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DENIAL BY DEFLECTION: THE IMPLEMENTATION OF ILLUSORY RIGHTS IN THE DENIAL OF FIRST NATION SOVEREIGNTIES

SUSAN GRIFFITHS*

The First Nations Peoples of Australia marked two significant anniversaries in 2012 — 40 years since the establishment of the Aboriginal Tent Embassy in Canberra and 20 years since Mabo declared terra nullius a fiction, removing any legitimate basis for Crown sovereignty. Despite these events, and the passage of time, recognition of First Nation sovereignties by the Australian government remains unrealised. This article examines the apparent success that has come with formal rights won for First Nations Peoples. It suggests that such rights have proven, at best, mixed, at worst, illusory. These formal rights have allowed governments to avoid recognition of First Nations' sovereignties and rights to self-determination. This article posits that an absence of First Nations Peoples sovereignties will continue to disadvantage and rob Aboriginal and Torres Strait Islander people of the capacity to negotiate a just future. Policy has failed and cannot work unless First Nations Peoples have the sovereign rights necessary for self-government, to effect change, and to access resources that are rightfully theirs.

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I INTRODUCTION

The year 2012 witnessed two significant anniversaries in relation to First Nations Peoples of Australia. It marked 40 years since the establishment of the Aboriginal Tent Embassy in Canberra, a key objective of which was to campaign for self-determination and the recognition of First Nations sovereignties. It also marked twenty years since *Mabo v Queensland* ('*Mabo*') declared terra nullius a fiction.¹ This removed any legitimate basis for Crown sovereignty. Despite these momentous historical events and the passage of time, recognition of First Nation sovereignties by the Australian government remains unrealised. Despite First Nations Peoples consistently maintaining that their sovereignties have never been ceded, and some direct writing on the topic, there seems to be an overwhelming silence on the part of those who do not identify as First Nations Peoples.² This article attempts to fill that silence.

This article commences with a brief summary of Australian colonial history based on the

¹ *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 39–43 (Brennan J) ('*Mabo*').

² See, eg, Aileen Moreton-Robinson (ed), *Sovereign Subjects: Indigenous Sovereignty Matters* (Allen & Unwin, 2007); Michael Mansell, *Back to Basics: Aboriginal Sovereignty* (September 1998) The Koori History Website <<http://www.kooriweb.org/gst/sovereignty/back-to-basics.html>>.

presumption of Crown sovereignty. This history was one of extermination, protection, and assimilation policies, before First Nations Peoples won the struggle for basic rights. Despite apparent success with formal rights, the results for First Nations Peoples have proven mixed at best and illusory at worst. Formal rights have allowed governments to avoid recognition of First Australian sovereignties and self-determination.³ It is posited that an absence of First Nations sovereignties will continue to disadvantage and rob Aboriginal and Torres Strait Islander people of the capacity to negotiate a just future. In short, policy has failed and cannot work unless First Nations Peoples have the sovereign rights necessary for self-government, to effect change, and to access resources, such as land and minerals, that are rightfully theirs.

Before this argument is made out, it is necessary for me to declare, in accordance with appropriate Aboriginal and Torres Strait Islander research protocol, who I am, who I claim to speak for, and why I am writing on this topic.⁴ As a middle-class Australian of European descent I do not, and cannot, purport to speak for First Nations Peoples on this, or any other issue.⁵ Instead, my intention in writing this article is to connect sovereignty with policy. This is a reasonable connection to make for several reasons. Firstly, policy has been based on a denial of the legitimacy of First Nations sovereignties and therefore denies Aboriginal and Torres Strait Islander peoples their right to self-govern. Secondly, *Mabo* removed the basis for Crown sovereignty — the doctrine of terra nullius. Thirdly, First Nations Peoples have struggled for their sovereignties to be respected since 1788 and, with rare exception, this struggle has not been given the recognition it deserves by other Australians.

Aboriginal and Torres Strait Islander sovereignties is not a topic that 'looms large' in the minds of most people in mainstream Australia.⁶ If sovereignty is thought of, it is with

³ References in this article to First Australian *sovereignties* as opposed to *sovereignty* is done consciously to highlight diversity among the First Peoples of Australia and to reject treating them as homogenous people. To do otherwise is to repeat historical colonial errors as Watson points out in Irene Watson, 'Settled and Unsettled Spaces: Are we free to roam?' in Aileen Moreton-Robinson (ed), *Sovereign Subjects: Indigenous Sovereignty Matters* (Allen & Unwin, 2007) 31.

⁴ Karen Lillian Martin, *Please Knock Before You Enter: Aboriginal Regulation of Outsiders and the Implications for Researchers* (Post Pressed, 2008) 19.

⁵ Lester-Irabinna Rigney, 'Indigenist Research and Aboriginal Australia' in Normalungelo I Goduka and Julian E Kunnie (eds), *Indigenous Peoples' Wisdom and Power* (Ashgate Publishing, 2006) 32; Allan Ardill, 'Non-Indigenous Lawyers Writing about Indigenous People: Colonisation in Practice' (2012) 37 *Alternative Law Journal* 107.

⁶ Wendy Brady, 'That Sovereign Being: History matters' in Aileen Moreton-Robinson (ed), *Sovereign Subjects: Indigenous Sovereignty Matters* (Allen & Unwin, 2007) 140.

reference to Australia's rights in international law or whether Australia should become a republic.⁷ The concept of First Nations sovereignties differs from abstract notions of Western sovereignty in that it attempts to be liberated from colonial power, including colonial notions of sovereignty.⁸ It seeks legitimacy and authority, both politically and legally, for First Nation Peoples on their own terms.⁹ As observed by Buchan:

To claim Indigenous sovereignty is thus not simply to claim an independent political existence (though it could mean that), rather it is to claim a sovereignty that encompasses the claims of Indigenous people to a substantive recognition of their collective identities.¹⁰

As a concept, First Nations sovereignty is relatively new, arising in the discourse of the 1960s. However, as a lived experience, sovereignty has existed for First Nations Peoples since time immemorial and has never been ceded.¹¹ According to Mansell:

We did not consent to the taking of our land, nor of the establishment of the nation of Australia on our country. Our consent to being subsumed within the Australian nation was neither sought nor given. Our sovereign rights as a people remain intact. By virtue of those sovereign rights we are the sole decision-makers about what we need and will accept.¹²

The article aims to urge a shift in the thinking of Australians who do not identify as First Nations Peoples to realise the salience of First Nations sovereignties, in particular, lawyers and academics, who have turned their backs on this important question of justice.

