] SASC 56.

to a white family without the parent's knowledge and consent and notwithstanding that parental care was satisfactory. Contrary to the legislative provisions relating to Aboriginal children, all being wards of the state in South Australia,[152] the legislation did not give the Aboriginal Protection Board power to remove children from their parents without consent. [153] The Secretary had had legal advice to that effect but nonetheless, the administrative policy was for the removal of children regardless of the quality of family care.[154]

94. In extending the limitation period, the Full Court held that there was a public interest in having such claims decided by a court so as to expose them to public scrutiny. [155] The public interest, it was said, was an interest of justice.[156]

95. Mr Trevorrow's claims for damages for misfeasance in public office and for negligence were upheld. Damages of nearly half a million dollars, plus interest of a quarter million dollars, were awarded.[157] However, his claims for breach of fiduciary duty and false imprisonment failed. As the duties of a fiduciary are proscriptive, the Full Court rejected that an aspect of the Board's fiduciary duty was an obligation to give Mr Trevorrow information about his removal

[152] Despite the legislative change in 1962, removing the status of ward and placing Aboriginal children, including Mr Trevorrow under the same legal regime as all other residents of South Australia, with the result being that where the 1934 Act had deprived Thora Karpany of legal guardianship of Mr Trevorrow, the 1962 Act reverted that guardianship to her. There was no evidence that the family were informed of this change: [2010] SASC 56, [54]-[57].
[153] [2010] SASC 56, [214].
[154] There was evidence before the trial judge, referred to on the appeal at [200] that South Australian government pursued a policy of assimilation, a policy in fact adopted by the Commonwealth and the other states at the 1961 Native Welfare Conference, a policy affirmed again in 1963.
[155] It has given rise to a number of enquiries and reports, and in particular the report: 'Bringing Them Home: Report of the National Inquiry into the separation of Aboriginal and Torres Strait Islander Children From Their Families' (1997) chaired by Sir Ronald Wilson. We consider that we can take judicial notice of this. In his reasons at [423] the Judge referred to the publication by the Executive Government of South Australia entitled 'A Brief History of the Laws, Policies and Practices in South Australia which led to the Removal of Many Aboriginal children'. This was published in 1997. Until there was a change of policy in this respect, the prospect of an Aboriginal child challenging his or her treatment by the APB or the AAB seems remote indeed. There is an element of injustice in the Court concluding that, nevertheless, the action should not proceed. [2010] SASC 56 at [460]-[461].
[156] [2010] SASC 56 at [102]. The Court also recognised the inability of the plaintiff to protect himself.
[157] [2010] SASC 56.

and to ensure that he received independent legal advice, as had been found by the trial judge.[158]

96. The failure of the fiduciary claim was not unexpected given the decision in *Cubillo v The Commonwealth*[159]. In *Cubillo* the fiduciary claim failed on two bases. First, on the principle that a fiduciary claim cannot modify the operation of a statute. In this regard, the plaintiffs had not established that their removals were unauthorised.[160] Secondly, the fiduciary obligation had been 'sought to' be superimposed on tortious duties or contractual obligations, which is impermissible if intended simply to improve the nature and extent of the remedies available to Mr Cubillo's claim.[161]

B Genocide

97. Claims based on Genocide have also been unsuccessful, notwithstanding that in its 1997 *Bringing Them Home* report, the Human Rights and Equal Opportunities Commission concluded that the assimilationist policy at the heart of the forcible removal of some 40,000 Aboriginal and Torres Strait Islander children was genocidal, within the terms of the *Genocide Convention Act 1949* (Cth).[162] This has never been accepted politically, nor is it supported by case law.

98. In *Kruger and Bray v Commonwealth*[163] the allegation that the *Aboriginal Ordinance 1918* (NT) authorised genocide and was thus unconstitutional, failed,[164] both because the *Ordinance* predated the incorporation of the

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[158] The articulation of the duty in those terms seemed to have been based on the Hight Court's approach in *Bennett v Minister of Community Welfare* (1992) 176 CLR 408, 411-412 (Mason CJ, Deane and Toohey JJ) and 427 (McHugh J). However, that case had been decided on the basis of a common law duty of care, not on a breach of fiduciary duty.
[159] *Cubillo v The Commonwealth* [2001] FCA 1213. A fiduciary claim was also made in *Coe (No 2)* but was struck out on the pleadings: *Coe v The Commonwealth* (1993) 68 ALJR 110 at 116.
[160] *Tito v Waddell (No2)* [1975] Ch 106.
[161] *Paramasivam v Flynn* (1998) 90 FCR 489; [1998] FCA 1711; It might be noted that a fiduciary claim was also made in *Coe (No2)* but did not survive an application to strike out the pleadings, as uncertain and inadequate. See *Coe v Commonwealth* (No 2) (1993) 68 ALJR 110, 118 (Mason CJ).
[162] *Convention on the Prevention and Punishment of the Crime of Genocide*, opened for signature 1949, entered into force 12 January 1951. Adopted under the *Genocide Convention Act 1949* (Cth).
[163] *Kruger and Bray v Commonwealth* (1997) 146 ALR 126.
[164] All claims in *Kruger and Bray v Commonwealth* (1997) 190 CLR 1 were dismissed (at 128-129, Gaudron J in dissent found the *Ordinance* to be invalid. Gaudron J held that the purpose of the Ordinance was to restrict the freedom of movement and association, and thus that it would only be

