

POSTCOLONIAL INROADS INTO THE NATIVE TITLE PROCESS¹

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I Introduction

Postcolonial critical theory has made limited inroads into the legal discipline,² especially as far as domestic legal regimes are concerned.³ Indeed, the scant attention paid by postcolonial theorists to domestic regimes is quite striking given the example set by postcolonial critiques of international law.⁴ While, at first sight, there may be good reasons for the lack of a postcolonial challenge to legal positivism in settler societies such as Australia, as they arguably remain colonial, postcolonial insights are not necessarily so limited in scope. In any event, the applicability of postcolonial theory merits consideration before being dismissed outright. The potential benefits of postcolonial theorising can be demonstrated, for example, by applying postcolonial critiques to native title law in order to better appreciate how colonialism has survived in new guises. Such analysis is particularly insightful because post *Mabo*,⁵ it has become increasingly evident that even though the colonial fallacy of *terra nullius* was rejected in Australia, its implications continue.

After assessing the applicability of postcolonial critical theory to

¹ This article has been assessed by independent academic referees with expertise in the field.

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² As Fitzpatrick and Darian-Smith explain, '[e]ngagements between law and postcolonialism have been infrequent': Peter Fitzpatrick and Eve Darian-Smith, 'Laws of the Postcolonial: An Insistent Introduction', in Eve Darian-Smith and Peter Fitzpatrick (eds), *Laws of the Postcolonial* (1999) 1, 4.

³ Cf eg, Roshan de Silva, 'An Ontological Approach to Constitutionalism in Sri Lanka: Contingency and the Failure of Exclusion' in Eve Darian-Smith and Peter Fitzpatrick (eds), *Laws of the Postcolonial* (1999) 181; Upendra Baxi, 'Postcolonial Legality' in Henry Schwarz and Sangeeta Ray (eds) *A Companion to Postcolonial Studies* (2000) 540.

⁴ See eg, Anthony Anghie, 'Francisco de Vittoria and the Colonial Origins of International Law' (1996) 5 *Social and Legal Studies* 321, reprinted in Eve Darian-Smith and Peter Fitzpatrick (eds), *Laws of the Postcolonial* (1999) 89; Simon Chesterman, 'Law, Subject and Subjectivity in International Relations: International Law and the Postcolony' (1996) 20 *Melbourne University Law Review* 979; Dianne Otto, 'Subalternity and International Law: The Problems of Global Community and the Incommensurability of Difference' in Eve Darian-Smith and Peter Fitzpatrick (eds), *Laws of the Postcolonial* (1999) 145.

⁵ *Mabo v Queensland (No 2)* (1992) 175 CLR 1 ('*Mabo*').

Australian native title law, the way in which legal institutions create new forms of colonisation will be further highlighted by drawing on significant steps in the process of a native title claim. From the registration of a claim and the granting of the subsequent right to negotiate, through to the determination of native title rights and interests, the system results in repeated intrusions into the lives of Indigenous people. It will be shown that without an adequate understanding of the forces at play, well-meaning parties to the process may otherwise fail to appreciate the negative implications of their actions and may unwittingly perpetuate imperialist attitudes.

II Postcolonial Critical Theory

The term ‘postcolonialism’ like ‘postmodernism’ is notoriously difficult to define. Some attempts undertaken by proponents of postcolonial studies to delineate its scope are even outright contradictory.⁶ The term is also apt to mislead as the prefix ‘post’ does not necessarily imply ‘after’;⁷ hence, the widespread preference for the unbroken term ‘postcolonialism’ rather than the hyphenated ‘post-colonialism’.⁸ As Byrnes explains:

Postcolonialism is often mistakenly defined as the assumption that we have left the colonial past behind... However, it is more useful to see postcolonialism not as a finite period, but as a critical engagement with the aftermath of colonisation.⁹

This phenomenon is captured by the difference between the terms decolonisation and postcolonialism: ‘[w]hile decolonisation signals that the colonisers have left and relinquished their authority, postcolonialism implies a continuation of that power.’¹⁰

In other words, postcolonial theory is not limited by temporal constraints: ‘postcolonialism is an attitude, rather than an epoch’.¹¹ Nevertheless, the scope of postcolonial theory remains open to debate, which is prone to intensify when the issue of so-called ‘settler societies’, such as Australia, Canada, and New Zealand, is taken into consideration.¹² On one

⁶ As Davies explains, some confine it to be ‘the study of the continuing effects of colonial power in post-independence societies’, while others recognise that it also characterises ‘the condition of all groups affected in one way or another by a past or present colonialism or imperialism’: Margaret Davies, *Asking the Law Question* (2nd ed, 2002), 278.

⁷ *Ibid.*

⁸ See Leela Gandhi, *Postcolonial Theory: A Critical Introduction* (1998), 3.

⁹ Giselle Byrnes, ‘Past the Last Post? Time, Causation and Treaty Claims History’ (2003) 7 *Law/Text/Culture* 251, 253.

¹⁰ *Ibid* (citations omitted).