II REVISITING AUSTRALIA'S HISTORY OF 'SHAME'¹³

It has been recognised that the economic, social, cultural, and political position of Aboriginal and Torres Strait Islander Peoples today can be traced back to a long history

⁷ Ibid.

⁸ Allan Ardill, 'Australian Sovereignty, Indigenous Standpoint Theory and Feminist Standpoint Theory, First Peoples' Sovereignties Matter' (2013) 22 *Griffith Law Review* 315, 318.

⁹ Ibid.

¹⁰ Bruce Buchan, 'Notwithstanding the Tide of History: The *Yorta Yorta Case* and Indigenous Sovereignty' (2002) 1(2) *Borderlands e-journal* [4]

<http://www.borderlands.net.au/vol1no2_2002/buchan_yorta.html>.

¹¹ Aileen Moreton-Robinson, above n 2, 3.

¹² Mansell, above n 2.

¹³ Dean and Gaudron JJ used the phrase 'a national legacy of unutterable shame': *Mabo* (1992) 175 CLR 1, 104.

of government policies.¹⁴ The importance of granting sovereignties and self-determination cannot be understood without reflecting on the systemic disempowering consequences of past government actions. Upon arrival of the First Fleet in 1788, Australia was declared, for the purposes of acquisition and application of English law, terra nullius. It was deemed a land uninhabited by a recognised sovereign or peoples with recognisable institutions and laws.¹⁵ From the beginning, First Nation sovereignties were denied by the introduction of European law. This lack of recognition became the theme of all subsequent contact.

A study of Australia's history allows us to discern several phases of policy by past Australian governments in their dealings with First Nation Peoples — extermination, protection, and assimilation. While these policies covered different time periods and were enacted for various purposes, they all had similarly devastating results for First Nations Peoples. Under these policies First Nations Peoples of Australia were raped, murdered, incarcerated, institutionalised, and dispossessed of their lands. Their sovereign rights were lost, together with the right to practice their culture and raise their children in accordance with their traditions. As a result of the prevailing attitude to deny and destroy the indigenous identities of First Nations Peoples, thousands of children were forcibly removed from their families, resulting in what is now known as the 'stolen generation'.¹⁶

The rhetoric that accompanied the various laws implemented for First Australians was that they were necessary for their protection, benefit, and wellbeing. This meant amongst other things, 'no independent Aboriginal voices were ever officially allowed to surface and make themselves heard about the experience of actually having to live under the "protective" laws'.¹⁷ With the passage of time and increased activism on the part of First Nations Peoples, particularly from the 1960s onwards, this began to change. First Nations Peoples were joined by others in the struggle for greater recognition and

¹⁴ See, eg, Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991); Commonwealth, Human Rights and Equal Opportunity Commission, *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (1997).

¹⁵ Australian Law Reform Commission, *Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [344]–[392].

¹⁶ Raymond Evans, *Fighting Words: Writing About Race* (University of Queensland Press, 1999) 154–7; Human Rights and Equal Opportunity Commission, above n 14.

¹⁷ Evans, above n 16, 165.

the provision of rights for the First Peoples of Australia. The emergence of rights discourse prompted official reaction that failed to contemplate First Nations sovereignties, resulting in a limitation of rights.

III A PUSH FOR RIGHTS AND THE ILLUSORY EFFECT OF THE AUSTRALIAN GOVERNMENT'S RESPONSE

A The 1967 Referendum and Proposed Constitutional Changes

The push for greater recognition and rights led to the 1967 referendum. On 27 May 1967, a federal referendum saw the highest "YES" vote ever recorded. This referendum approved two Constitutional amendments relating to First Nations Peoples.¹⁸ Despite popular thought, the referendum, which was passed by 90.77 per cent of the votes cast and carried in all six states, did not give Aboriginal and Torres Strait Islander peoples the vote, social welfare benefits, or equal pay and wage justice.¹⁹ Rather, the deletion of s 127 of the Constitution allowed First Nations Peoples to be counted in the census. This has led to clearer comparisons on the extent of disadvantage suffered. The second change was to delete the words 'other than the aboriginal people of any State' from s 51(xxvi) of the Constitution. This allowed the Federal Government to make laws pertaining specifically to First Nations Peoples.

The 1967 changes came about as a result of a petition seeking the removal of discrimination to achieve equal citizenship for First Nations Peoples.²⁰ However, this was only sought after a 1927 petition failed.²¹ This earlier petition asked the Parliament to constitute a model Aboriginal State, ultimately managed by a native tribunal according to their own laws.²² It sought to have First Nations Peoples represented in federal parliament in a similar way to the Maori People of New Zealand.²³ A case for First Peoples' sovereignties was therefore pressed as far back as the 1930s. However, the later referendum ignored the possibility of such sovereign rights and instead entrenched Crown sovereignty. It did so by rendering First Nations Peoples subject to

¹⁸ *The 1967 Referendum — Fact Sheet 150*, National Archives of Australia
<<http://www.naa.gov.au/collection/fact-sheets/fs150.aspx>>.

¹⁹ Henry Reynolds, 'Aborigines and the 1967 Referendum: 30 Years On' (Speech delivered at the Department of the Senate Occasional Lecture Series, Parliament House, 14 November 1997) 55
<<http://wopared.parl.net/senate/pubs/pops/pop31/c05.pdf>>.

²⁰ *Ibid* 56.

²¹ *Ibid*.

²² *Ibid*.

²³ *Ibid*.

the sovereign power of the Crown on the advice of Parliament and through its legislative and judicial arms.

