



**POSTCOLONIAL ACTION OR CONTINUING COLONISATION?**  
**THE ROLE OF A GUBBAH<sup>+</sup> LAWYER**  
**IN THE FORMATION OF HYBRID INDIGENOUS CORPORATIONS**

*Angus Frith*

**I. INTRODUCTION**

This paper is about the colonial process in Australia, the postcolonial reaction, and my engagement, as a white practising lawyer and academic researcher in both those processes. Australian law and society are products of the British colonial engagement with the land now known as Australia. Over more than two hundred years of colonisation in Australia, they have dispossessed Aboriginal peoples and Torres Strait Islanders of their lands and their cultures.

---

<sup>+</sup> "Gubbah" is a south east Australian Aboriginal Kriol word meaning "non-Aboriginal", and therefore, "non-Indigenous". Aboriginal people tell me it is believed to derive from "government".

I am a product of Australian society,<sup>1</sup> and in my professional legal practice, an agent of Australian law: I am an officer of the Supreme Court of Victoria. In my work with Aboriginal peoples and Torres Strait Islanders, I necessarily engage with the effects these institutions have had on the people I work with. In that context, I must decide what I must do and how I must act: whether I am to be another agent of dispossession or to participate in the struggle for Indigenous land justice. This paper addresses the method of my professional legal practice for Aboriginal peoples and the impact that experience might have on my current academic research on Aboriginal and Torres Strait Islander corporations.

## II. EUROPEAN COLONISATION IN AUSTRALIA

Before European settlement from the eighteenth century, the area now known as Australia had been occupied for at least 40 000 years by Indigenous peoples, whose descendents are now known as Aboriginal peoples and Torres Strait Islanders (Reynolds 1988: 4). Torres Strait Islanders' traditional country is in the Torres Strait, between Australia and the island of New Guinea; Aboriginal peoples' country covers the rest of the continent and Tasmania.<sup>2</sup>

The anthropologist, WEH Stanner, in his Boyer lectures in 1968, described the relationship between Aboriginal people and their homeland, and the disruption of that relationship due to the effects of European colonisation, thus:

“No English words are good enough to give a sense of the links between an Aboriginal group and its homeland. Our word ‘home’, warm and suggestive

---

<sup>1</sup> In this paper, I use the terms “Australian”, and “Aboriginal”, “Torres Strait Islander” or “Indigenous” in opposition to each other. One is the coloniser; the other, the colonised.

<sup>2</sup> In this paper, I refer to Aboriginal peoples and Torres Strait Islanders as “Indigenous peoples”, unless the context demands otherwise. References by particular authors and myself to the people we have worked with are retained as references to Aboriginal people. I make the assumption that, in general, the same conclusions can be drawn in respect of Torres Strait Islanders as for Aboriginal peoples.

though it be, does not match the Aboriginal word that may mean 'camp', 'heart', 'country', 'everlasting home', 'totem place', 'life source', 'spirit centre', and much else all in one. Our word 'land' is too spare and meagre. We can now scarcely use it except with economic overtones unless we happen to be poets. The Aboriginal would speak of 'earth' and use the word in a richly symbolic way to mean his 'shoulder' or his 'side'. I have seen an Aboriginal embrace the earth he walked on. To put our words 'home' and 'land' together into 'homeland' is a little better but not much. A different tradition leaves us tongueless and earless towards this other world of meaning and significance. When we took what we call 'land' we took what to them meant home, the source and locus of life, and everlastingness of spirit. At the same time it left each local band bereft of an essential constant that made their plan and code of living intelligible. Particular pieces of territory, each a homeland, formed part of a set of constants without which no affiliation of any person to any other person, no link in the whole network of relationships, no part of the complex structure of social groups any longer had all its co-ordinates. What I describe as 'homelessness', then, means that the Aborigines faced a kind of vertigo in living. They had no stable base of life; every personal affiliation was lamed; every group structure was put out of kilter; no social network had a point of fixture left" (Stanner 2009: 206-207).