¹¹ *Ibid.*

¹² ‘Settler societies’ are often discussed without being precisely defined. Johnston and Lawson, however, draw on historical definitions which have relied ‘on the presence of long-term, majority white racial communities, where indigenous peoples have been outnumbered and removed by colonial policies and practices’: Anna Johnston and Alan Lawson, ‘Settler Colonies’ in Henry Schwarz and Sangeeta Ray (eds) *A Companion to Postcolonial Studies*

hand, there are those such as Watson who argue that as these countries remains largely colonial, using the term ‘post-colonialism’ risks falsifying the present situation and obscuring its continuity with the past.¹³ On the other hand, some writers such as Gandhi are abhorred by the suggestion that ‘settler societies stand in the *same* relationship to colonialism as those societies which have experienced the full force and violence of colonial domination’.¹⁴ Of course, the relationship is not the same. However, Gandhi’s comment risks downplaying the violent dispossession that has occurred in Australia. In fact, the case of settler societies is an important issue for postcolonial theorists to consider because it highlights what are the appropriate bounds of postcolonial thought. As Johnston and Lawson make clear:

To overlook the particularity of the settler site, to collapse it into some larger and unspecified narrative of empire or metropolis, or even to exclude it from the field of the postcolonial altogether, is to engage in a strategic disavowal of the actual processes of colonization, a self-serving forgetting of the entangled agency of one’s history as a subject with that of the displaced Native/colonized subject.¹⁵

Thus, even though Australia does not fit easily into the colonial/postcolonial dichotomy but rather in a ‘semantic vacuum’,¹⁶ this is not in itself a reason for excluding the Australian situation from postcolonial critique.¹⁷ Moreover, the Australian situation is likely to give rise to interesting analyses, as there are varying degrees of settlement of the Australian continent. This can be grasped by noting the differences between the difficulties faced by the Ngarluma Yindjibarndi peoples in the *Daniels* litigation¹⁸ and the Yorta Yorta in the more ‘settled’ south¹⁹ who both first lodged native title claims in

(2000) 360, 361.

¹³ Irene Watson, ‘Indigenous Peoples’ Law-Ways: Survival against the Colonial State’ (1997) 8 *Australian Feminist Law Journal* 39, 56, as explained in Davies, above n 6, 278.

¹⁴ Gandhi, above n 8, 168.

¹⁵ Anna Johnson and Alan Lawson, above n 12, 20 (citations omitted).

¹⁶ Gandhi, above n 8, 168.

¹⁷ In any event, although the term ‘postcolonialism’ may have originally denoted ‘the study of the continuing effects of colonial power in post-independence societies’, it is now more widely accepted as characterising ‘the condition of all groups affected in one way or another by a past or present colonialism or imperialism’: Davies, above n 6, 278. Hence, the case of Australia, while problematic and somewhat marginalised within postcolonial theory, may nevertheless be regarded to be within the scope of the current body of postcolonial thought.

¹⁸ See *Daniel v State of Western Australia* [2003] FCA 666 (Unreported, Nicholson J, 3 July 2003) — the principle decision of the litigation — and *Daniel v State of Western Australia* [2005] FCA 536 (Unreported, Nicholson J, 2 May 2005) — the determination. Collectively they are referred to here as ‘*Daniels*’.

¹⁹ See *Members of the Yorta Yorta Aboriginal Community v Victoria* [1998] FCA 1606 (Unreported, Olney J, 18 December 1998); *Members of the Yorta Yorta Aboriginal Community v Victoria* (2001) 110 FCR 244; *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422 (referred to collectively as ‘Yorta Yorta’). There are a few postcolonial readings of these judgments: see especially Ben Golder, ‘Law, History, Colonialism: An Orientalist Reading of Australian Native Title Law’ (2004) 9 *Deakin Law*

1994.

On one hand, after waiting more than ten years to have their native title rights recognised, the Ngarluma Yindjibarndi achieved the first native title determination in the Pilbara in May 2005.²⁰ Although the area covered by the claim was relatively unsettled, it included areas rich in resources and infrastructure, particularly the Burrup Peninsula,²¹ which meant that the determination was heavily contested. Ultimately, the non-exclusive native title rights and interests found to exist, such as the right to hunt and gather food,²² were found to be subject to other interests and to extinguishment,²³ which has led some, including Bartlett, to conclude that the decision produced ‘very little other than a “paper declaration” of frozen rights over a small area of traditional land’.²⁴

On the other hand, after nearly a decade of litigation, the Yorta Yorta claim to areas of land and waters with recreational, industrial, forestry, farming and pastoral interests in northern Victoria and southern New South Wales did not even come close to receiving a ‘paper declaration’.²⁵ Rather, after first being denied access to their lands because of settlement, and years of legal and emotional turmoil,²⁶ at trial Olney J, whose much criticised judgment was

Review 41; Valerie Kerruish and Colin Perrin, ‘Awash in Colonialism’ (1999) 24 *Alternative Law Journal* 3. As Kerruish and Perrin point out, the Yorta Yorta claim ‘poses a particular challenge to the belief that native title is or ought to be confined to regions relatively isolated from colonisation’: *ibid* 3. This is a belief that has also been challenged by the recent Noongar determination in *Bennell v Western Australia* [2006] FCA 1243 (Unreported, Wilcox J, 19 September 2006) to areas of land in and around Perth: see, eg, Noel Pearson, ‘A Mighty Moral Victory’, *The Australian* (Sydney), 23 September 2006, 20.

²⁰ Following Nicholson J’s July 2003 decision in *Daniel v State of Western Australia* [2003] FCA 666 which is much cited for clarifying the principles set out in *Yorta Yorta* (2002) 214 CLR 422 and *Western Australia v Ward* (2002) 213 CLR 1: see, eg, Ulla Secher, ‘A Common Law Doctrine of Suspension of Native Title?: Judicial Interpretations of the “Reversion Expectant Argument” and the concept of “Operational Inconsistency” — Part 2’ (2005) 12 *Australian Property Law Journal* 1, 27–9. This decision ended with a draft determination that was finally settled in the May 2005 judgment following further submissions of the parties: *Daniel v State of Western Australia* [2005] FCA 536. For further explanation: see Richard Bartlett, ‘The Denial of Native Title to the Resource Provinces of the Burrup Peninsula and the Pilbara: *Daniel v State of Western Australia*’ (2003) 22 *Australian Resources and Energy Law Journal*, 453, 454.