The political environment of the 1960s had urged the government to make positive change to benefit Aboriginal and Torres Strait Islander peoples. At the same time, the government was also 'keenly aware of the likely impact on Australia's image overseas of a successful deletion of the discriminatory clauses in the constitution'.²⁴ The 1967 referendum was therefore a move by the government to improve its image at home and abroad. It is often touted as an important milestone in Australian race relations. However, it is also questioned by First Nations Peoples as failing to recognise their sovereign rights:

The vote of the 1967 referendum didn't result in the restoration of lands from which many of us had been dispossessed, or restoration or control over our lives; ... The 1967 amendments to the Constitution did little to advance recognition of Aboriginality in law, culture and land ownership or to empower Aboriginal peoples to determine the future of our lives and lands and our governance of those concerns.²⁵

In fact, one of the consequences of the 1967 referendum was that First Nations Peoples ceased to be mentioned in the Australian Constitution at all. This silence has been recognised recently with a renewed push for Constitutional reform.²⁶ This time the proposal includes the deletion of sections that allow governments to make laws applying only to certain racial groups under ss 25 and 51(xxvi), and the insertion of three new sections (namely, ss 51A, 116A, and 127A).²⁷

The proposed s 51A would allow the government to make laws 'with respect to Aboriginal and Torres Strait Islander peoples', seeks to 'recognise' Aboriginal and Torres Strait Islander peoples as the first occupants of Australia, 'acknowledge' their continuing relationships with their traditional lands, waters, and the need to secure

²⁴ Bain Attwood and Andrew Markus, *The 1967 Referendum: Race, Power and the Australian Constitution* (AIATSIS, 1997) 35–6, cited in Reynolds, above n 19, 58.

²⁵ Irene Watson, 'The Aboriginal State of Emergency Arrived with Cook and the First Fleet' (2007) 26 *Australian Feminist Law Journal* 3, 3.

²⁶ 'Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution: Report of the Expert Panel' (Report, Expert Panel on Constitutional Recognition of Indigenous Australians, January 2012) <<http://www.recognise.org.au/expert-panel-report>>.

²⁷ *Ibid.*

their advancement, and to 'respect' their continuing cultures, languages, and heritage.²⁸ The new s 116A aims to prohibit racial discrimination. It also aims to be made 'for the purpose of overcoming disadvantage, ameliorating the effects of past discrimination or protecting the cultures, languages or heritage of any group'.²⁹ Notably, the proposed s 127A aims to recognise that 'Aboriginal and Torres Strait Islander languages are the original Australian languages, a part of our national heritage.'³⁰

The moment of handing the recommendations to the government was described as being a 'great occasion and a moment of pride'.³¹ However, even without reforms that will likely decay some of the proposals, very little substantive benefit will be delivered to First Nations Peoples if the recommendations succeed.³² The recognition provided by the proposed reforms is of a symbolic nature only. It in no way acknowledges the sovereignties of First Nations Peoples or provides them with any way of becoming truly self-determining peoples. The respect of their culture and recognition of their language as the original Australian language does not provide them with any separate status as sovereign peoples. The recognition that First Nations Peoples first occupied Australia and have a continuing relationship with their traditional lands and waters will not return them to their land. Indeed, as the following analysis shows, rights to land remain elusive even after the acclaimed *Mabo* case.

B *Mabo and Australian Native Title Rights*

On 3 June 1992, after ten years of litigation, the High Court delivered one of its most monumental decisions — the *Mabo* decision.³³ This decision rejected the doctrine of terra nullius as the basis for the Crown's sovereignty in Australia,³⁴ allowing Aboriginal and Torres Strait Islander Peoples' interests in land to have survived British acquisition.

²⁸ Ibid.

²⁹ Ibid.

³⁰ Ibid.

³¹ Emma Wynne, 'Plan to include Aboriginal people in Australian Constitution presented to PM', *ABC Goldfields* (online), 19 January 2012 [2] <<http://www.abc.net.au/local/audio/2012/01/19/3411661.htm>>.

³² Patricia Karvelas, 'Historical vote facing hurdles "the right time" for Indigenous recognition in the Constitution, says Gillard', *The Australian* (Surrey Hills), 20 January 2012, 1–2.

³³ *Mabo* (1992) 175 CLR 1.

³⁴ Ibid 39–43 (Brennan J).

They were now protected under the common law through the concept of native title.³⁵ This protection was offered where it could be shown that ‘a clan or group has continued to acknowledge the laws and (so far as practicable) to observe the customs based on the traditions of that clan or group, whereby their traditional connection with the land has been substantially maintained’.³⁶

From the start, however, this protection was subject to state ownership and was only provided to the extent that it would not ‘fracture the skeletal principle of our legal system’.³⁷ A ‘clear and plain intention’ of the Crown could extinguish native title,³⁸ such as grants of freehold. This meant that any Act, even if contrary to the rights of First Nations Peoples, could not legally be declared a wrong Act. Further, extinguishment of native title appeared to be possible without consent or compensation.³⁹

The limitations on native title as a property right in Australia have existed since the beginning of its recognition in 1992. However the ability of the law to afford real justice to dispossessed First Australians has been made even more difficult by changes to the common and statutory law since. While the *Native Title Act 1993 (Cth)* (*‘Native Title Act’*) in its original form proved difficult for successful native title claims to be made, the later amendments (known as Howard’s “10 point plan”) not only reduced the land over which claims can be made, but made the bringing of a claim an onerous task.⁴⁰ Over time, the rights of First Australians in the process have been significantly watered down and the interests of miners and pastoralists favoured.⁴¹ The decision in *Yorta Yorta v Victoria* (*‘Yorta Yorta’*) further reduced the effectiveness of native title as a protection of First Nations Peoples title to land.⁴² An ‘interruption’ in the observance of traditional law and custom was found to extinguish native title.⁴³ A continuous acknowledgment and

³⁵ Maureen Tehan, ‘A hope disillusioned, an opportunity lost? Reflections on common law Native Title and ten years of the *Native Title Act*’ (2003) 27 *Melbourne University Law Review* 523, 533; *Mabo* (1992) 175 CLR 1, 48 (Brennan J).

³⁶ *Mabo* (1992) 175 CLR 1, 58–60 (Brennan J).

³⁷ *Ibid* 43 (Brennan J).

³⁸ *Ibid* 63, 65, 68, 89–90 (Brennan J), 110–11 (Deane and Gaudron JJ), and 184, 195 (Toohey J).

³⁹ *Ibid* 15 (Mason CJ and McHugh J), 126 (Dawson J).

⁴⁰ Commonwealth, Australian Human Rights Commission, *Native Title Report July 1994–June 1995* (1995); Tehan, above n 35, 550; *Native Title Act 1993 (Cth)* ss 32, 237.

