

CHAPTER 12 **'SOMETHING FOR NOTHING?'**

ABORIGINAL PROPERTY RIGHTS AND NATIONALIST MYTHS

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*My father grew up in a children's home and never forgot the way he was taught history there. He told me about a time when his class was learning about the explorers crossing the Blue Mountains and how the Aborigines had tried to stop them, and the way that all of the other children in his class turned around to look at him. This was one of many times in his life when he was made to feel ashamed of his Aboriginality. As an adult, he carried that around with him for a very long time.*

*It wasn't until my father decided to try and locate his Aboriginal family in the early 1980s that he really shed those latent feelings of shame. Knowing his family history, reconnecting with his culture, finding an*

*extended family: these all assisted in giving him a sense of self that finally vanquished the negative messages he had received about his Aboriginality.*

*At this time, he became enamoured with the work of Henry Reynolds. It didn't define how he felt about his Aboriginality, nor did it change his understanding of the history of his people, but it did resonate with what he came to learn from the older people he spent time with at Walgett, Brewarrina and Lightning Ridge. They told him their perspectives and he found that Reynolds' work acknowledged such views.*

*The writings of those such as Reynolds not only gave my father lenses through which to see Aboriginal history but, perhaps more importantly, taught him how to research and use archives, how to actively search for clues and follow them, how to find his own family — and then how to assist others to do the same.*

### Nationalist myths

Our beliefs about the kind of society we inhabit, the values we claim to embrace, the way we see ourselves, and our hopes for what we think Australia ought to be, reflect much about our attitudes and self-perceptions. Self-image may be a long way from reality but it influences our values and ideas in a profound way. In this essay I want to explore a dominant construct of Australian identity that underpins relationships to land and the role of historical narratives in creating these before turning to a discussion of property rights in Australian culture and law.

This national self-image was evident during the bicentennial year of 1988. Early in that year, the social researcher Hugh Mackay conducted interviews with a cross-section of Australians and sketched a national profile on the basis of it.<sup>1</sup> Mackay found that Australians like to think of themselves as mostly masculine, sociable and friendly, spontaneous,

fun-loving, versatile and resourceful, 'good sports' (both in terms of athletic prowess and mateship), tough, resilient, popular and attractive, rural rather than urban, self-deprecating, down to earth and imbued with a sense of humour. These positive attributes led Australians to be sceptical of authority, supportive of the hardworking family man, and able to tame the harsh elements of the Australian landscape.

The characteristics of this profile evoke images of the 'little Aussie battler' (the hard working, blue collar worker or struggling farmer), sporting heroes, pioneers and the ANZACs. They are played out in the folklore of explorers, swagmen, settlers and farmers claiming, conquering and taming the wilderness. People with such characteristics celebrate the underdog who struggles against adversity or against more powerful people and forces. The ethos derides 'tall poppies' or those who get above their station. There is an inherent tension in this self-image: the (white) 'battler' romanticises the notion of achieving against the odds yet is wary of people who are 'too big for their boots'. Rise against adversity, but don't achieve too much. This romanticism is linked to the dream that Australians have a sphere in which to act out this man-on-the-land, man-of-the-people fantasy. The dream of home ownership is fostered and proprietorship over a small parcel of land becomes a fundamental Australian aspiration.

Mackay noted in the profile he drew up that it was structured by dichotomies of 'sameness' and 'otherness', inclusion and exclusion, presence and absence. This meant that the dominant nationalist narrative was challenged by indigenous presence, perspective and experience. Although many Australians can integrate this Aboriginal presence into their concepts of national identity, the white Australia meta-narrative is destabilised. A decade after the bicentenary, Mackay

noted that, although there was some moderation of these dichotomies and Australians considered themselves 'overwhelmingly in favour of the multicultural ideal', they feared the changes such a policy might bring and felt their culture and way of life could be threatened.<sup>2</sup> In 2000, an expert on multiculturalism, Mary Kalantzis, described the divide in national consciousness as that between the 'mainstream' and the 'noisy minority', 'British' and 'multicultural', 'battler' and 'feminist', 'Aboriginal' and 'ethnic'.<sup>3</sup>

The former Prime Minister, John Howard, worked these divisions hard during the Liberal/National Party government's term in office between 1996 and 2007. He articulated the reluctance of some Australians to understand and acknowledge the uncomfortable history of their country:

Of course we treated the Aboriginals very, very badly in the past ... but to tell children whose parents were no part of that maltreatment, to tell children who themselves have been no part of it, that we're all part of a sort of racist and bigoted history is something that Australians reject.<sup>4</sup>

In the years prior to Howard's government, there had been an increased awareness in Australian society of aspects of Aboriginal experience. From the 1980s, Aboriginal perspectives and experiences were being woven into the national narrative by academic historians such as Reynolds, and in the 1990s the reports of the Royal Commission into Aboriginal Deaths in Custody and the report of the Human Rights Commission's inquiry into the practice of removing Aboriginal children unearthed stories of which many Australians were ignorant. These new perspectives

inevitably challenged the public silence about the fate of Australia's first peoples.