²¹ Indeed an agreement was signed in 2003 over the Burrup Peninsula by the Ngarluma Yindjibarndi, the Wong-Goo-Tt-Oo people, and the Yaburara Mardudhunera, clearing the way for over \$6 billion worth of industrial developments: see National Native Title Tribunal, ‘First Native Title Determination in the Pilbara’ (Press Release, 2 May 2005).

²² A full list of the rights and interests can be found in *Daniel v State of Western Australia* [2005] FCA 536 at [6]–[7].

²³ As set out in the schedules to the May 2005 determination. See also Bartlett, above n 20, 454.

²⁴ Bartlett, *ibid* 453.

²⁵ See Kerruish and Perrin, above n 3.

²⁶ See Wayne Atkinson, “‘Not One Iota’ of Land Justice: Reflections on the Yorta Yorta Native Title Claim 1994–2001’ (2001) 5(6) *Indigenous Law Bulletin*, 19, 22 for an insider’s account of the toll of ‘these litigious and protracted proceedings’.

upheld on appeal to the Federal Court and the High Court,²⁷ found that:

...[t]he evidence does not support a finding that the descendants of the original inhabitants of the claimed land have occupied the land in the relevant sense since 1788 nor that they have continued to observe and acknowledge throughout that period, the traditional laws and customs in relation to land of their forebears.²⁸

This evidence, which included the written account of a pastoralist and a petition influenced by a mission owner, played an important role in denying the native title claimants any sort of legal recognition.²⁹ In contrast to the Ngarluma Yindjibarndi peoples, after ten years of struggle, the Yorta Yorta were only granted limited recognition in the form of a Victorian Government agreement acknowledging land management rights, which was a result of political rather than legal processes.³⁰

Consequently it is important to keep in mind that by suggesting that postcolonial insights may shed light on Australian legal processes, particularly native title, I am not asserting that experiences are uniform throughout the continent, nor that the Australian experience is the same as experiences elsewhere. Moreover, postcolonial theory is not without its limitations. Indeed, Western commentators, and lawyers for that matter,³¹ are prone to fall into the trap of speaking for the ‘subaltern’³² rather than letting the ‘subaltern speak’, as Spivak alluded to in her famous essay.³³ It is hoped, however, that the risks of appropriating and speaking for the ‘subaltern’ are minimised in this article, as

²⁷ For critique of *Yorta Yorta*, particularly Olney J’s judgment, see the articles referenced at above n.

²⁸ [1998] FCA 1606, [129].

²⁹ This evidence was principally that of Edward Curr in *Recollections of Squatting in Victoria* (1883) which Olney J found should be ‘accorded considerable weight’ (ibid [106]) and a ‘petition signed in 1881 by 42 Aboriginals’ (ibid [119]) which was used by Olney J to demonstrate that the group no longer had possession of any of their tribal lands and wished to change their mode of life (ibid [120]). There are many critiques written on Olney J’s over-reliance on this evidence: see especially Kerruish and Perrin, above n, 3 (referring to the ‘cruel twist... that the Yorta Yorta’s claim has been dismissed because of their evident failure to conform to a pastoralist’s view of what, in his eyes, they were’) and Golder, above n 50–1.

³⁰ Jess Hogan and Fergus Shiel, ‘Historic Yorta Yorta Deal Signed’, *The Age* (Melbourne), June 11 2004, 9. Yorta Yorta governing council chairman Lee Joachim was quoted by Hogan and Shiel as stating that the agreement was a ‘small but significant step towards true reconciliation’.

³¹ The position of lawyers is problematic as they are a part of the colonial system, and thus must deal with the significant degree of antagonism that native title claimants may feel towards them, while at the same time they are required to fulfil the role of advocate. Just as the postcolonial critic is apt to misrepresent the lived realities of the ‘subaltern’, lawyers might misrepresent their clients since they do not understand the system of values to which their clients adhere.

³² The term ‘subaltern’ derives from the work of Gramsci and is used to signify those who do not occupy dominant, elite or hegemonic positions of power: see generally, Antonio Gramsci, *The Prison Notebooks* (first published 1949, 1992 ed).

³³ Spivak, Gayatri Spivak, ‘Can the “Subaltern” Speak’ in Cary Nelson and Lawrence Grossberg (eds) *Marxism and the Interpretation of Culture* (1988) 271.

postcolonial theory is being used to comprehend the workings of our native title system and not to study and objectify the Indigenous ‘other’. Instead, the purpose of this article is to demonstrate that benefit can be derived through adopting a new way of thinking in order to probe colonial assumptions and processes.

III Colonisation Anew

Just as post-independence societies now battle with the continuing impact of colonialism — as colonialism is believed to continue in the minds of the people and in the institutions which were imposed in the process of colonisation³⁴ — Australian society must come to grips with present colonial realities. Despite the rejection of the legal fiction of *terra nullius* in *Mabo*,³⁵ the system of native title that has subsequently developed remains tied to colonial ways of thinking and the restraints of our legal system. Indeed, the legacy of *terra nullius* is far from dead. As Watson makes clear:

... [t]erra nullius has not stopped; the violations of our law have continued, the ecological destruction of the earth our mother continues with a vengeance, we are still struggling to return to the land, and the assimilator-integrator model is still being forced upon us.³⁶

Moreover, it has become increasingly clear that *terra nullius* has been largely replaced by the ‘tide of history’ euphemism. Justice Brennan’s remark in *Mabo* that ‘when the tide of history has washed away any real acknowledgment of traditional law and any real observance of traditional customs, the foundation of native title has ceased’³⁷ has since been (mis)used, particularly in *Yorta Yorta*, to explain why Indigenous groups do not have legal recourse to native title rights and interests.³⁸ In essence the colonial construct of *terra nullius* has taken on a new form, just as colonialism has survived in new guises in post-independence societies.