These complex relationships between people and country were ignored by the colonising British, who over a century or so became Australian. For much of the first two hundred years after white settlement, the Indigenous relationship with land was ignored by Australian law, which operated as if it did not exist. Thus, Australian law operated to damage Indigenous law and dispossess Indigenous people of their land and their culture. This Australian legal silence with regard to Aboriginal law was part of a broad range of action directed to controlling and managing Aboriginal resistance, which included massacres, imprisonment, assimilation, taking children, and 'surveillance and regulation through an expanding bureaucracy' (Finnane & McGuire 2001: 280).

## POSTCOLONIAL ACTION OR CONTINUING COLONISATION?

It was only in the 1960s and 1970s that the possibility of Indigenous land rights being recognised by Australian law was seriously contemplated. In the first land rights case in the Northern Territory, the Judge found that:

“The evidence shows a subtle and elaborate system highly adapted to the country in which the people led their lives, which provided a stable order of society and was remarkably free from the vagaries of personal whim and influence. If ever a system could be called ‘a government of laws, and not of men’, it is that shown in evidence before me.”<sup>3</sup>

However, the court felt itself bound by previous court decisions, such that “the doctrine of communal native title never formed part of the law of Australia”.<sup>4</sup>

At last, the responsibility of non-Indigenous Australians for their actions in respect of Indigenous peoples, their law, and their land began to be recognised. For example, in 1992, the Prime Minister, Paul Keating, said, in a speech to Aboriginal people at Redfern in Sydney:

“[I]t was we [Australians] who did the dispossessing. We took the traditional lands and smashed the traditional way of life. We brought the disasters, the alcohol. We committed the murders. We took the children from their mothers. We practised discrimination and exclusion.

It was our ignorance and our prejudice; and our failure to imagine these things being done to us. With some noble exceptions, we failed to make the most basic human response and enter into their hearts and minds. We failed to ask – how would I feel if this were done to me? As a consequence, we failed to see that what we were doing degraded all of us.”

---

<sup>3</sup> *Milirrpum v Nabalco Pty Ltd* (1972-73) ALR 65 (*Milirrpum*), at 171, per Blackburn J.

<sup>4</sup> *Milirrpum*, at 160.

The Indigenous relationship with land eventually was recognised by Australian courts. The decision by the highest court in Australia in *Mabo v Queensland (No.2) (Mabo)*<sup>5</sup> overturned the colonialist doctrine of *terra nullius*, pursuant to which, at European settlement, land could be taken by settlers because it was not occupied by Indigenous peoples under any system of law. In *Mabo*, the Australian High Court held that the British acquisition of sovereignty in 1788 was subject to an underlying radical title based on the traditional laws and customs of Indigenous people. That title was capable of recognition by the common law, and was called *native title* (*Mabo*: 58-69; Perry and Lloyd: 8-12; Strelein: 10-23). However, the Court did not feel able to address the illegality of that acquisition of sovereignty.

In response to the *Mabo* decision, and in accordance with its obligations under the *International Convention on the Elimination of All Forms of Racial Discrimination* and the *Universal Declaration of Human Rights*, the Australian government enacted the *Native Title Act 1993* (Commonwealth)(*NTA*), to provide a mechanism and process for the recognition and protection of native title (*NTA*: preamble & s.3). Despite the fact that the *NTA* is a political compromise, over the last fifteen years or so, Australian law has been using and refining that mechanism, allowing some Indigenous peoples to achieve the recognition of their native title by and within Australian law.<sup>6</sup>

The recognition and exercise of native title rights and interests has been severely curtailed by paternalistic attitudes and the political action of powerful commercial interests. Rather than providing land justice for Indigenous peoples, the native title regime has “substantially preserved the status quo” (Short 2007: 867), maintaining the Australian settler state’s jurisdiction over Indigenous nations. The recognition and exercise of native title rights and interests are controlled and regulated by the Australian state, in contrast to the requirements of true self-determination (Short 2007).

---

<sup>5</sup> (1992) 175 CLR 1.

<sup>6</sup> See Strelein for an exposition of the development of native title law since *Mabo*.