⁴¹ Brian Keon-Cohen, ‘Indigenous land rights: Some things remain the same’ (1999) 24 *Alternative Law Journal* 121.

⁴² *Yorta Yorta v Victoria* (2002) 214 CLR 422.

⁴³ *Ibid* 456–7 [89] (Gleeson CJ, Gummow and Hayne JJ); Cf *Mabo* (1992) 175 CLR 1, 66 (Brennan J).

observance of traditional laws and customs from the acquisition of the Crown to the present was necessary for success.⁴⁴

Native title in the absence of the presumption of First Peoples sovereignties means the onus of proof is excessive. Sovereignty would mean that the onus of proof would be reversed so that claimants would need to show that they have a connection to the land. This is opposed to the post-*Yorta Yorta* requirement for claimants to prove an unbroken connection to land stretching back to 1788. It would also mean that respondents to native title claims would then bear an onus to prove that native title had been extinguished rather than claimants showing that there had been no interruption or extinguishment, especially when the documents necessary for this evidence are in the possession of governments and not readily or cheaply available to claimants. In terms of those persons dispossessed and unable to lodge a claim for native title, recognition of First Nations sovereignties would allow scope for other remedial measures to take place that are today not even on the agenda, such as compensation. Therefore, sovereignty is integral to justice for First Nations Peoples.

With respect to native title as a legal proposition there are a number of issues that deserve reflection. Firstly, in overturning the racist doctrine of terra nullius as the basis for Crown sovereignty, the High Court opened up a possibility, at least for a moment. This possibility was that there could be recognition of pre-existing and continuing First Nations sovereignties. However, just as quickly as the High Court presented this opportunity, it took it away. It upheld the validity of the Crown's sovereignty on the basis of an 'Act of State'; the 'doctrine denies fundamental human rights and self-determination to Indigenous peoples in the same way that the doctrine of terra nullius has done'.⁴⁵

Secondly, through native title, First Nations Peoples have been given a 'white-constructed form of a proprietary right'.⁴⁶ Neither *Mabo* nor the *Native Title Act* gave First Peoples of Australia the right to own land, control what happened on their land, or profit from the use of their land. What First Peoples of Australia have been given, by way of native title, is inferior when compared to the title held by the Crown and all those that

⁴⁴ Ibid.

⁴⁵ Irene Watson, 'Nungas in the Nineties' in Greta Bird, Gary Martin and Jennifer Nielsen (eds), *Majah Indigenous Peoples and the Law* (Federation Press, 1996) 1, 11.

⁴⁶ Moreton-Robinson, above n 2, 4.

hold land by way of a fee simple estate. Not only is it inferior, but the exercise of First Nations Peoples right to land must be exercised on colonial terms, subject to competing economic and other interests. Native title has been recognised as being

not epistemologically and ontologically grounded in Indigenous conceptions of sovereignty. Indigenous land ownership, under these legislative regimes, amount to little more than a mode of land tenure that enables a circumscribed form of autonomy and governance with minimum control and ownership of resources, on or below the ground, thus entrenching economic dependence on the nation state.⁴⁷

Thirdly, native title is framed and judged according to common law principles rather than the way that First Nations Peoples view their relationship to their traditional lands. Claimants must prove a traditional physical connection that has been substantially maintained.⁴⁸ However, it is incredibly difficult for First Nations Peoples to prove this connection within a system that is not based upon their beliefs, particularly the way they view their relationship to land.⁴⁹ Working within this system poses obstacles, such as evidentiary requirements and the favouring of written evidence over the oral history and tradition of First Nations.⁵⁰ These difficulties will remain so long as the viewpoint of Australian law is allowed to prevail by virtue of Crown sovereignty.

The recognition of native title was heralded as an important step towards reconciliation and the recognition of First Nations Peoples rights to land in Australia. However, its effect is predominantly illusory. It allows the core values and beliefs of Crown sovereignty to hide behind a veil of equality. It has allowed the government to maintain control over First Nations Peoples and dodge the question of their sovereignties. It has allowed this to happen whilst maintaining a façade of support for the rights of First Nations Peoples and a false belief that Aboriginal and Torres Strait Islander peoples enjoy extra rights 'privileged' above other Australians.⁵¹ Most damagingly, it has removed a proper consideration of the operation of native title since *Mabo*:

The Aboriginal voice of opposition to the theft of Aboriginal land is now quiet, as though the matter has been settled by the High Court decision in *Mabo* and the

⁴⁷ Ibid.

⁴⁸ *Mabo* (1992) 175 CLR 1, 58–60 (Brennan J); *Native Title Act 1993* (Cth) s 190B(7).

⁴⁹ Mark Gregory, 'Absent Owners' (1995) 20 *Alternative Law Journal* 20.

⁵⁰ Peter Seidel, 'Native Title: The Struggle for Justice for the Yorta Yorta Nation' (2004) 29 *Alternative Law Journal* 70.

⁵¹ Tehan, above n 35, 538.

subsequent native title legislation. There is no longer broad public support for land rights, as if the public think that Aborigines have enough land already.⁵²

Failures with respect to native title have been mirrored in the failure of policy initiatives aimed at bridging the socioeconomic gaps between First Nations Peoples and other Australians. Despite the struggle for self-determination within the executive and public administration arms of government, First Nations Peoples have only ever managed to receive what could be described, at best, as quasi-self-determination through the creation of the Aboriginal and Torres Strait Islander Commission ('ATSIC').⁵³

C The Aboriginal and Torres Strait Islander Commission

A new policy direction of self-determination was urged during the 1970s, representing a fundamental departure from the previous assimilationist agenda,⁵⁴ which had required First Nations Peoples to adopt the culture of "settler society". However, self-determination was said to recognise cultural difference and the need for self-representation, particularly on issues related to First Australian communities.⁵⁵ It was towards this end that the *Aboriginal and Torres Strait Islander Commission Act 1989* (Cth) was introduced. The establishment of the Commission was said to provide a means for Aboriginal and Torres Strait Islander peoples to 'have a real say in the management of their own affairs'.⁵⁶ Commissioners were tasked with representing First Nations Peoples at the federal level, providing policy advice to the government, and managing specific programs.⁵⁷

The Commission was portrayed as a body granting First Nations Peoples full access to self-determination in both the national and international arenas.⁵⁸ However, in practice, it proved to be 'more a mechanism for the continuation of colonial control than a step on

⁵² Watson, above n 3, 28.