Genocide Convention into Australia's domestic law, and because the *Ordinance* did not evidence an 'intention to commit genocide' as is necessary to establish a breach of the *Convention*. Rather, as expressed by Gummow J, the Ordinance evinced an intention 'to assist survival rather than destruction'.[165]

99. One significant point of difference emerged between the judgments of Dawson J and Gaudron J which is worth noting. Dawson J was of the view that s 122 of the Constitution did not constrain the Parliament from enacting laws authorising genocide. He said:

> 'the legislative power of the parliament to make laws for the government of territories is sovereign and, subject to the possibility of any specific limitation to be found elsewhere in the Constitution, there is nothing which places rights of any description beyond its reach'.[166]

100. Gaudron J however, considered that s 122 did '**not** confer power to pass laws authorising acts of genocide as defined in Part II of the Genocide Convention. The acts encompassed in that definition are so fundamentally abhorrent to the principles of the common law that… it is impossible to construe the general words of s 122 as extending to laws of that kind.'[167]

101. Commentators have pointed out that under customary international law,[168] Genocide is prohibited which, it has been argued, would have overcome the majority's response that the Ordinance predated the introduction of the Convention into domestic law, and it has been pointed out,

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valid if it was necessary for the attainment of an overriding public purpose or for the satisfaction of a pressing social need. Noting the specific provisions relating to custody (s6), confinement in reserves and institutions (s 16) and schooling (s 67(1)(c)), Gaudron J held that the Ordinance in its entirety was not necessary for the preservation or protection of Aboriginal people and was thus ultra vires).

[165] *Kruger and Bray v Commonwealth* (1997) 146 ALR 126, 230-231 (Gummow J).

[166] *Kruger and Bray v Commonwealth* (1997) 146 ALR 126, 163.

[167] *Kruger and Bray v Commonwealth* (1997) 146 ALR 126, 190.

[168] Customary international law is established by objective evidence of adherence to custom, being 'a constant and uniform usage practised by the States in question' and evidence of a subjective belief that 'a given behaviour is required by law, that it is legal obliged, a duty (as opposed to behaviours that are motivated by other concerns, or simply random or habitual behaviour)': *Columbia v Peru* (ICJ, 1950) ('*Asylum Case'*); *France v Turkey* (PCICJ, 1927) ('*S.S. Lotus Case'); North Sea Continental Shelf Case* [1969] ICJ 1.

that question was not addressed by the majority. Subsequent claims based on genocide have failed.[169]

IV CONCLUSION

102. Sovereignty remains an unresolved issue for many Aboriginal Australians. An important attribute of sovereignty is the right to enter into treaties with other sovereign nations or entities. Paul Finn, Megan Davis and others have noted that the dominant difference between Australia's Aboriginal peoples and those of New Zealand and Canada,[170] is the absence of treaty or substantial constitutional recognition. Such recognition in those countries altered the conception of sovereignty vis à vis the indigenous populations and provided a basis for establishing a fiduciary relationship with the Crown.[171]

103. By contrast, it has been argued that the absence of treaty or other recognition of Australian Aboriginal sovereignty has had negative implications for Aboriginal peoples' interaction with the common law,[172] particularly in relation to whether they are owed fiduciary obligations by State and Commonwealth governments.

104. Given that successive attempts to claim Aboriginal sovereignty have failed, other notions have been advanced, including recognition of Indigenous governance in law and policy.[173] It has been argued that whilst *Mabo* recognised the land rights of Aboriginal Australians, it didn't recognise the

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[169] *Nulyarimma v Thompson; Buzzacott v Hill* [1999] FCA 1192; *Thorpe v Kennett* [1999] VSC 442.
[170] *Guerin et al v The Queen* (1984) 2 S.C.R. 338.
[171] Paul Finn, 'The Forgotten 'Trust": The People and the State", Malcolm Cope (ed) *Equity: Issues and Trends* (Federation Press, 1995).
[172] Megan Davis, 'Sovereignty and the First Australians' in Martin Hinton and John M Williams (eds) *The Crown: Essays on its manifestation, power and accountability* (2018, Adelaide) 19; Referendum Council, *The Uluru Statement from the Heart* (2017).
[173] Alexander Reilly, 'A Constitutional Framework for Indigenous Governance' (2006) 28(3) *Sydney Law Review* 403.

system of Indigenous governance that underpins those rights.[174] That, it is said, is still to be determined.[175]

[174] Ibid, 421.

[175] Reliance was placed on the principle in Blackstone's *Commentaries* relating to the introduction of English law into a country previously outside the King's domain, being the principle which underpinned the decision in *Cooper v Stuart* (1889) 14 App Cas 286, namely that: 'such colonialists carry with them only so much of the English law, as is applicable to their own situation and the condition of the infant colony'.