This approach to Indigenous policy-making reflects the attitude of successive Australian governments. Rather than allowing 'self-determination' as understood at international law,<sup>7</sup> they have provided what might be better described as 'self-management', which is a much narrower concept. Policy decisions regarding Indigenous people in Australia are often made by governments in the 'alleged best interests of [I]ndigenous communities' (Edney 2002: 221). Continuing failure to allow for true self determination has had corrosive effects on those Indigenous communities. Edney describes the "core themes in the history of the treatment of [I]ndigenous communities in Australia [as] excessive bureaucratic control; a high degree of paternalism; indifference to the concern of [I]ndigenous communities and a failure to accord [I]ndigenous communities any participation and control over matters that directly affected them" (Edney 2002: 222-223).

### **III. THE COLONIAL PROCESS IN AUSTRALIA AND I**

This history, and the political and legal reactions to it over the last twenty years or so, has provided me with inspiration for action, and been the basis for much of my professional work for more than ten years. Statements such as those of Stanner and Keating, together with my work for Aboriginal people, inspire me to believe that the relationships in Australia between Indigenous people, non-Indigenous people and the land ought to be shifted, and indeed can be shifted. However, in doing so, I also take account of the limitations of native title's conception of land justice and the system within which I am working.

Since 1995, I have worked with and for Aboriginal people in various States and Territories of Australia assisting them to achieve their land justice aspirations through the native title process.<sup>8</sup> This has meant working as an employed solicitor for Aboriginal community controlled organisations, and thus for Aboriginal people who are seeking to 'get the land back',

---

<sup>7</sup> See, for instance, the Declaration of the Rights of Indigenous Peoples, particularly articles 3 & 4.

<sup>8</sup> I have never worked for Torres Strait Islanders or in the Torres Strait.

and, more recently, practising native title law as a member of an independent bar, generally on behalf of Aboriginal applicants for a native title determination under the *NTA*.

Working for Aboriginal community controlled organisations and with Aboriginal people has exposed me secondhand to the devastation of Aboriginal loss and dispossession, to Aboriginal politics, and to Aboriginal culture. In that work I have necessarily learnt what it is to work at the direction of Aboriginal people in their organisations, and as their lawyer. I have had to reconcile duties to my employer, to the people I work for, to Aboriginal people more generally, and my ethical duties as a practising lawyer to the Court, to clients and to the profession, in a context that fundamentally involves perpetuating colonialist assumptions, attitudes and institutions. Pragmatically, it means I help particular groups of Aboriginal people take what they can from the system while maintaining the struggle in other ways.

In doing so, I hope I have adjusted the way I practise Australian law, within the boundaries of the ethical requirements of practice. I hope my practice has become more accommodating to Aboriginal ways of doing things, while providing Aboriginal people with the same standard of service they are entitled to expect from anyone working for them. A commitment to Aboriginal methodological approaches means that my practice includes a commitment to Indigenous self-determination, which involves “autonomy, empowerment, independence, self-sufficiency and control” (Edney 2002: 227), and which in local Indigenous political terms means Indigenous people determining their own future (Behrendt 2001: 856). This is effectively a localised gloss on the terms of Article 1 of the International Covenant on Civil and Political Rights and of the International Covenant on Economic, Social and Cultural Rights. Accordingly, in order to facilitate my clients being able to determine their own future within and without the Australian legal system and the particular legal process they are engaged in at the time, I must behave in particular ways. Ultimately, these methods are informed by domestic Australian law and State obligations under international law; in the day to day they are formed by my relationships with and commitment to particular people and their aspirations, as constrained by our various obligations under different systems of law. In my

## POSTCOLONIAL ACTION OR CONTINUING COLONISATION?

view, carrying out my obligations to Aboriginal people under, and to, their law as far as I can make me a better and more effective lawyer, both more generally and for them in particular.

Working at the boundaries of the Australian and the Aboriginal worlds, I must refrain from imposing my decisions and my world-view on Aboriginal people. I need to think about the distinction between legal advice and telling people what to do. I must listen and respond to needs whether expressed or not. I must act only on instructions. This means that I need to understand how the group gives instructions as a group – it is not necessarily a matter of listening only to one senior person. So long as my clients have full and clear advice about their legal options, I must not pursue the legal outcome at the expense of their broader political and social objectives.