Judicial treatment of the requirement of ‘continuity of acknowledgment and observance of traditional law’³⁹ provides a pertinent example of the way in which native title law can result in renewed colonialism. While the ‘traditional’ element is said to ‘refer to the body of law and customs acknowledged and observed by the ancestors of the claimants at the time of sovereignty’,⁴⁰ the ‘notion of tradition and cultural continuity’ that has prevailed is ‘unnecessarily

³⁴ Davies, above n 6, 278. As Nandy explains, ‘colonialism colonises minds in addition to bodies’: Ashis Nandy, *The Intimate Enemy: Loss and Recovery of Self* (1983) xi.

³⁵ (1992) 175 CLR 1.

³⁶ Watson, above n 13, 48. See also at 47.

³⁷ (1992) 175 CLR 1, 60.

³⁸ See, eg, *Members of the Yorta Yorta Aboriginal Community v Victoria* [1998] FCA1606, 66, 126, 129. See Golder, above n, 48–9; Kerruish and Perrin, above n 4.

³⁹ See eg, *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, 446, 456–7 (per Gleeson CJ, Gummow and Hayne JJ).

⁴⁰ *Ibid* 456.

narrow' and difficult to prove.⁴¹ Furthermore, in cases such as *Yorta Yorta*, the very reason why traditional connections were interrupted was due to the dispossession of Aboriginal people as a result of colonisation. To put this down to the 'tide of history',⁴² or to disregard why acknowledgement and observance has stopped,⁴³ is to bring about a double colonisation.⁴⁴ However, many judges appear to have avoided this conclusion by adopting an artificial separation between the present and the past. As Kerruish and Perrin explain,

The metaphor of the tide of history conveys the legal meaning of the colonisation of Australia. Colonialisation is in the past: a natural and inevitable force. The law of native title, on the other hand, is in a present that, while absolved from any responsibility for that which has been washed away, acknowledges the possibility of survival.⁴⁵

However, despite the rhetoric that prevails in many judicial pronouncements of the law, especially demonstrated through the use of the past tense,⁴⁶ colonisation is not only something of the past; colonisation of the Indigenous 'other' continues in the present.⁴⁷

The way in which native title is conceptualised is also a matter of concern. In Australia, in contrast to the more holistic concept of dominium, which gives rise to an interest or title to land itself,⁴⁸ native title is often described as a 'bundle of rights' and is consequently susceptible to piecemeal extinguishment as each individual right or stick of the bundle may be extinguished one by one.⁴⁹ Thus, as Bartlett points out, by denying native title

41 Kirsten Anker, 'Law in the Present Tense: Tradition and Cultural Continuity in *Members of the Yorta Yorta Aboriginal Community v Victoria* (2004) 28 *Melbourne University Law Review* 1, 1.

42 See *Members of the Yorta Yorta Aboriginal Community v Victoria* [1998] FCA 1606 (Unreported, Olney J, 18 December 1998) [66], [126], [129].

43 See eg, *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, 457 (per Gleeson CJ, Gummow and Hayne JJ). Cf the joint judgment of Kirby and Gaudron JJ in which they demonstrated a more nuanced understanding of the effects of colonisation: at 465. See also Golder, above n 58.

44 As Godden explains, '[i]t is a force that denies the attribution of responsibility to any individual or institution': Lee Godden, 'Awash in a Tide of History: "Responsibility" for Cultural Violence – A Comparative Analysis of *Nulyrimma* and *Voss*' in Andrew Palmer and Peter Rush (eds), *An Aesthetics of Law and Culture: Text, Images, Screens* (2004) 203, 204.

45 Kerruish and Perrin, above n 4.

46 See eg, *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, 471, where Callinan J explains that the claimants had suffered 'past dispossession' and 'past exploitation' and yet this dispossession continues into the present. See Golder, above n, 58.

47 See also Golder, *ibid* 49.

48 This approach has been adopted in Canada: see *Delgamuukw v British Columbia* (1997) 153 DLR (4th) 193 and the discussion in Patricia Lane, Patricia Lane, 'Native Title — The End of Property As We Know It?' (2000) 8 *Australian Property Law Journal* 1, 33.

49 See particularly *Western Australia v Ward* (2002) 213 CLR 1, 89–95 (per Gleeson CJ, Gaudron, Gummow and Hayne JJ) and the commentary provided in Katy Barnett, 'Western Australia v Ward — One Step Forward and Two Steps Back: Native Title and the Bundle of Rights Analysis' (2000) 24 *Melbourne University Law Review* 462.

claimants interests in land on a par with other property rights, the system of native title operates so as to bring about the denial of equality, full respect and the application of universal principles.⁵⁰

In addition to the problem of susceptibility to extinguishment, the sometimes insurmountable and restrictive standards of proof are cause for concern. Even if native title claimant groups have not been dispossessed of their land, they still must conform to the judiciary's idea of a pre-colonisation normative system.⁵¹ Native title claimants are judged on whether they are sufficiently 'native'⁵² according to criteria such as tradition and cultural continuity.⁵³ They are also denied the opportunity to narrate their story on their own terms,⁵⁴ which is accentuated by the operation of the rules of evidence, particularly the importance placed on written evidence as can be demonstrated by the (over)reliance by the court on the accounts of a pastoralist in *Yorta Yorta*,⁵⁵ and the operation of the hearsay rule.⁵⁶ As Atkinson explains, the process involves 'the subjugation of our voices to those of outsiders'.⁵⁷ Experts such as anthropologists present evidence, and 'in their hunting and gathering for the authentic native [they] construct identities and favoured "informants"'.⁵⁸ Similarly, historians construct an authorised view of indigenous pasts, which leads one not only to question whether the 'subaltern' can speak but also to query 'who speaks for [I]ndigenous pasts?'.⁵⁹ To adopt Moreton-Robinson's terminology: 'Aborigines are yet again represented as objects – as the "known" and not as "knowers"'.⁶⁰

Despite the rhetoric that native title law is at the intersection of common law and Aboriginal customary law,⁶¹ it is the coloniser's system that prevails.