⁵³ Lyndon Murphy, *Who's Afraid of the Dark?: Australia's Administration in Aboriginal Affairs* (Masters Thesis, Centre for Public Administration, The University of Queensland, 1990).

⁵⁴ Ian Anderson, 'The End of Aboriginal Self-Determination?' (2007) 39(2-3) *Futures* 137, 138, 142.

⁵⁵ Anderson, above n 54, 137, 138; Jon Altman, 'Indigenous Affairs at a Crossroads' (2004) 15 *Australian Journal of Anthropology* 306, 307.

⁵⁶ Paul Coe, 'ATSIC: Self-Determination or Otherwise' (1994) 35 *Race & Class* 35, 35; Commonwealth, *Parliamentary Debates*, House of Representatives, 4 May 1989, 2001 (Gerry Hand).

⁵⁷ Altman, above n 55, 306; Anderson, above n 54, 137, 138.

⁵⁸ Patrick Sullivan, 'All Things to All People' in Patrick Sullivan (ed), *Shooting the Banker: Essays on ATSIC and Self-Determination* (North Australian Research Unit, 1996) 105, 110-11.

the way to the self-determination of a separate and distinct people'.⁵⁹ Its proximity to government, internal structure and onerous accountability standards revealed it to be just another instrument of the Federal Government.⁶⁰ Rather than creating a body to be representative of First Nations Peoples, the purpose of ATSIC was merely to provide them 'with a voice within the Australian government'.⁶¹ Despite being held out as an example of self-determination, nowhere in the Act is the term "self-determination" mentioned, and it was in no way able to be a free association of Indigenous Australians as a separate people.⁶²

While the elected regional councils were put forward as advancing self-determination and giving First Nations Peoples a say in political processes, their existence actually denied self-determination.⁶³ All structures and processes were imposed by the Federal Government rather than developed by First Nations Peoples.⁶⁴ Further, the right to vote was dependant on the region an individual lived in, rather than which groups and individuals had rights over the land under Indigenous lore.⁶⁵ Such an oversight displays cultural ignorance and denies First Nations sovereignties by failing to treat First Nations Peoples as individuals with distinct and separate Indigenous identities.⁶⁶

At all times, control of the body remained with the Federal Government. The Commission underwent extensive governmental reviews, reporting requirements, and auditing procedures.⁶⁷ The Minister for Aboriginal Affairs always maintained overall control and was able to direct the Commission in general terms, take control of its financial decisions, and had the power to both dismiss a Commissioner for misbehaviour, as well as to determine what constituted such misbehaviour.⁶⁸ The Commission had to submit to many constraints and was unable to make policy recommendations independent of the parameters laid down by the government. This meant it was always doomed to be merely a body of advice, consultation, and compromise.

⁵⁹ Ibid 109.

⁶⁰ Ibid.

⁶¹ Ibid 110–11, 118.

⁶² Ibid.

⁶³ Coe, above n 56, 36.

⁶⁴ Ibid.

⁶⁵ *Aboriginal and Torres Strait Islander Commission Act 1989* (Cth) s 101 ('ATSIC Act'); Coe, above n 56, 36.

⁶⁶ Coe, above n 56, 36.

⁶⁷ *ATSIC Act* ss 72–73, 75–78, 99.

⁶⁸ *ATSIC Act* ss 12, 74, 40.

Irrespective of the lack of control, First Nations Peoples had to make ATSIC a success, otherwise it was held out by conservatives as a failed attempt at self-determination. In abolishing the body John Howard stated: 'We believe very strongly that the experiment in separate representation, elected representation, for indigenous people has been a failure'.⁶⁹ In stamping ATSIC a failure, the government highlighted the lack of progress that had been made in achieving real outcomes for Aboriginal and Torres Strait Islander peoples. These outcomes were measured on key socioeconomic indicators such as health, housing, and education.⁷⁰ While ATSIC was held out as being responsible for all policy impacting on First Nations Peoples, in reality responsibility for most of these key areas had remained with the State and Federal governments.⁷¹ In using ATSIC as a scapegoat, the government was able to sidestep questions of its own failings in these areas. It was also able to put an end to the limited form of self-determination policy in place since the 1970s. Consequently, the Howard government engineered a new phase in policy, stating that it 'should be integration, giving Aboriginal people the opportunity for education and then allowing them to integrate as part of a unified Australian society, rather than talk about self-determination. That has failed'.⁷²

Both policies, from quasi self-determination to integration, were possible precisely because First Nations Peoples were denied their sovereign rights. In the case of ATSIC:

ATSIC was not an Aboriginal model; it was a colonialist model that served to entrench white values and ways of being ... Aboriginal peoples were given an under-resourced white model to perform the impossible task of caring for Aboriginal Australia. From the beginning, the ATSIC project was doomed to fail and, when it did, white racism laid the blame in black hands.⁷³

Integration failed First Nations Peoples, and policy took yet another turn under the Rudd government, coming to power in 2007. If ATSIC proved to be a hollow advance, then First Nations Peoples experienced a similar feeling in the wake of the belated apology to the Stolen Generation delivered in 2008.

⁶⁹ Mark Phillips, 'Howard abolishes ATSIC', *The Courier Mail* (Brisbane), 16 April 2004, 1, cited in Jane Robbins, 'The Howard Government and Indigenous rights: An imposed national unity?' (2007) 42 *Australian Journal of Political Science* 315, 323.

⁷⁰ Marcus Priest, 'Howard to abolish ATSIC', *Australian Financial Review* (Melbourne), 16 April 2004, 3.

⁷¹ Robbins, above n 69.

⁷² Anderson, above n 54, 137, 144.

⁷³ Watson, above n 3, 24.