I must recognise that in my interactions with the group and with others on their behalf, I am bound by Aboriginal culture and law. I must respect the elders. I must sit back and not necessarily speak out. I must be patient and persevering. I must accept that people cannot necessarily live by timetables imposed by the Australian legal system. Finally, I must temper the demands of the legal process, and, as far as I can, try not to be yet another agent of the colonial tide of history that continues to batter against Aboriginal people and their culture. I must also continuously acknowledge that even the focus in this paper on my history and my convictions in the context of my work with Aboriginal peoples may effectively be a re-colonisation of their issues and their space, since it offers them no room to speak. Here, they only appear through the lens of me speaking about myself.

There are rewards for me from my work and these adjustments to the way I work. I think I have gained some Aboriginal people's trust. At least in some sense, I have become one of the family. I think I have helped some Aboriginal people achieve outcomes that they might not otherwise have got. People have expressed gratitude. I have felt part of the Aboriginal community at least to a limited extent. I have been present at moments when, I think, the



politics of the relationship between particular groups of Aboriginal people and the broader Australian society have in fact shifted. Some people have got some of their land back.

#### **IV. MY WORK AND THE ACADEMY**

In doing this work, I have come to the realisation that while getting the land back is important, more questions must be asked, and answers sought. These include: 'what do Aboriginal peoples and Torres Strait Islanders do with their land?', 'how do they manage it?' and 'how do they engage with the broader Australian society to achieve these things?' I have turned to academic research as one way of addressing them, since the answers provided by Australian law are vague and ill-defined.

The *NTA* provides for applications for the recognition of native title rights and interests to be determined by the Federal Court of Australia. Once the Court has determined that native title ought to be recognised, it must also make a determination that that native title is to be held on trust for, or managed as the agent of, the native title holders, by a prescribed body corporate (*NTA* ss.56 & 57). Regulations made under the *NTA* provide that a prescribed body corporate must be incorporated under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Commonwealth). Indigenous people form corporations to hold native title, and to take the benefits of agreements with miners or other developers wanting access to their land, or for other beneficial purposes.

In many cases in the past, such corporations have not survived for long. They have failed for many reasons, including limited resources, lack of robust governance arrangements, and inadequate political and cultural match between the internal structures and processes of the group that the corporation represents and what is needed to engage in the market and the broader society. The concern is that in the medium to long term, a corporation set up to secure

## POSTCOLONIAL ACTION OR CONTINUING COLONISATION?

for a group of Aboriginal people or Torres Strait Islanders the substantial benefits of holding native title or taking the benefit of an agreement may fail for similar reasons. Therefore, the native title or the other benefits held or managed by the corporation could be put in jeopardy.

Some of these problems might be avoided if the group is able to use a corporate structure that reflects the ways in which the group organises itself socially in accordance with their traditional law and custom.<sup>9</sup> I argue that these corporate structures and governance should be most effective, efficient and sustainable when they reflect ways of doing things that already exist within the group.

Indigenous peoples should be able to organise themselves under their own laws and customs so as to engage with the Australian settler society more on their own terms. In legal terms, the boundary between the Australian and the Indigenous systems of law and custom should be set so as to create a space for the operation of Indigenous law within the structures and processes of their corporations. A metaphor of Indigenous law being enclosed by a semi-permeable membrane that allows it to engage with the external legal system, but not be overborne by it, might be useful. Such a corporation might look very different to one constructed solely under Australian law.

Postcolonial thought might help with the task of reshaping Australia's colonialist law and institutions to allow better expression of Indigenous law in their corporations. Following Trivedi, I argue that each party to the colonial encounter both gives and gains elements of its culture and laws in that process (Trivedi 1993: 15). Such a transaction subverts the hierarchical positivist nature of the Australian system and of the common law and statute that supports it. As the identities of the colonised and the coloniser each take on aspects of the other, hybrid identities are created 'which are not single, nor stable, but rather in flux, caught in the opposition between colonising and colonised culture' (Davies 2002: 280). In this 'place of

---

<sup>9</sup> "Traditional law and custom" is a key part of the definition of native title in the *NTA*: s.223 *NTA*.

hybridity', between the spheres of authority of the coloniser and the colonised, can be constructed 'a political object that is new, *neither the one nor the other*' (Bhabha 1994: 25).

