# *Critique: A Historian said Terra Nullius was an invention - I'm a blackfella lawyer who has serious concerns about his lack of understanding and knowledge of the common law*

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Michael Connor ends his polemic *The Invention of Terra Nullius* stating 'some tactful forgetting is necessary'.[1] Might I suggest we start with his book—and one doesn't really need to be tactful — it should be seen merely as a history text dealing with issues of law which allows the author to take to task other historians such as Henry Reynolds. He refers, in his own words, 'usually dismissively, to the "old historians" ... they all share a frozen moral outlook ... their snobbery, their self-flattering moral vanity, their hunger for power, their fear of criticism, their elitism, etc'.[2]

It should be interesting the history bun-fight that ensues, between Connor and those historians on the other side of the divide; methinks Connor is like a lot of historians,

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1 Michael Connor, *The Invention of Terra Nullius* (2005) 330.

2 Ibid 41.

endeavouring to forge out his own little historical niche and what better way than to be controversial and take issue with other historians. As Connor says of one of Reynolds' books: '[t]he problem with *The Law of the Land* is — everything'.[3] A flippant remark and one that could be just as easily addressed to Connor's own book.

*The Invention of Terra Nullius* reads, in part, disturbingly like a history text from the 1950s. I say disturbing because that was the era when I sat in classrooms and was taught that Captain Cook discovered Australia. I had serious reservations about this 'discovery' concept; as a blackfella I wondered how we could have been discovered because I didn't realise that we were ever lost. I certainly knew my country and my 'mob'. The first white squatter in the Mary Valley in the 1860s took our country to graze sheep and cattle, but us blackfellas never got a cracker for it (of course, this isn't written down so it can't be true, if one subscribes to the theories of 'dissident historian' Keith Windschuttle).[4]

But even works such as this have redeeming features. I thought maybe I could use Connor's book to show my law students that legal reasoning is not determined. When I have to explain those Latin terms *ratio decidendi* (the reason for the decision) and *obiter dicta* (judicial observations that do not form part of the reasoning of a case) I can expand on the notion of *terra nullius* as enunciated by the author and explain how correct legal reasoning and precedent led to the recognition of the pre-existing rights of the original inhabitants of Australia.

Connor claims, '[i]n reality Australia was discovered by Captain Cook who formally took possession in an act of annexation'.[5] As a lawyer I agree that annexation as a matter

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3 Ibid 45.

4 Ibid 43. It should be noted that Connor first acknowledges Windschuttle as his publisher (page 6); yet later (page 234) he claims his publisher is Michael Duffy.

5 Ibid 199.

of (English) law took place at Possession Island in Cape York on 22 August 1770. It's an interesting concept: whack a flag into a piece of ground and claim the whole bloody lot for someone on the other side of the world. (I wonder what the blackfellas out in the desert thought, on that day in August. They probably jumped for joy: 'Brother, we are now British citizens, let's go to England we can live in squalor and get a job in the coal mines!')

Cook also carried instructions from the British Admiralty dated 1768:

> You are with the consent of the natives to take possession of convenient situations in the country in the name of the King of Great Britain, or, if you find the country uninhabited take possession for His Majesty by setting up proper marks and inscriptions as first discoverers and possessors.[6]

It is patently absurd that for the next 18 odd years the original inhabitants of this continent for 40,000 years were (unbeknown to them) British citizens. I can just imagine on the 26 January 1788 a bunch of blackfellas sitting on the Heads leading into what is now known as Sydney Harbour, looking at each other quizzically as the first fleet sails in and saying ruefully, 'I've got a real bad feeling about this, bunj,[7] there goes the neighbourhood'.

And the neighbourhood did go. It passed onto Captain Arthur Phillip and the Admiralty instructions of 1768 were conveniently ignored until 3 June 1992 when we blackfellas were finally given our rightful and equal place in Australia. I did say to my father at the time, 'we've been written back into history'. But then I can't substantiate this as my father passed away in his 80th year in 1997 and I didn't write it down (again I am slipped up by Keith Windschuttle).

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[6] Heather McRae, Indigenous Legal Issues: Commentary and Materials (2003, 3rd ed) 19.

[7] "Bunj" means "brother".