Under Howard's leadership, they were attacked and labelled as a 'black armband' view of history. Howard's 'white blindfold', to use Reynolds' term, sought to shut out anything about Australia's past that might be unpleasant or which suggested that white Australians should acknowledge or carry responsibility for the historical treatment of Aborigines. This popular sentiment was elaborated by Howard in his comments after publication of the report on the removal of Aboriginal children:

So far as the public is concerned, they don't believe in intergenerational guilt and they do believe that this country has a proud history ... Some of the past practices, although they might be condemned now, were done with the best motives and intentions and many people were in fact cared for in warm and loving homes.<sup>5</sup>

A Newspoll survey undertaken in 2000 revealed the conflicting attitudes many Australians have to Aboriginal people that Howard exploited. While 80 per cent of Australians saw Aborigines as unfairly and harshly treated in the past, only 41 per cent considered them to be a disadvantaged group today and 80 per cent thought that there had been enough talk about how Aboriginal people had been treated in the past and that we should 'just get on with the future'. While 70 per cent acknowledged the need for government initiatives to reduce Aboriginal disadvantage, 60 per cent thought that Aboriginal people received too much government assistance.<sup>6</sup> So the researchers concluded:

If it is a statistical fact that Aboriginal and Torres Strait Islander people are the poorest, unhealthiest, least employed, worst housed and most imprisoned Australians, but only half the community believes Aboriginal people are worse off than other Australians (and only around 30 percent believe they are 'a lot' worse off), then there is a significant gap between the facts and what many people believe about the position of Aboriginal people.<sup>7</sup>

This research was reinforced by a Saulwick and Muller qualitative study that found that white Australians were willing to treat Aboriginal Australians like any other Australians provided they were prepared to accept 'our' values and 'our' rules. Respondents expressed impatience with, and lack of understanding of, Aborigines who did not conform to 'general community norms'. They demonstrated intolerance, a lack of empathy and an inability or disinclination to see matters from an indigenous perspective even if they had grown up with Aboriginal people or had Aboriginal friends.<sup>8</sup> With these attitudes so prevalent, it is not surprising that efforts to assert indigenous claims to land are so vehemently resisted. Believing that Australia was vacant makes Aboriginal people invisible, leaving nationalist myths and self-images intact.

Property rights, black and white

On 22 January 1997, the front page of the *Sydney Morning Herald* featured news of a tragic fire in Melbourne. Photographs showed flames licking a house, charred bicycles and men fighting to save property. The newspaper was able to play an angle that evoked sympathy. The loss of property was emphasised in its human elements. On the same page as the report of the fire was another news item. It was headed 'Aborigines

set strong demands for Wik talks'. At that time, the 'Wik talks' were the latest battleground in the fight by Aboriginal people for the recognition of their property rights by the laws, institutions and consciousness of the Australian people.

The media coverage of the *Wik* case was shrouded with a politically loaded perspective. The newspaper featured the *Wik* decision as 'A Decision for Chaos' and printed a photograph of a farmer, a Mr Fraser, looking forlornly down at his land under the headline: 'Family's land dream turns into nightmare'. Although Mr Fraser claimed to be a strong supporter of Aboriginal people and to believe in reconciliation, he was confused by the *Wik* decision: 'I can't believe these judges made that decision. It's not a decision. I can't see that we have made very much progress. We are obviously going through another period of indecision and I am not sure how much of that sort of punishment people can take'.<sup>9</sup>

The juxtaposition of these stories on the front page of the *Sydney Morning Herald* revealed that while the loss of property — houses, bicycles, cars — was seen as a tragedy when (white) people had their homes destroyed, the loss of property rights by Aboriginal people did not have meaningful human consequences for them. The recognition of Aboriginal people's property rights was presented as the result of 'strong demands' rather than as something that already existed and required protection, and Aboriginal property interests were also seen as threatening the interests of white property owners because they generated 'chaos', 'indecision' and 'uncertainty': the two rights could not co-exist. These three perceptions — that there is no human aspect to Aboriginal property rights, that Aborigines and Torres Strait Islanders are getting something for nothing, and that white property

interests are more valuable than black ones — were played out in more than just the headlines of a Sydney newspaper. Their influence can be found pervasively throughout the history of colonised Australia, starting from the day that the British declared Australia was theirs on the basis of a legal fiction.