Thus, if an Indigenous corporation that is itself such a hybrid exists within this place of hybridity, there should not be a great cultural distance between its hybrid identity and the hybridised edges of the identities of Australian law and of Indigenous law. Therefore, it ought to be able to operate reasonably effectively in both worlds. That, at least, is my argument.

Now I must ask how, as an academic, do I test this thesis, and how do I work with Aboriginal peoples and Torres Strait Islanders to achieve such an outcome, if that is what they want?

## **V. INDIGENOUS PEOPLE AND THE ACADEMY**

There has been a long history in Australia of engagement by academics and other researchers with Indigenous people. Some of that engagement has been less than satisfactory from the point of view of Indigenous people (see Nakata 2007). Relevantly, some of these cases involve academics at the University of Melbourne, where I am undertaking my PhD research.

Amateur and government ethnographers have engaged with Aboriginal people in Victoria, the Australian State of which Melbourne is the capital, almost since the commencement of European colonisation. George Augustus Robinson was the first Protector of Aborigines in Victoria, appointed in 1839, four years after Melbourne was established (Clark 1998). Other early ethnographers included Fison and Howitt, who wrote on the Kamilaroi in New South Wales and the Kurnai in Gippsland in Victoria in the late nineteenth century (Fison and Howitt 1880). Their work, along with that of many other amateur ethnographers, has been used in native title cases to support arguments for the continuing existence of traditional

Aboriginal traditional laws and customs. In addition, their work has been used by interpreters of the ethnographic product such as Frazer, Durkheim and Freud (Stanner 2009: 199).

An early scholarly researcher was Baldwin Spencer, who was appointed the first professor of biology at the University of Melbourne in 1887. He participated in expeditions to Central and Northern Australia in 1894, 1901-02, 1912, 1923 and 1926. He had a long term collaboration in this work with the post master at Alice Springs, Frank Gillen (Morphy 1996: 135-136).

While Spencer produced much of value, recording ethnographic material and photographs of Aboriginal people very soon after contact with European colonisation, his general attitude to them was essentially racist. He could write such things as:

“The Australian Aboriginal may be regarded as a relic of the early childhood of mankind left stranded” (Spencer 1901: 12).

While the attitudes revealed by such statements reflect the prevailing social Darwinism and racism of the period, it was not likely to allow him to engage with Aboriginal people in this work on anything like equal and constructive terms.

More recently, the attitude of researchers to Aboriginal people has led some Aboriginal people to take legal action to protect their culture and their rights. An example is the case of *Foster v Mountford*,<sup>10</sup> where an Aboriginal plaintiff sought to injunct the publication of an anthropologist's book *Nomads of the Australian Desert* on the basis that it would reveal secrets to women, children and uninitiated men, which would undermine the social and religious stability of the community. In short, Mountford was not complying with the law of the Aboriginal

---

<sup>10</sup> (1976) 14 ALR 17.

people he had worked with over a period of years. The court granted the injunction (Davis 2001: 311-312).

Another example is the case of *Berg v University of Melbourne*,<sup>11</sup> where Jim Berg, an Aboriginal inspector under the *Archaeological and Aboriginal Relics Preservation Act 1972* (Victoria), sought the return of skeletal remains held by the University. Similarly, the case of *Sainty v Allen*<sup>12</sup> involved 130 000 artefacts and remains excavated by two archaeologists in Tasmania pursuant to permits under the *Aboriginal Relics Act 1975* (Tas). The permits expired and the Tasmanian Aboriginal people wanted to regain control and management of their cultural heritage. After unproductive discussions with the Tasmanian Government and the Archaeology Department of La Trobe University in Melbourne, the Federal Court made an interim order that they be delivered to the Museum of Victoria for safekeeping. They were subsequently delivered to Tasmanian Aboriginal Land Council on behalf of Tasmanian Aboriginal people (Auty 1995: 20).