D *The National Apology Of 2008*

The delivery of the Australian government apology to the Stolen Generation in 2008 was met with much acclaim. This is unsurprising when the length of time it took to occur is considered. The path to a formal apology had been paved over 15 years beforehand when, in 1992, Prime Minister Paul Keating acknowledged the link between Australia's history and present suffering in his now famous Redfern Address. From there, a national inquiry was commissioned and the *Bringing Them Home: The Stolen Children Report* delivered in 1997. The inquiry left no doubt there had to be a national apology. However, by the time the report was delivered, the Keating government was defeated, with John Howard becoming Prime Minister.⁷⁴ Howard refused to apologise throughout his time in office declaring this call for an apology a "black armband" view of Australian history.⁷⁵

With the change of government in 2007, the apology became a priority. During consultation, First Nations Peoples made it clear that "sorry" was the word that had to be used. The apology did not disappoint.⁷⁶ Throughout the nationally televised event, the Prime Minister reflected on the 'mistreatment of those who were the Stolen Generation'.⁷⁷ He said sorry for the 'pain, suffering and hurt' caused by past government policies, for 'the breaking up of families', and for the 'indignity and degradation' inflicted on Aboriginal and Torres Strait Islander peoples' culture.⁷⁸ The moment was thoughtful, respectful, and sympathetic. However, it fell short of any recognition of First Peoples' sovereignties or affording any reparation for a history of harm.

From the start, the apology was limited in its terms. It was specifically an apology to the Stolen Generation, not to all First Nations Peoples. The apology did come about as a result of a recommendation made by the *Bringing Them Home* report, but there was nothing preventing the government from acknowledging the consequences of other past policies and government actions. While the severity of the effects of removal policies should never be undermined, it has been shown several times over that they were not

⁷⁴ Tony Barta, 'Sorry, and Not Sorry, in Australia: How the Apology to the Stolen Generations Buried a History of Genocide' (2008) 10 *Journal of Genocide Research* 201, 203.

⁷⁵ *Ibid.*

⁷⁶ *Ibid.*

⁷⁷ Commonwealth, *Parliamentary Debates*, House of Representatives, 13 February 2008, 167–171 (Kevin Rudd, Prime Minister of Australia).

⁷⁸ Alexander Reilly, 'How Sorry Are We? The Limits of the Apology to the Stolen Generation' (2009) 34 *Alternative Law Journal* 97, 98.

the only policies to cause suffering and disadvantage to First Nations Peoples.⁷⁹ Despite this, there was no sorry said for the theft of land, the mass killings, and the numerous attempts at the destruction of culture.

The government apologised for the wrongdoing that stemmed from past government control over Aboriginal and Torres Strait Islander Peoples, yet continued to maintain control by deciding that First Nations Peoples must move on from the past as well as deciding what had to happen next.⁸⁰ To be genuine, an apology must have the ability to be rejected, and cannot place expectations upon the person or groups who are to receive it.⁸¹ Further, an apology remains incomplete until the individual to whom it is directed is willing to receive and accept it.⁸²

Despite being made in the presence of First Nations Peoples, the apology was never capable of rejection.⁸³ Instead it 'requested' that First Nations Peoples accept it 'in the spirit in which it is offered as part of the healing of the nation'.⁸⁴ In assuming that it would be so accepted, the government proceeded to write the 'new page in the history of our great continent'.⁸⁵ Had the apology been capable of rejection, it would have recognised the power of First Nations Peoples to do so, and acknowledged their sovereignties.⁸⁶ Instead, no reflection can be found 'on the nature of government power or the extent of the State's sovereignty. These were assumed. The control the government maintained over the apology reinforced its claim to absolute sovereignty'.⁸⁷

While the apology offered an opportunity for the government to begin to 'acknowledge the calls of Aboriginal leaders and others' and enter into serious thought and discussion about the recognition of First Nations sovereignties,⁸⁸ it failed to do so. The fact that it was surrounded by an aura of hope and future possibilities allowed so many to overlook the fact that nothing of substance was actually delivered.

⁷⁹ See Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991).

⁸⁰ Reilly, above n 78.

⁸¹ *Ibid.*

⁸² Jean-Marc Coicaud and Jibecke Jönsson, 'Elements of a road map for a politics of apology' in Mark Gibney et al (eds), *The Age of Apology: Facing Up to the Past* (University of Pennsylvania Press, 2008) 77, 79.

⁸³ Reilly, above n 78.

⁸⁴ Commonwealth, *Parliamentary Debates*, House of Representatives, 13 February 2008, 167–171 (Kevin Rudd, Prime Minister of Australia).

⁸⁵ *Ibid.*

⁸⁶ Reilly, above n 78, 99.

⁸⁷ Reilly, above n 78.

⁸⁸ *Ibid* 100.

Colonial law and policy framed without recognition of First Peoples' sovereignties has had devastating effects on First Nations Peoples despite their sustained resilience and strength. Past policies forced Aboriginal and Torres Strait Islander peoples on to reserves, removed children from kinship networks, and led to the loss of land and culture. These caused well over a century of poverty, illness, hunger, under-education, and under- or non-employment.⁸⁹ The effects of these policies are still evident in First Peoples' communities today, irrespective of the so-called advancement in rights and recognition.

IV MANIFESTATIONS OF COLONIAL APPROACHES TO THE "ABORIGINAL PROBLEM"

It has often been said that, when key indicators are examined, First Nations Peoples are greatly disadvantaged in comparison to any other identifiable section of the Australian population.⁹⁰

When compared to the figures for other sections of the Australian population, Aboriginal and Torres Strait Islander Peoples have a higher birth rate, particularly as a result of teenage pregnancies, yet they also have a higher infant mortality rate.⁹¹ They have a lower life expectancy and poorer health, both physical and psychological.⁹² The figures show high rates of illicit and licit substance abuse, associated with a range of health and social problems such as violence, child abuse, and neglect.⁹³ First Nations Peoples are more likely to live in overcrowded dwellings with structural deficiencies.⁹⁴ Households living in such dwellings tend to have poor economic wellbeing, lower family functioning and are more likely to experience greater life stressors.⁹⁵ Despite representing a minority 2.5 per cent of the total Australian population, First Nations Peoples represent 24 per cent of the total prison population.⁹⁶ Retention rates and levels of attainment in

⁸⁹ Australian Law Reform Commission, above n 15, [29]–[36]; Ros Kidd, 'Aboriginal Protection in Queensland' (Speech delivered at University of Queensland, Brisbane, March 1998) <<http://www.linksdisk.com/roskidd/tpages/t3.htm>>.