50 Richard Bartlett, 'Humpies not Houses Or The Denial of Native Title: A Comparative Assessment of Australia's Museum Mentality' (2003) 10 *Australian Property Law Journal* 1, 3.

51 Lisa Strelein, '*Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58 (12 December 2002) – Comment' (2003) 2(21) *Land, Rights, Laws: Issues of Native Title* 1, 6. See also Golder, above n 59.

52 Golder, *ibid.*

53 See above n 41–6 and accompanying text.

54 Golder, above n 56.

55 See above n 29 and accompanying text.

56 The bias against oral evidence was also evident in *Yorta Yorta*, where Olney J found that 'less weight should be accorded to' much of the claimants' evidence 'based on oral tradition': at 106. For a critique of this approach see Golder, above n, 50–1; Kerruish and Perrin, above n, 5.

57 Wayne Atkinson, "'Not One Iota" of Land Justice: Reflections on the *Yorta Yorta* Native Title Claim 1994–2001' (2001) 5(6) *Indigenous Law Bulletin* 19, 20.

58 Irene Watson quoted in Aileen Moreton-Robinson, 'Whiteness, Epistemology and Indigenous Representation' in Aileen Moreton-Robinson (ed), *Whitening Race: Essays in Social and Cultural Criticism* (2004) 75, 75.

59 To paraphrase Chakrabarty. See Dipesh Chakrabarty, 'Postcoloniality and the Artifice of History: Who Speaks for "Indian" Pasts?' (1992) 37 *Representations* 1.

60 Moreton-Robinson, above n 58, 75.

61 See, eg, *Fejo v Northern Territory* (1998) 195 CLR 96, 128 (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ); *Commonwealth v Yarmirr* (2001) 208 CLR 1,

Even consideration of the ‘[I]ndigenous element’⁶² is approached and formulated from a perspective alien to Indigenous culture. As Tony Lee makes pertinently clear: ‘[t]he High Court and General Court decisions and judgments are what the white judges decide native title is—not what Aboriginal people believe it is’.⁶³ Instead of recognising Aboriginal customary law, Aboriginal rights and interests are appropriated to fit within the colonial legal system.

IV The Native Title Process

It was suggested above that not only do colonial ways of thinking continue to permeate our legal system, but that the very workings of this system create new forms of colonialism. The impact of the processes involved in bringing together a native title application, particularly the repeated intrusions into the lives of Indigenous people, provide a further example. From the process of registration to the often distant goal of receiving a determination, legal requirements are laden with hidden implications. Whether it be the effect of setting in stone aspects of group membership that were by their very nature fluid and changing, or as result of the limitations of legal discourse in articulating the claims of the oppressed, postcolonial theory can highlight this oft missed dimension.

A Registration

A native title claim begins with the lodgement of an application in the Federal Court.⁶⁴ Once this procedural hurdle is overcome, the application may be eligible for registration in order to access interim rights.⁶⁵ However, to gain the right to negotiate and access to other rights dependent upon registration, the native title claimants must pass the registration test. As there are conditions that the claimants must meet,⁶⁶ claimants are required to ‘toe the line’ and demonstrate that they meet the requirements set by those in a position of power.

As explained in a guide produced by the National Native Title Tribunal, ‘the Registrar must be satisfied that the persons in the native title claim group are named, or are described sufficiently clearly for it to be ascertained whether

37 (Gleeson CJ, Gaudron, Gummow and Hayne JJ). On this ‘recognition space’ see Noel Pearson, ‘The Concept of Native Title at Common Law’ in Galarrwuy Yunupingu (ed), *Our Land is Our Life: Land Rights - Past, Present and Future* (1997) 150. See also Lisa Strelein, ‘Conceptualising Native Title’ (2001) 23 *Sydney Law Review* 95, 98.

62 To adopt the term used in David Ritter and Francis Flanagan, ‘Lawyers and Rats’ in Sandy Toussaint (ed), *Crossing Boundaries* (2003) 128, 136.

63 Tony Lee, ‘The Natives are Restless’, in Christine Choo and Shawn Hollbach (eds), *History and Native Title* (2003) 29, 35. This is also evident in the exclusion of cultural knowledge from the scope of native title.

64 *Native Title Act 1993* (Cth) pt 3.

65 *Native Title Act 1993* (Cth) pt 7.

66 *Native Title Act 1993* (Cth) ss 190B–C.

any particular person is *in*, or *not in*, that group'.⁶⁷ Even at this early stage in the process, complex issues of inclusion/exclusion arise. There is no room for ambiguity. Instead, groups are required to be clearly delineated and named.⁶⁸ Where overlapping claims are involved, a claimant can only be on one claim.⁶⁹ Thus, while a claimant's mother may be Innawonga⁷⁰ and father Jurruru,⁷¹ the claimant cannot be on both claims as they overlap. As a result, the requirements are somewhat divorced from the realities of group membership in some parts of the continent.