These cases are examples of the successful resort by Aboriginal people to litigation to address their lack of control of the activities of archaeologists and anthropologists, arising out of the holding of human remains or secret sacred material. They reflect longstanding campaigns by Australian Indigenous people to ensure the return of such remains and artefacts from academic institutions and museums in Australia and Europe. They are not good guides of how I should work and engage with Indigenous peoples, except as examples of what not to do.

Indigenous people have also had problems with lawyers' practice in respect of Indigenous people and Indigenous issues, with lawyers' writings, and with the ways in which their behaviour and attitudes can be inconsistent with principles of self-determination. For instance, Gary Foley writes:

---

<sup>11</sup> Unreported decision of the Supreme Court of Victoria, No.2175 of 1984, 18 June 1984.

<sup>12</sup> Unreported decision of the Federal Court of Australia, No VG 643/1995; see Auty 1995: 20.

## POSTCOLONIAL ACTION OR CONTINUING COLONISATION?

“One of the ways in which racism manifests itself is when someone writes about a people in a manner that dehumanises them, and presents them as incidental, nameless victims apparently incapable of playing a role in their own affairs; non-persons able only to achieve liberation on the advent of the ‘good guys’ (i.e. earnest young white lawyers from Melbourne)” (Foley 1994: 1).

What should an earnest white (gubbah) lawyer from Melbourne do?

Some guidance is provided by other Indigenous people, writing after the death of a lawyer they worked with in Alice Springs:

Ray brought to CAALAS [Central Australian Aboriginal Legal Aid Service] a rare quality of confident humility which allowed him to listen to Aboriginal people. He was not one to pretend he had all the answers to our problems or to try and tell us what to do. ... It is the ability to listen which is the first quality we need in white people who work for the Aboriginal cause (Clients and staff of the Central Australian Aboriginal Legal Aid Service 1985: 23).

These observations are about the behaviour of lawyers in practice. Similar observations could be made about lawyers engaged in academic pursuits that involve Indigenous people, and about academics in other fields.

## **VI. INDIGENOUS PEOPLE AND MY RESEARCH**

The standard Western academic approach is positivist and hierarchal in that it requires support for an argument to be based on the authoritative statements of other academics or on empirical work that relies on measuring the external world. Other sources of information and

opinion do not have the same level of authority. As Nakata says, “what I [bring] to my learning, that standpoint derived from within my own lived experience of my world [is] not considered admissible unless I [can] explain and defend it according to the content, logic and systems of thought of others” (Nakata 2007: 10).

So, I must ask in an academic context, what the above examples of what not to do, the observations of others, and the manner in which I have performed, and continue to perform, my legal professional work mean for me in undertaking my academic research?

First, my academic research methodology must mesh with the method by which I conduct my legal practice. I cannot treat and deal with Indigenous people differently according to the ultimate aim and context of my interaction with them. I cannot divorce my academic work from my professional work. The important things in both contexts are the relationships between me and the people I am working with, and also their relationships with Australian law and institutions, such as the academy, and Australian society in general. My professional experience means a commitment to working to address Indigenous disadvantage, in ways and for particular aims determined by Indigenous peoples, and in a manner that facilitates the expression of Indigenous voice. These approaches necessarily carry through to my research work. I cannot do it in any other way.

I must also be accountable, in their terms, to the Indigenous people for whom my work is done. That might mean being accountable to Indigenous people, generally, or through one of my supervisors, Professor Marcia Langton, who is an Aboriginal woman. However, I would prefer to have a more direct mode of accountability that mirrors the direct relationships I have had with clients.

Therefore I have chosen to work through a case study, in part to provide me with a mechanism by which I can be accountable to one particular group of Indigenous people and

their corporation. A case study is also important because I feel constrained in discussing the nature of Indigenous law and sovereignty in an academic context without reference to a specific Indigenous law. Otherwise, I would be considering Indigenous corporations from the point of view of Australian law, rather than looking at the interaction between Australian law and Indigenous law. I need the benefit of real engagement with Indigenous people expressing their law through their own internal corporate organisation. In my view, working with a specific Indigenous group, through a case study, would be a good way of doing so. However, in doing so, I need to recognise that Aboriginal people must be able to speak about their concerns in their own voice. I cannot use the case study as a vehicle for appropriating their stories, either knowingly or unknowingly.