The way in which Australians perceive Aboriginal land rights reveals much about their perception of their own history and their sense of nationalism. These perceptions underlie every aspect of Australian life and are found most strikingly in how Australian law has operated separately for Aboriginal and non-Aboriginal peoples. For most Australians, the right to own property and to have property interests protected is a central and essential part of their legal system. For Aborigines, Australian law has operated to deny property rights, acknowledge them sparingly, and then extinguish them again.

In 1992, the High Court's *Mabo* ruling defined native title as a right that exists when an indigenous community can show that there is a continuing association with the land, and where no explicit act of the government, federal or state, has extinguished that title.<sup>10</sup> Radical title was vested in the Crown of the so-called discovering nation — or the subsequent independent, once-colonial government — but the indigenous people retained the right of occupancy although they could dispose of their land to the Crown. It is important to emphasise that the Court recognised rather than created native title — that is, native title had existed unacknowledged all along. Furthermore, it should be noted that native title, although often conceptualised as an 'indigenous right', is also a property right with parallels to many other property rights. In fact, in many ways native title is no different to some property rights that are already recognised and uncontroversial,



such as easements. Its communal nature is also analogous to the property holdings of corporations, for instance. The co-existence of interests is like many competing interests over a piece of property — mortgagors, landlords, lessors. Therefore, given that native title shares characteristics with other property rights and that the High Court set strict parameters for claiming it, the divisive, passionate controversy surrounding its recognition needs to be explained.

Let us explore the response to the High Court's ruling in the *Wik* native title case.

This case arose when the Wik and Thayorre peoples made a native title claim on the Cape York Peninsula. In its 1996 ruling the High Court attempted to clarify one of the gray areas created by the *Mabo* case — the issue of whether pastoral leases and mining leases extinguished native title. It held by a majority that pastoral leases did not give exclusive possession to the pastoralists and that the grant of a pastoral lease did not extinguish native title interests. This coexistence of native title interests and leasehold interests reflected arrangements informally created by pastoralists who allowed indigenous people access to traditional sites and whose properties had supported communities of indigenous people as pools of cheap labour.

However, while the Court ruled that native title could co-exist with a pastoral lease, it also ruled that where the interests of the landholders conflicted the native title interests would be subordinate. It also ruled that a native title holder could not exclude the holder of a pastoral lease from the area covered by the pastoral lease or restrict pastoralists from using the lease area for pastoral purposes. Nor could a native title holder interfere with the pastoralist's ability to use land and water on their leasehold, the pastoralist's privacy, or their right

to build fences or make other improvements to the land. Further, whenever there was a conflict between the use under the lease by the pastoralist and the native title interest, the interest of the farmer would always prevail. Pastoralists would not even pay for the infringement or extinguishment of native title interests. Any compensation would be payable by the government. Therefore, the legal interests of farmers remained unchanged and there was no impact on the value of the pastoral lease. Financial institutions base their loans on the property's capacity to carry stock (its ability to generate income), the equipment owned by the pastoralists, and improvements to the land. These matters were unaffected by the *Wik* decision. It was only the pastoralists' *perception* of their property rights that changed.

As with *Mabo*, the decision in the *Wik* case ignited public hysteria that was further fuelled by the misrepresentations of the Howard government which scared farmers by telling them that Aborigines could claim their land. The Howard Government's response to the *Wik* case was laid out in 1997 in their proposal to implement a 'Ten Point Plan'. This envisaged the extinguishment of native title interests by converting the leasehold into a freehold — a windfall to farmers who would effectively 'get something for nothing'. The cost of conversion and any compensation that would become payable due to an extinguishment of native title was to be covered by the public purse. Indigenous peoples would lose, even if compensation was payable. If the native title interest was the right to enter the land and perform a ceremony, the monetary amount payable for the extinguishment of that right would fail to compensate for the substance of the right being lost. The remuneration did not account for cultural and religious practices being lost. Aboriginal people preferred to keep their property interest.