But let us deal with the written word and *The Invention of Terra Nullius*. Connor relies on Kent McNeil, a Canadian academic: 'McNeil seemed to offer a legalistic framework for both plaintiffs and judges to discover Aboriginal native title'.[8] Ah yes, the 'discover' word again. May I point out that in courts of law, legal argument does take place from time-to-time, counsel does have to persuade the judges to accept their point of view and they do draw from other cases as well as the writings of learned academics, scholars and so forth? Connor himself has cited the works of eminent legal scholars such as De Vattel, Blackstone, Wolffe *et al* throughout his book. McNeil points out in his book *Common Law Aboriginal Title* that when European nations were colonising the world in the late 18th century,

> The European powers sought to fortify shaky claims by whatever means they could, including assertions of discovery, symbolic acts of possession, papal bulls, the signing of treaties ... and outright conquest by force of arms.[9]

One gets the impression when reading the works of legal scholars from bygone centuries there is a distinct flavour of Eurocentric notions of racial superiority (I probably have a bit more of an idea of what racism and racist attitudes are, certainly more so than most people). Probably more telling is the comment by Jack Woodward in his polemic on Native Title Law,

> that the process whereby aboriginal people became subjects of the Crown does not appear to be founded in the consent of the governed, in contrast to the process by which the Crown may legally acquire their lands. In contrast, the answer given in American law is that there is simply no explanation, beyond the 'pretensions' of the European powers that came to North America. [10]

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[8] Connor, above n 1, 218-19.

[9] Kent McNeil, *Common Law Aboriginal Title* (1989) 110.

[10] Jack Woodward, *Native Title Law* (1990) 144.

The following quote is from an American legal case, *Worcester v Georgia* (this case was cited by Connor in response to a point raised by a barrister in the *Mabo* litigation). In the case, Chief Justice Marshall casts doubt on the then accepted 'discovery doctrine'; that is, that discovery gave title to the discoverer:

> Did these adventurers, by sailing along the coast and occasionally landing on it, acquire for the several governments to whom they belonged, or by whom they were commissioned, a rightful property in the soil ... or rightful dominion over the numerous people who occupied it ... But power, war, conquest give rights, which, after possession, are conceded by the world, and which can never be controverted by those on whom they descend. We proceed then, to the actual state of things, having glanced at their origin, because holding it in our recollection might shed some light on existing pretensions.[11]

This decision from the American Supreme Court (the US equivalent of the High Court) and numerous others from different colonised countries were discussed in the *Mabo*[12] decision which alluded to the pre-existing rights of the original inhabitants. The earliest reference was to the *Case of Tanistry* (1608) which sprang from the British conquest of Ireland. It was held that the British Crown was not in actual possession of the land by virtue of the conquest. However, I believe that the Irish are white. If they were black, who is to know what would have happened.

As well as the above cases, there are numerous others from common law jurisdictions that deal with the rights of the original inhabitants of countries colonised by European powers as far back as the fifteenth century.

In *Delgamuukw v British Columbia*,[13] Lamer CJ held that

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[11] (1832) 31 US 530, 543 (Marshall CJ). This decision was handed down in 1832, only 44 years after Captain Phillip arrived in Australia.

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

[13] [1997] 3 SCR 1010.

Aboriginal title in Canada arises from the occupation of land by indigenous inhabitants prior to the acquisition of sovereignty. It had originally been thought that the source of aboriginal title in Canada was the Royal Proclamation, in 1763.[14] However it is now clear that although aboriginal title was recognised by the Proclamation, it arises from the prior occupation of Canada by aboriginal peoples.

In a New Zealand case, *Te Runanganui o Te Ika Whenua Inc Society v Attorney-General*, Cooke P held:

> Aboriginal title is a compendious expression to cover the rights over land and water enjoyed by the indigenous or established inhabitants of a country up to the time of its colonisation. On acquisition of the territory, whether by settlement, cession or annexation, the colonising power acquires a radical or underlying title which goes with the sovereignty. Where the colonising power has been the United Kingdom, that title vests in the Crown. But, at least in the absence of special circumstances displacing the principle, the radical title is subject to the existing native title rights.[15]

On the acquisition of sovereignty, in each of these jurisdictions, the common law recognised and preserved these pre-existing rights to land. Australia finally caught up to the rest of the common law world in 1992 with the handing down of the *Mabo* decision. As Deane and Gaudron JJ said in *Mabo*:

> The strong assumption of the common law was that interests in property which existed under native law or customs were not obliterated by the act of state establishing a new colony but were preserved and protected by the domestic law of the colony after its establishment.[16]