⁹⁰ Commonwealth, National Population Inquiry, *Population & Australia: A Demographic Analysis and Projection* (1975) Vol 2, 455.

⁹¹ Australian Institute of Health and Welfare and Australian Bureau of Statistics, *The Health and Welfare of Australia's Aboriginal and Torres Strait Islander Peoples 2008*, cat no 4704.0 (2008) 79–80, 94.

⁹² Ibid 94, 111, 121, 133–4, Table 7.34; Australian Institute of Health and Welfare and Australian Bureau of Statistics, *The Health and Welfare of Australia's Aboriginal and Torres Strait Islander Peoples 2008*, cat no 8903.0 (2008) Table 3.4.

⁹³ Australian Institute of Health and Welfare and Australian Bureau of Statistics, above n 91, 139, 141.

⁹⁴ Ibid 41, 42.

⁹⁵ Ibid 42.

⁹⁶ Australian Bureau of Statistics, *Experimental Estimates of Aboriginal and Torres Strait Islander Australians*, ABS cat no 3238.0.55.001 (June 2006)

education remain low, impacting upon employment outcomes.⁹⁷ In 2006, only 57 per cent of First Nations Peoples were participating in the workforce, compared to 76 per cent of other Australians.⁹⁸ Rates of participation have been shown to decline with remoteness of location.⁹⁹ Low levels of education and employment impacts upon income levels and, in 2006, the mean equivalised gross household income for First Nations Peoples was \$460 per week, about 62 per cent of the rate for other Australians.¹⁰⁰ Further, the median weekly gross individual income was \$278, 59 per cent of the median weekly income for other Australians.¹⁰¹

These figures are increasingly well-known and have become familiar territory covered by governments trying to formulate new ways to “close the gap”. However, as identified by the Royal Commission into Aboriginal Deaths in Custody (‘RCIADIC’), these statistics are the legacy of the historical and systemic disempowering processes of past government actions.¹⁰² To concentrate solely on them takes the focus away from the true cause of First Peoples’ disadvantage today.

The Commission found past policies assumed that First Nations Peoples culture and way of life was ‘without value’ and that a ‘favour’ was being conferred through assimilation.¹⁰³ This took away the independence and self-esteem of First Peoples.¹⁰⁴ The living situation of Aboriginal and Torres Strait Islander Peoples today has been recognised as being a result of dispossession and disempowerment. This is a product of non-recognition. Australian governments, at both federal and state levels, have failed to recognise First Nations Peoples as sovereign peoples.¹⁰⁵ In response to this the RCIADIC

<<http://www.abs.gov.au/ausstats/abs@.nsf/mf/3238.0.55.001>>; Australian Bureau of Statistics, *Prisoners in Australia 2008*, ABS cat no 4517.0 (2008)

<<http://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/4517.02008>> 22 (Table 8).

⁹⁷ Australian Institute of Health and Welfare and Australian Bureau of Statistics, above n 91, 16–17; Steering Committee for the Review of Government Service Provision, Parliament of Australia, *Overcoming Indigenous Disadvantage: Key Indicators 2005 Report*, Productivity Commission (2005) [3.26].

⁹⁸ Australian Bureau of Statistics, *Population Characteristics, Aboriginal and Torres Strait Islander Peoples 2006*, cat no 4713.0 (4 May 2010) 49–53

<<http://www.abs.gov.au/ausstats/abs@.nsf/PrimaryMainFeatures/4713.0#>>.

⁹⁹ Australian Bureau of Statistics, *Population characteristics, Aboriginal and Torres Strait Islander Australians 2001*, cat no 4713.0 (30 October 2003) 65

<<http://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/4713.02001>>.

¹⁰⁰ Australian Bureau of Statistics, above n 96.

¹⁰¹ Australian Bureau of Statistics, above n 96.

¹⁰² Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991).

¹⁰³ *Ibid*

¹⁰⁴ *Ibid*.

¹⁰⁵ Murphy, above n 53, 13.

found that ‘the elimination of disadvantage requires an end of domination and an empowerment of Aboriginal people; that control of their lives, of their communities must be returned to Aboriginal hands’.¹⁰⁶

The Commission clearly recommended that empowerment was the only way to eliminate the high levels of disadvantage currently suffered in First Peoples’ communities. However, there has been no move by the Australian government to afford real self-determination or sovereignties for First Nations Peoples. What has been seen instead are a series of gestures. These have succeeded in giving the appearance of affording First Peoples rights and privileges. However, as was explored above, when these policies and measures are examined closely, nothing of substance can be found.

Rather than deliver justice, the gestures have created an illusion of recognition and success. They have created a public perception that justice for First Nations Peoples has been delivered. It is constantly expressed that the past is the past — it is finished. Yet there is a constant failure to understand that the past lives on:

Cut off a man’s leg, kill his mother, rape his land, psychologically attack him and keep him in a powerless position each day — does it not live on in the mind of the victim? Does it not continue to affect his thinking? Deny it, but it still exists.¹⁰⁷

Despite, and perhaps because of, the unwillingness to discuss colonialism as the cause of First Peoples’ disadvantage, the past lives on in the lives of First Nations Peoples. If change is to occur, a space must be created that allows for the possibility of recognising First Nations Peoples identities and sovereignties.

V TIME FOR A NEW CONVERSATION — BEGINNING THE RECOGNITION OF FIRST AUSTRALIAN
SOVEREIGNTIES

Notwithstanding direct evidence to the contrary, governments continue to insist that the imposition of colonial systems have the potential to deliver greater independence for First Nations Peoples. However, colonial systems are characterised by different values,

¹⁰⁶ Australian Bureau of Statistics, above n 96, [1.7.6].

¹⁰⁷ Philip Morrissey, ‘Dancing with shadows: Erasing Aboriginal self and sovereignty’ in Aileen Moreton-Robinson (ed), *Sovereign Subjects: Indigenous Sovereignty Matters* (Allen & Unwin, 2007) 65, 73.

cultural expectations, legitimacies of authority, and aspirations.¹⁰⁸ They may not be adequate to allow effective advocacy or representation of First Nations Peoples.¹⁰⁹ It is time to move beyond conversations on how to fix the Australian “Aboriginal problem” and begin conversations on how to fix the ongoing problem of colonialism.¹¹⁰ It is time to end the continuous domination over the lives of First Nations Peoples, and to allow them to take part as equals in the conversations that concern them and their communities. It is time for a serious discussion on the recognition of First Nations sovereignties. It is time to empower First Nations Peoples through the provision of self-determination. And more importantly, it is time to find a way to translate these discussions to real action.