Group membership and tribal boundaries are fluid and changing and have always been fluid and changing. As Lee J pointed out in *Ward v Western Australia*, '[e]xigencies of the Aboriginal way of life neither required, nor facilitated, establishment of precise boundaries for territories occupied by Aboriginal societies'.⁷² If one was to imagine two adjacent tribal groups to be represented by two overlapping circles, given intermarriage, the area of overlap would at some points in time be predominantly Jurruru and at other points in time, predominantly Innawonga. In addition, as Reilly explains, Indigenous boundaries reflect a relationship to the ground, and therefore shift as that relationship changes.⁷³ However, ...

...[u]nder the native title claims process as it is currently conceived, there is no room for contesting the spatial dimensions of native title ... Once on the map, Indigenous relationships to land are reduced to a form that law can read and assess in its own terms.⁷⁴

In the past, membership and boundaries were not something that was quantified and set in stone. Yet under the system of native title they are required to be reduced to such a material form.

⁶⁷ Mary Edmunds and Diane Smith, *Members' Guide to Mediation and Agreement-Making under the Native Title Act* (2000) National Native Title Tribunal, 8 <http://www.nntt.gov.au/metacard/files/Mediation_guide/mediation_guide.pdf> at 20 October 2006.

⁶⁸ Indeed, in the case of the Wong-Goo-TT-OO, the name of the group is not a traditional name but was adopted for the purposes of the native title system: *Daniel v State of Western Australia* [2003] FCA 666, [50]. The effect of the system may have on individual and group identity is likely to prove considerable.

⁶⁹ *Native Title Act 1993* (Cth) s 190C(3).

⁷⁰ One of the Innawonga claims is WC98/69, others include Gobarwarrah Minduarra Yinhawanga (WC97/43) and Innawonga, Bunjima and Niapali (WC96/61): *Pilbara: Native Title Applications & Determinations Area* (2005) National Native Title Tribunal, <http://www.nntt.gov.au/publications/data/files/Pilbara_NTCA_Schedule.pdf> at 20 October 2006.

⁷¹ WC00/8: see *ibid*.

⁷² (1998) 159 ALR 483, 545. See Edmunds and Smith, above n 67, 8–9.

⁷³ Alexander Reilly, 'Cartography, Property and the Aesthetics of Place' in Andrew Palmer and Peter Rush (eds), *An Aesthetics of Law and Culture: Text, Images, Screens* (2004) 221, 234.

⁷⁴ *Ibid* 236.

B The Right to Negotiate

Once the conditions of the registration test are satisfied, the right to negotiate with respect to certain proposed future developments within the claim boundaries arises.⁷⁵ In addition, even when not legally required to do so, some mining companies, such as Rio Tinto, have a policy of developing relationships with Indigenous groups.⁷⁶ Such trends indicate that even though native title rights have been slowly diminished and have represented ‘a hope disillusioned; an opportunity lost’,⁷⁷ there is ‘another story – of negotiation, of agreement-making, of changed approaches, of activity beyond the strict requirements of native title law’.⁷⁸ However, this story still leaves much to be desired. As Tehan makes clear, Indigenous participation in negotiations is generally reduced to one of process, rather than involving substantive agreement about access and use of resources.⁷⁹

Even though consultation may be empowering, it is far from ensuring a meaningful degree of self-determination, and disparities in bargaining power are also likely to distort the outcomes achieved.⁸⁰ There is a risk that ‘[a]greements may fail to deliver promised benefits because of a lack of resources or a failure to address implementation issues, or because the terms have been poorly negotiated’.⁸¹ As far as employment and training are concerned, this may be because flexible arrangements are not envisaged or due

⁷⁵ See *Native Title Act 1993* (Cth) s 26(1). Note that there are some future acts to which the right to negotiate does not apply, for example for mining infrastructure: s 24MD(6B). See Edmunds and Smith, above n 67, 59–60.

⁷⁶ According to Hamersley Iron, a subsidiary of Rio Tinto active in the Pilbara, ‘Rio Tinto’s Aboriginal and Torres Strait Islander policy requires the consideration of Aboriginal people’s issues in all development and exploration in Australia’: *Indigenous Relations* (2005) Hamersley Iron <http://www.hamersleyiron.com/sustain_ind.asp> at 20 October 2006. Cf *Pilbara Aboriginal Meeting Condemns Rio Tinto* (2005) Mines & Communities Website <<http://www.minesandcommunities.org/Action/press639.htm>> at 20 October 2006. Note that it is only those native title rights and interests which have been determined or registered via the registration test that must be the subject of good faith negotiation: *Native Title Act 1993* (Cth) ss 30(3), 31(2), 190B(6). See 26(1). Edmunds and Smith, *ibid* 63.

⁷⁷ 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, 564.

⁷⁸ *Ibid*.

⁷⁹ *Ibid* 570.

⁸⁰ This lack of self-determination is also evident in the lack of Indigenous representation and consultation in the current review of the *Native Title Act*: see Law Council of Australia, ‘Technical Amendments to the *Native Title Act 1993* (Cth)’, Submission to the Legal Services and Native Title Division, Commonwealth Attorney General’s Department, 3 February 2006, [2] available from <<http://www.lawcouncil.asn.au/sublist.html?year=2006>> at 20 October 2006. See also Hannah McGlade, ‘Not Invited to the Negotiating Table’: The *Native Title Amendment Act 1998* (Cth) and Indigenous Peoples Right to Political Participation and Self Determination under International Law’ (2000) 1 *Balayi* 97 on the lack of indigenous representation in previous reviews.

⁸¹ Tehan, above n 77, 564–5.

to a failure to address education issues. In many cases the standards set have meant that the promise to provide employment is rendered meaningless. The irony also is that groups without resources on their land are likely to lose out. Although their land may be less likely to be permanently damaged, in the case of the Pilbara, where iron ore is transported across large distances to be exported eventually, the reality is ‘the more rail, the more money’.