Connor is mistaken in saying "[t]he judges were classifying Australia in law as a territory whose sovereignty rested on

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[14] *St Catherine's Milling & Lumber Co v The Queen* (1888) 14 App Case 46.
[15] [1994] 2 NZLR 20, 23-4.
[16] *Mabo* (1992) 175 CLR 1, 82 (Deane and Gaudron JJ).

the occupation, or settlement of a terra nullius"[17] because, as one can see from the reasoning in the above cases, it is plain that sovereignty is asserted; as Brennan J said in *Mabo*, '[a]lthough the question whether a territory has been acquired by the Crown is not justiciable before municipal courts, those courts have jurisdiction to determine the consequences of an acquisition under municipal law'.[18]

The next step is to deal with those pre-existing rights that flow from the acquisition of sovereignty.

Even Justice Dawson in dissent was in agreement with the other six members of the court on this point; '[t]here is ample authority for the proposition that the annexation of land does not bring to an end those rights which the Crown chooses, in the exercise of its sovereignty, to recognise'.[19]

In the course of their judgment, six members of the High Court analysed various decisions of the Privy Council as well as similar cases in other jurisdictions to come to the conclusion that the pre-existing rights of the original inhabitants survived the 'settlement' of Australia just as pre-existing rights of those peoples whose countries were conquered or ceded.

Connor points to the foreword by Sir Harry Gibbs in Margaret Stephenson's book, *Mabo, a Judicial Revolution*, and quotes him:

> The question whether land was terra nullius is relevant at international law in deciding whether a state [had] acquired sovereignty by attempted occupation. So far as I am aware, it was not the question asked at common law to determine whether a colony, admittedly under the sovereignty of Great Britain, was acquired by settlement.[20]

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17 Connor, above n 1, 197.

18 *Mabo* (1992) 175 CLR 1, 32 (Brennan J).

19 Ibid 123 (Dawson J).

20 Sir Harry Gibbs, 'Foreword', in Margaret Stephenson and Suri Ratnapala (eds), *Mabo, A Judicial Revolution: The Aboriginal Land Rights Decision and Its Impact on Australian Law* (1993) xiv.

As I explained previously, the European powers acquired colonies by any means they could; their international law allowed them to carve up the rest of the world by conquest, cession or settlement (discovery). The rights of the original inhabitants flowed from this, and these rights are recognised by the common law. Gibbs goes on to say:

> It may have been thought that the expression was synonymous with the common law rule that if Englishmen establish[ed] themselves in 'an uninhabited or barbarous country' the colony will be regarded as being acquired by settlement but that ignores the fact that it was enough to satisfy the common law that the land was 'barbarous', by which was meant not under civilised government. Australia was certainly not unoccupied in 1788 but it is another thing to say that the social organisation of the Aboriginal inhabitants was of a kind which the nations of Europe in the eighteenth and nineteenth century recognised as civilised.

Yes, that Eurocentric notion of racial superiority again raises it ugly head. Just because Cook did not see any cities as he knew them in England and there were no slums where people lived and died in poverty, where their excrement was thrown into the street; ah yes, the civilised life. In his last sentence Gibbs said; '[o]f course the High Court understood the full extent of the common law principles but public understanding is not assisted when those principles are described by a phrase that is emotive and misleading'.[21] Maybe the former Chief Justice Harry Gibbs understood the common law? And as Connor said, reading *Mabo* is confusing, so I assume he, too, is confused.

Yes, terra nullius is synonymous with *Mabo* and Connor alludes to the term from a number of sources. He cites the number of times it has been used by Brennan J (27) and Deane and Gaudron JJ (twice).[22] I agree with him that it has been used out of context a number of times in relation to the Mabo

[21] Ibid.

[22] Connor, above n 1, 215.

judgment, just as many people misrepresent the outcome of the 1967 referendum by saying Aborigines got the right to vote. Some blackfellas already had the vote (eg returned servicemen and persons with exemption certificates from the reserves). Part of what the 1967 referendum did was delete s 127 of the Constitution, which said 'Aborigines shall not be counted in the census'; it did not give us voting rights.