Thirdly, research is about listening. The process is about more than listening to the particular person who is talking to me. I need to listen in a sophisticated way, to be aware of the implications of silence, of who is talking and who is not, and the context in which speaking is done. Does the voice of one person speak for the group? All this sophistication requires engagement with the group and with their rules for making decisions, for speaking for country and for the group. A case study is a good means of doing so. It allows me to better engage with, and become subject to, Indigenous law in the context of my research.

In my work with Indigenous people and on their interaction and engagement with Australian law and society, I am subject to Indigenous law, whether I like it or not, or even whether I know it or not. I have obligations under that law. In some ways, with, and subject to, the people I am working with, I might embody the membrane between the two systems of law.

At the same time, I cannot allow myself to get too carried away about the importance of what I am doing. I am not an Indigenous person. I cannot speak for Indigenous people. I cannot continue the colonial process by appropriating Indigenous law in order to create a hybrid that is necessarily not wholly Indigenous. In every case, I can only ask for engagement from them; I



cannot impose it or these ideas on people. Each interaction must be a transaction freely entered into with equal knowledge of the potential consequences.

My obligations under Indigenous law also mean that, as far as possible, my research itself should allow for the expression of Indigenous law. It can be a purely descriptive work that addresses the interaction of two sets of laws, and thereby describes mechanisms that would allow for further and better expression of Indigenous law in the general society, or it can do some work itself towards clearing a space within Australian law for such expression. I think that by challenging my own personal and academic assumptions and limitations better research is possible.

Another complementary academic approach is to engage with the discipline of anthropology to assist my engagement with Indigenous law. The native title recognition process necessarily involves a court hearing expert anthropological opinion as to the connection of a native title claim group to their traditional country. I have worked with anthropologists in the preparation and presentation of such evidence. The discipline of anthropology can assist translating Indigenous concepts into language that is familiar to Australian law (Davis 2001: 305). Consideration of the nature of the discipline and the specific help it can offer should be part of my work. It can help explain the manner in which land, natural resources, culture, and Indigenous people are all part of an interlocking system (Davis 2001), which might be able to be expressed and managed through a hybrid corporation.

Research done solely from within the Western academy is less likely to be able to challenge the constraints of Australian law on Indigenous law. I should evaluate all assumptions made about Indigenous law and its capacity to operate in (and even outside) the broader society we have, and the society we might wish to have. I can't write a thesis from within Indigenous law that expresses that law. But I might be able to write a thesis that itself 'recognises' Indigenous law

## POSTCOLONIAL ACTION OR CONTINUING COLONISATION?

in a meaningful way,<sup>13</sup> by having a methodology that itself recognises and takes account of Indigenous law and allows for its better expression. My task is working out how to do so. That can only be done in conversation. For me this is a pre-requisite for working with Indigenous people and complying with their law.

Lastly, given my professional background, I feel I must do something that is of practical use to people using my professional skills; something that meets a relatively immediate need. This means they have a greater chance of having control over the process because they have a say in what is done. In my view, this should reflect the control they would have had if I were their lawyer. I will need to engage with people at least to find out what would be likely to be useful to them and their corporation.

## VII. POSTCOLONIALISM AND METHODOLOGY

What does my thinking about hybridity and postcolonialism mean for the way in which I do my research?

If the research is about the creation of corporations in a hybridised space, maybe the way in which I do it should be in a hybridised space, as far as I can construct or imagine one. That might bring a postcolonial methodology into the work I am doing. Colonialism is about separation, positivism and hierarchy. In contrast, my methodological response to colonialism should require collaboration, participation and agreement.

One of the problems with postcolonial theory is that it 'principally addresses the needs of the Western academy [and] continues to render non-Western knowledge and culture as the "other"

---

<sup>13</sup> Compare the concept of the recognition of native title identified in *Mabo* and *NTA* s.223, and see Pearson.

in relation to the normative “self” of Western epistemology and rationality’ (Gandhi 1998: ix-x). It is not generally about the ‘other’ investigating the West.