It has become increasingly clear that Indigenous Australians have been denied a position of empowerment *vis-à-vis* their land. Whilst groups in post-independence countries have battled to develop a meaningful degree of self-determination, in the face of a corrupt elite, remaining colonial processes and globalisation,⁸² post *terra nullius*, Indigenous Australians must continue to fight in order to have a meaningful say over what occurs on their land, while finding themselves up against more powerful well-resourced parties.⁸³

The belief that the native title process, especially the consultation of claimant groups pursuant to the future acts regime, gives rise to a degree of self-determination, or even a de facto treaty making process,⁸⁴ needs to be critically assessed. While the benefits that have already resulted from the future acts regime should not be downplayed — particularly as Indigenous groups are consulted in circumstances which may have never occurred before — there is still much ground to be covered. As Jonas explains:

... the native title system ... is not based on equality and non-discrimination. It does not facilitate the full and effective participation of indigenous people ... Only when the native title system does provide real equality of opportunity — ranging from adequate, and equitable, resourcing of native title representatives through to the ability to negotiate over economic and development opportunities through to processes which facilitate indigenous governance rather than imposed management structures — can it aim to fulfill this broader role.⁸⁵

82 Indeed, Fanon warned against problems such as these in Franz Fanon, *Wretched of the Earth* (first published 1963, 1968 ed). Globalisation has received much attention in postcolonial work as a new form of imperialism: see, eg, Simon Gikandi, ‘Globalization and the Claims of the Postcoloniality’ (2001) 100 *The South Atlantic Quarterly* 627.

83 This is also accentuated by the different funding and accountability requirements for Native Title Representative Bodies (‘NTRBs’) and respondents. Indeed, as Aboriginal and Torres Strait Social Justice Commissioner, Tom Calma pointed out in his recent submission to the Claims Resolution Review ‘from 1998-1999 to 2002-2003 NTRBs proportion of funding has declined, while funding to other areas of the system including respondents, the NNTT and the Federal Court have increased’: ‘Review of the Claims Resolution Process in the Native Title System’, Submission to the Legal Services and Native Title Division, Commonwealth Attorney General’s Department, available at:

<http://www.hreoc.gov.au/Social_Justice/submissions/claims_resolution_review_process.htm> at 20 October 2006.

84 Cf William Jonas, ‘Reflections on the History of Indigenous People’s Struggle for Human Rights in Australia — What Role Could a Treaty Play’ (Paper presented at the Treaty: Advancing Reconciliation Conference, Perth, 27 June 2002) available at <<http://www.treaty.murdoch.edu.au/Conference%20Papers/Dr%20William%20Jonas.htm>> at 20 October 2006.

85 Jonas, above n 84.

In other words, '[a]lthough the rhetoric of native title is one of advancing the "self-determination" of Indigenous people, the practice suggests the contrary'.⁸⁶ Despite the benefits of negotiations and agreement making, Aboriginal people still lack the necessary internal sovereignty and power to govern their own affairs.⁸⁷ There has not been an adequate opportunity for the 'subaltern' Indigenous classes to 'speak', to be listened to, or to determine their own affairs. Instead, the coloniser's way of doing things is imposed on the colonised. Even within working group meetings which are believed to involve an admirable degree of Indigenous participation,⁸⁸ something so fundamental as Indigenous forms of decision-making are not meaningfully encompassed.

Rather, the native title system involves the subsumption of the Indigenous 'other' under the legal processes of the powerful. Not only do the outcomes of negotiations often fail to bring about meaningful change; final determinations of native title rights and interests may also disappoint raised hopes. They bring about the pigeonholing of Indigenous custom into a list of determined 'native title rights and interests'.

C Determinations

While obtaining a determination is the ultimate goal of the native title process, the nature of the road that must be followed in order to achieve a determination, and the inadequacies of what is actually achieved, needs to be kept in mind. Even if a consent determination is handed down by the court on the basis of an agreement reached between the native title claimants, the Government and interested parties, the process involved has parallels with what occurs at trial – as the Government will want to satisfy itself that all the requirements are met. Thus, problems of voice and representation are not avoided as experts are still required to 'speak for' the Indigenous claimants.

Often determinations involve a list of rights and interests that do not confer upon the native title holders much more than an articulation of the rights and interests that they had already been exercising, such as the right to hunt and gather food. To quote Ritter and Flanagan, a determination such as *Clarrie Smith*⁸⁹ (or *Daniels*⁹⁰ for that matter) is 'exactly the kind of result that the

⁸⁶ Ritter and Flanagan, above n 62, 137.

⁸⁷ With the abolition of the Aboriginal and Torres Strait Islander Commission ('ATSIC') in 2004 this is even more obvious. For a discussion of the challenges brought about by the abolition of ATSIC see Tom Calma, 'The Human Face of Native Title: Challenges and Opportunities in Times of Change' (Paper presented at the Native Title Conference 2005, Coffs Harbour, New South Wales, 1–3 June 2005) available at <http://www.humanrights.gov.au/speeches/social_justice/NTRBConference2005.html> at 20 October 2006.

⁸⁸ See Anthony Dann and Simon Hawkins, 'Working Group Service Delivery Model' (Paper presented at the Native Title Conference 2005, Coffs Harbour, New South Wales, 1–3 June 2005) abstract available at <<http://www.aiatsis.gov.au/rsrch/ntru/conf2005/speakers/speakers.html>> at 1 November 2005.