For too long the debate around First Nations sovereignties has been hampered because of a lack of understanding of the issue. The political agenda of First Nations Peoples is perceived as a threat to the security of Australians and their assumed territorial integrity.¹¹¹ The fact that such fear exists, at a time when First Nations Peoples exist as a minority two per cent of the total Australian population, is completely without justification. Increased knowledge and discussion of international law has meant sovereignty has come to mean the independence of a state from any other state.¹¹² However, Brennan, Gunn, and Williams have suggested that there is a distinction to be made between ‘external’ and ‘internal’ sovereignty.¹¹³ While external sovereignty is concerned with who has the power on behalf of the nation and in dealing with other nation states in the international arena, internal sovereignty looks at how and where power is distributed within territorial boundaries.¹¹⁴

Sovereignty claims by First Nations Peoples are claims to be free of the legal and political power of others.¹¹⁵ It is ‘the power for Indigenous communities to imagine

¹⁰⁸ Ros Kidd, ‘Social Engineering: A Disastrous Experiment’ (Speech delivered at Department of Families, Brisbane, June 2003) <<http://www.linksdisk.com/roskidd/tpages/t12.htm>>.

¹⁰⁹ Ibid.

¹¹⁰ Watson, above n 3, 29.

¹¹¹ Watson, above n 3, 20; Larissa Behrendt, *Achieving Social Justice: Indigenous Rights and Australia's Future* (Federation Press, 2003) 115.

¹¹² Phillip Falk and Gary Martin, ‘Misconstruing Indigenous Sovereignty: Maintaining the Fabric of Australian law’ in Aileen Moreton-Robinson (ed), *Sovereign Subjects: Indigenous Sovereignty Matters* (Allen & Unwin, 2007) 33, 35.

¹¹³ Sean Brennan, Brenda Gunn and George Williams ‘“Sovereignty” and Its Relevance to Treaty- Making Between Indigenous Peoples and Australian Governments’ (2004) 26 *Sydney Law Review* 312.

¹¹⁴ Ibid.

¹¹⁵ Reilly, above n 78, 100.

themselves ... [and] to be creators of themselves as subjects rather than objects of law and history'.¹¹⁶ First Nations sovereignties are an attempt to protect culture and relationships, especially those that concern land.¹¹⁷ This protection is sought by endeavouring to invest the power to govern in the hands of First Nations Peoples. Such an assertion of sovereignty is comparable internationally to the sovereignty granted to American and Canadian First Nations Peoples. It is also comparable domestically to the internal sovereignty seen in territories like the Northern Territory and Australian Capital Territory, which have their own legislative and electoral structures.¹¹⁸

Recognition of First Nations' sovereignties would grant First Nations Peoples the right to decide their political status and their relationship to the state, if they decided to have any relationship at all.¹¹⁹ It would grant rights over their economic, social, cultural, and political development, and give them greater control within their communities.¹²⁰ It would require the Australian Government to deal with First Nations Peoples on a government-to-government basis. The fact that forms of internal sovereignty already exist in other nations, and in Australia's own territories, demonstrates that the recognition and workings of such sovereignty is achievable. However, this matter cannot be determined by colonial Australia. The responses and resolutions surrounding sovereignty and self-determination have to come from Aboriginal and Torres Strait Islander peoples themselves. It must be recognised that there is no singular voice capable of speaking for all First Nations Peoples.¹²¹ First Peoples of Australia are diverse, with differing situations, interests, desires and dreams. A space must be created where such diversity can be heard.¹²²

To create true justice for First Nations Peoples it is the role and responsibility of other Australians to construct this space. We must refuse to accept the illusion that justice has been done and that Aboriginal and Torres Strait Islander peoples have now received sufficient reparation for the past discrimination and disadvantage heaped upon them.

¹¹⁶ Dianne Otto, 'A Question of Law or Politics? Indigenous Claims to Sovereignty in Australia' (1995) 21 *Syracuse Journal of International Law and Commerce* 65, 74.

¹¹⁷ Falk and Martin, above n 112.

¹¹⁸ Ibid.

¹¹⁹ Ron Sutton, Interview with Les Malezer (SBS News, 26 January 2012).

¹²⁰ Ibid.

¹²¹ Irene Watson, 'Illusionists and Hunters: Being Aboriginal in this Occupied Space' (2005) 22 *Australian Feminist Law Journal* 15, 15.

¹²² Watson, above n 3, 31.

We must put aside any fears we may have around such change and not allow ourselves to defensively state that granting First Nations sovereignties “would never work” before it is even attempted. We must not evade this important question of justice merely because First Nations Peoples represent a small proportion of the total Australian population.¹²³ For far too long we have imposed ‘a vision of national unity by unilateral decision’.¹²⁴ It is time for this to end.

VI CONCLUSION

Since the beginning of colonisation, First Nations’ sovereignties have been denied under Australian law. This denial has led to over two centuries of disempowerment and the resultant damaging effects on First Nations Peoples remain evident in their communities today. Calls for recognition have been voiced, but they have been met only by a series of gestures by the Australian government. These gestures have succeeded in giving the appearance of affording rights and privileges to First Nations Peoples while delivering very little substance, sidestepping true justice.

An absence of First Nations’ sovereignties will continue to disadvantage and rob Aboriginal and Torres Strait Islander people of their capacity to negotiate a just future for themselves. It will continue to deny them the opportunity to decide their political status and relationship to the state. Further, it will withhold their rights to control their economic, social, cultural, and political development, and will continue to foster feelings of disempowerment. Colonial systems are not capable of delivering the independence First Nations Peoples deserve. It is therefore the responsibility of other Australians, particularly lawyers and academics, to recognise this, and work towards creating a space where the diversity of Australia’s First Peoples can be heard and their desires implemented.

¹²³ Brady, above n 6, 149–50.

¹²⁴ Robbins, above n 69, 315.

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