Justice Brennan on several occasions points to the enlarged meaning of terra nullius to explain its relevance in the 20th century:

> The enlarging of the concept of terra nullius by international law to justify the acquisition of inhabited territory by occupation on behalf of the acquiring sovereign raised some difficulties in the expounding of the common law doctrines as to the law to be applied when inhabited territories were acquired by occupation (or "settlement", to use the term of the common law).[23]

Brennan J goes on to say: 'the Crown acquired sovereignty recognised by the European family of nations under the enlarged notion of terra nullius, it was necessary for the common law to prescribe a doctrine relating to the law to be applied in such colonies ...'.[24] He also alludes to the theory of terra nullius which has been critically examined in recent times by the International Court of Justice in its *Advisory Opinion on Western Sahara*[25] in which Judge Ammoun, Vice-President of the Court, concluded: 'the concept of terra nullius, employed at all periods, to the brink of the twentieth century, to just conquest and colonisation, stands condemned'.[26]

Brennan J goes on to say:

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[23] *Mabo* (1992) 175 CLR 1, 33 (Brennan J).
[24] Ibid 36.
[25] [1975] 1 ICJR 12; cited by Brennan J in *Mabo* (1992) 175 CLR 1, 40.
[26] *Mabo* (1992) 175 CLR 1, 41 (Brennan J).

> If the international law notion that inhabited land may be classed as terra nullius no longer commands general support, the doctrines of the common law which depend on the notion native peoples may be "so low in the scale of social organisation" that it is idle to impute to such people so shadow of the rights known to our law" can hardly be retained. If it were permissible in past centuries to keep the common law in step with international law, it is imperative in today's world that the common law should neither be nor be seen to be frozen in an age of racial discrimination. The fiction by which the rights and interests of indigenous inhabitants were treated as non-existent was justified by a policy which has no place in the contemporary law of this country.[27]

> The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights. A common law doctrine founded on unjust discrimination in the enjoyment of civil and political rights demands reconsideration.[28]

Simply put, that reconsideration finally brought Australia into line with other countries colonised by European powers. The recognition of the pre-existing rights of the indigenous inhabitants of Australia occurred in 1992, some 204 years after they should have been recognised.

Connor emphatically states '[t]he *Mabo* decision is wrong.'[29] I would suggest his understanding of legal reasoning needs considerable work. If he cares to take the time he may work out that *Mabo* wasn't about terra nullius; it was about recognising rights in land of people that existed prior to the acquisition of sovereignty, which means I now am no longer a stranger in my own country.

Law does not exist in a vacuum, it evolves and changes (albeit ever so slightly) as society changes. I would surmise

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[27] Ibid 41-2.

[28] Ibid 42.

[29] See the back cover of *The Invention of Terra Nullius* (Connor, above n 1).

societal outrage if the law did not change to recognise that women in marriage could no longer be treated as goods and chattels, owned by a husband to be utilised as they thought fit. As Brennan J said in *Mabo*, '[i]t is imperative in today's world that the common law should neither be, nor be seen to be, frozen in an age of racial discrimination'.[30] What *Mabo* did was drag Australia into the 20th century by recognising something that had been recognised in other colonised lands: the pre-existing rights of the original inhabitants. The rights of Canada's first peoples were recognised by Royal Proclamation in 1763 (and in subsequent common law cases). As seen above, Marshall CJ questioned the discovery theory in the United States in the early 19th century. In New Zealand/Aotearoa, the Treaty of Waitangi in 1840 recognised Maori rights to land prior to acceding sovereignty. Was it too little to expect that Australia might finally catch up, in the eyes of the law, to the rest of the world?

I am glad there are lawyers presiding in judgment over important matters of law, and not historians. I have faith in those seven justices who make up the High Court of Australia to be able to deal with, amongst others, issues of contract law, constitutional law, criminal law, and corporate law and deliver judgment in a lucid, erudite and sagacious manner. When reading judgments, the depth and breadth of knowledge of all facets of law is extremely impressive.

I have no interest in historians beating up on each other; perhaps it will enable the protagonists to sell more books, become better known and become part of a clique (there are always the lefties, the righties, the oldies, the newies, the dissidents, the conservatives, the apologists: the list is endless and yet another form of racism). But I do have an interest in the transplanted English law and how it develops to inculcate in society moral and ethical values that can be recognised in decisions handed down by those who preside over matters

[30] See fn 26 above.

of importance that cut to the very core of Australia's national identity.

As Connor says: '[h]istory and law are [two] distinct disciplines.'[31] With this, I agree and hope that we can keep it that way. I prefer the High Court to preside over matters of legal importance in Australia, let historians squabble amongst themselves.

[31] Connor, above n 1, 217.