⁸⁹ *Clarrie Smith v Western Australia* (2000) 98 FCR 358 ('*Clarrie Smith*').

colonising power intended the native title process to achieve'.⁹¹ The quantification of native title rights and interests could be likened to a neat labelling or categorisation in white man's terms of the unknown 'indigenous element'⁹² which we can then control: '[t]hese rights are neatly quantified and are entirely subject to a "workable" and "timely" process that enables them to be extinguished in the future, should it become desirable to do so.'⁹³ This involves colonising the Indigene but under a new name. That is to say, it is 'a subsumption of Aboriginal and Torres Strait Islander being under the commodity form of Anglo-Australian property law'.⁹⁴ However, compared to other forms of property, native title does not leave the same permanent marking of the land.⁹⁵ Consequently, a determination of native title rights must be viewed objectively; '[n]ative title rights must be seen as what they are: limited, contingent and vulnerable.'⁹⁶ A determination 'cannot reconnect Aboriginal people with the land in some form of magical reconstitution'⁹⁷ and it cannot remedy the displacement of Indigenous people from their lands, which has resulted in alienation and disempowerment.⁹⁸

Furthermore, in obtaining a determination groups may actually lose major rights, particularly the right to negotiate.⁹⁹ All but two of the registered claimant groups in the Pilbara have access to the interim right to negotiate. The Ngarluma and Injibarndi peoples have had their native title rights determined.¹⁰⁰ Once a determination is handed down by the court, the native title holders lose the interim right to negotiate. They will not have the right to negotiate with respect to future developments on their land unless this right is one of the rights and interests recognised by the court.¹⁰¹ Thus, any empowerment that may have accompanied the process of being consulted in the past may be lost.

V Where to Now?

Many of the implications of the native title process have not yet

⁹⁰ *Daniel v State of Western Australia* [2003] FCA 666 (Unreported, Nicholson J, 3 July 2003); *Daniel v State of Western Australia* [2005] FCA 536 (Unreported, Nicholson J, 2 May 2005).

⁹¹ Ritter and Flanagan, above n 62, 137.

⁹² To again adopt the term used in *ibid* 136.

⁹³ *Ibid* 137.

⁹⁴ Valerie Kerruish and Jeannine Purdy, 'He "Look" Honest—Big White Thief' (1998) 4(1) *Law, Text, Culture: In the Wake of Terra Nullius* 146, 163 cited in *ibid* 137.

⁹⁵ Lee Godden, 'Grounding Law as Cultural Memory: A 'Proper' Account of Property and Native Title in Australian Law and Land' (2003) 19 *Australian Feminist Law Journal* 61, 79.

⁹⁶ Ritter and Flanagan, above n 62, 137.

⁹⁷ *Ibid*.

⁹⁸ *Ibid*.

⁹⁹ *Ibid* 136.

¹⁰⁰ *Daniel v State of Western Australia* [2005] FCA 536 (Unreported, Nicholson J, 2 May 2005).

¹⁰¹ See generally Ritter and Flanagan, above n 62, 136.

completely surfaced. The full impact of the intrusions involved may also be impossible to quantify. In addition, some aspects of the process, which are often considered in a positive light by outsiders, may also have drastic long-term effects. For example, the fact that elements of Indigenous culture are now recorded in judgments for all time to come is often thought, sometimes in a patronising way, to be a positive outcome of the native title process. However, as the Northern Land Council explains, '[t]he intrusion of documentary records into what has previously been a record only in the minds of people is likely to have a powerful and distorting effect'.¹⁰² One can only guess what the full impact will be.

It is hoped that if lawyers and other parties are aware of the colonising effect of native title law, they will be better equipped to help native title claimants. Postcolonial critical theory also enables lawyers to gain a critical awareness of their role and of the workings of the system. However, as Chakrabarty makes clear, the problem is that 'the phenomenon of orientalism does not disappear simply because some of us have now attained a critical awareness of it'.¹⁰³ Thus, while the need for awareness should be advocated, its limitations should also be kept in mind. Nevertheless, without awareness there can be no hope for change. When one stands on the privileged side, as lawyers and judges invariably do, it is easy to be blind to the realities of the 'other'.¹⁰⁴ As postcolonialists have pointed out, these parties are often unaware the Australian native title process 'is not removed from the history of colonialism' but is a fundamental 'part of the contemporary presence of colonialism'.¹⁰⁵ In order to break with our colonial past, to as much an extent as possible, we must first recognise this fact. Only then can we hope to remedy the mistakes of the past by acknowledging the full entitlement of Indigenous groups to their property rights and rights of self-determination.

VI Conclusion

Although the applicability of postcolonial theory to Australia is often questioned, the current Australian legal discipline could benefit from a framework through which to view Australia's past and the impact that colonial processes will continue to have on our legal system in the future. Given that Australia is a 'settler society', there has not been as clear a break with the colonial past as in post-independence societies. Though, there has been an attempt to bring about the death of *terra nullius*. Unfortunately, however, the implications of this colonial fallacy continue. As an examination of the processes of registration, negotiations and determinations demonstrates, the lived realities and aspirations of Indigenous peoples are still being obscured

¹⁰² Cited in David Ritchie, 'Constructions of Aboriginal Tradition for Public Purpose' in Sandy Toussaint and Jim Taylor (eds), *Applied Anthropology in Australasia* (1999) 255, 255.

¹⁰³ Chakrabarty, above n 59, 1–2.

¹⁰⁴ After all, 'law is made by those on the riverbank and not those who are drowning', to quote Ritter and Flanagan in above n 62, 131.

¹⁰⁵ Golder, above n 52.

and frustrated. If lawyers to the process fail to understand the colonial implications of the system, and are ignorant of colonial dynamics, they will not be best placed to advise their clients. A false view of the process will prevail if the theoretical void is not filled, and parties to the process with such a distorted view will risk doing more harm than good. While creating a new sense of awareness of the continuing legacy of colonialism in our native title processes is but one step, it is a necessary step that must be taken in order to work together to create a more ideal future trajectory for our law.