During the development of the Ten Point Plan, the Federal Government sought to create the image that pastoral leaseholders were small family-run farms. The reality is that the industry is dominated by big individual and corporate farmers. Senator Cheryl Kernot, the then leader of the Australian Democrats, declared that a search of the register of members of Federal Parliament revealed that no fewer than twenty members and nine senators, representing the Liberal, National, One Nation and Labor parties, had interests in farming, grazing or pastoral activities.<sup>11</sup> Along with those members of Parliament were some of Australia's richest individuals. Foreign-controlled corporations also had rural landholdings of more than seven million hectares.<sup>12</sup> With this windfall at stake, it was little wonder that the mining and pastoral industries pushed the Liberal/National Party Government to take an inflexible line with the proposed bill. Senator John Herron, the Minister for Aboriginal Affairs, stated his commitment clearly: 'The backbone of this country, I'm proud to say, are the pastoralists'.<sup>13</sup>

Howard, in launching his Ten Point Plan, established a suburban solicitor's solidarity with rural Australia: 'although I was born in Sydney and I lived all my life in the urban parts of Australia, I have always had an immense affection for the bush'.<sup>14</sup> There was no such concern for indigenous people who were clearly not members of this community of the bush. Howard proceeded to rank the land rights:

[T]he plan the Federal Government has will deliver the security, and the guarantees to which the pastoralists of Australia are entitled ... Because ... the right to negotiate, that stupid property right that was given to native title claimants alone, unlike other title holders

in Australia, that native title right will be completely abolished and removed for all time.<sup>15</sup>

The right of the native title holder to negotiate was dismissed as merely the tool of troublemakers, not a valid property interest that is rooted in a cultural, legal and historical relationship:

We knew the right to negotiate was a licence for people to come from nowhere and make a claim on your property and then say until you pay me out, we're not going to allow you to do anything with your property. Well let me say I regard that as repugnant, and I regard that as un-Australian and unacceptable and that is going to be removed by the amendments that are already in the Federal Parliament. You won't have to put up with that any more.<sup>16</sup>

John Howard here characterises the effort to assert or protect a property right as 'un-Australian'. We are far from any legal debate and deep in the mire of nationalist myths.

The unfinished business of reconciliation

When the new Labor Prime Minister Kevin Rudd delivered an apology to members of the stolen generations on 13 February 2008, it was an occasion of great significance. The apology was long overdue. Eleven years earlier, in the first term of the Howard Government, the *Bringing Them Home* report had recommended that an official apology should be made by all Australian governments.

The Prime Minister's speech of apology on that day in February moved so many Australians because they had been governed for more

than a decade by the politics of fear: fear of others, fear of terrorism. And for so long Australia had a Prime Minister with a personal ideological view that the history and experiences of Aboriginal people, particularly those of the stolen generations, should be downplayed and trivialised, if not hidden altogether. After such a period of negativity, Australians responded to the more forward-looking and inclusive vision that Kevin Rudd articulated in his speech. For the Aboriginal people I spoke to about that day, it was uplifting to see that so many Australians could embrace a diversity of voices in their national story. The Swiss psychologist Carl Jung observed that ‘Certain Australian Aborigines assert that one cannot conquer foreign soil, because in it there dwell strange ancestor-spirits who reincarnate themselves in the new born. There is a great psychological truth in this. The foreign land assimilates the conqueror’. This insight assists in understanding the tension between the two competing historical narratives in Australia. When a colonising culture seeks to find its place in a country that is not theirs, and when the original custodians are an accusing presence, they seek either to silence that presence so that their own story will not be marred, or they find a way to incorporate the narratives of those they have displaced into their own story.

If Australia embraces the narrative of exclusion, introversion and celebration of the heroic past and denies or downplays Aboriginal experience and perspectives, it will be impossible to have a relationship with the Aboriginal community. White Australia will not have the generosity of spirit and the necessary civic responsibility in its heart to be the type of society that can treat all of its members — regardless of race, socio-economic background and religious belief — equally, justly and fairly. If, on the other hand, Australia wants a story that is

inclusive and seeks to find space for the alternative voices within the national narrative, there is a real opportunity for a meaningful and positive relationship with its indigenous people. Following the historic apology, there is now an opportunity for a renewed dialogue about the unfinished business of reconciliation.

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*It is not surprising that, given the negative experiences that my father had in his own history classes, he took a great interest in what I was taught. Throughout my time at high school, Dad would attend every parent-teacher night to ask what was being taught in the history curriculum and ask why there was nothing about Aboriginal history. I am sure that the history department would draw straws as to who was to deal with Dad on parent-teacher night.*

*Perhaps as a concession, Aboriginal history was chosen as one of the electives for Australian history when I was doing my HSC. I remember how the history teacher had to cycle over to our house and borrow some of Dad's books. They included Charles Rowley's *The Destruction of Aboriginal Society* and Henry Reynolds' *Aborigines and Settlers: The Australian Experience, 1788-1939* and his *Frontier: Aborigines, Settlers and Land*.*