“The West remains the privileged meeting ground of all ostensibly cross-cultural conversations” (Gandhi 1998: 136), and, implicitly, those within the third space. Thus, conversations within the third space use Western language and Western concepts, not those of Indigenous law. Expressing Indigenous concepts in foreign terms means they will lose much of their cultural precision. Indigenous concepts will not mean as much when expressed in English and in terms known to Australian law. They will be limited and narrowed. In this sense, the use of concepts arising from the theory of hybridity may be just another means of further colonising Indigenous people.

Accordingly, I must forever be aware of my place as a gubbah lawyer within the academy and the dominant institutions of Australian law: I am now and always an agent of those Western colonialist institutions and must not risk “presenting [myself] as an authoritative representative of subaltern consciousness” (Gandhi 1998: 2). These are issues I must continuously address in my research.

## **VIII. MY APPROACH TO MY RESEARCH**

I believe that informed by my previous work with Aboriginal people, and guided by postcolonial theory and the problems faced by previous researchers working with Indigenous people and issues, I can formulate an approach to my research that might be less likely to compromise the values of Indigenous law, culture and people than some of the above examples.

Such an approach requires me to let people know the exact nature of the research I am doing so that they can make informed decisions about whether they want to work with me.

## POSTCOLONIAL ACTION OR CONTINUING COLONISATION?

Fundamentally I need to gain their trust so that they are willing to participate. The requirements of exchange mean that I must be worthy of trust. This might require me to commit to a long term engagement with people, effectively in a social sense as one of the family. I suspect that the more I am trustworthy, the more effective participation I will obtain and the better my research will be. Another way to attain trust is to ensure that the Indigenous people I work with retain control of the research process.

The requirements of the University's ethics committee are important in a formal sense, but in some ways are likely to be less important in terms of their likely impact on improving the efficacy and value of my research for myself and for the people I work with than my obligations to them under their law. University ethics committees are generally aware of the difficulties that Indigenous people have previously had with researchers and are attempting to prevent them occurring in the future. However, it may be that these ethics requirements, imposed fairly mechanistically, do not entirely match what is required under Indigenous law. If I comply with my obligations under Indigenous law, I suspect I will be likely to have satisfied the requirements of the ethics committee. For me, my obligations to particular Indigenous people and their law are of much greater weight than the well-meaning requirements of a Western bureaucratic process.

Another important element of the research process is to listen to and to engage with people. Listening itself is an act by which I, as a representative of the continuing Western colonial enterprise, and the Indigenous people to whom I listen, mutually transfer elements of our culture and laws, and begin to create hybrid identities, even if in a very limited way. As Jean-Luc Nancy has said:

“To be listening is to be at the same time outside and inside, to be open from without and from within, hence from one to the other and from one in the other” (Nancy 2002: 14).

Listening is of vital importance to any research. It must be absolutely fundamental to any research with Indigenous people, both in terms of methodological outcomes and in terms of respect for them and for their law.

Respect for Indigenous law and for Australian law and for ways in which they might interact in practical and meaningful ways must underlie my approach to my research project and to my engagement with Indigenous people over a long period of time. It is only through respect that I will be able to achieve anything for them and for myself. Further, it has become a necessary part of my engagement with Indigenous people more generally. It is not something that I can divorce from the way I conduct my professional practice or my academic research.

Thus, my approach to my research must involve trust, engagement for the long term, giving up control, listening and respect. Without these qualities, I do not believe that my research can be completed at all, and certainly cannot be completed in any meaningful way that contributes to shifting the way Australian law and society addresses the needs and aspirations of Indigenous people.

---

## **Bibliography**

Auty, K. (1995) "Aboriginal Cultural Heritage: Tasmania & La Trobe University". *Aboriginal Law Bulletin*, 3 (76): 20.

Behrendt, L. (2001) "Indigenous Self-Determination: Rethinking the Relationship between Rights and Economic Development". *University of New South Wales Law Journal*, 24(3): 850-886.

Bhabha, H.K. (1994) *The location of culture*. London; New York, Routledge.

Clark, I.D. (ed.) (1998) *The Journals of George Augustus Robinson, Chief Protector, Port Phillip Aboriginal Protectorate: Volumes One to Six*. Melbourne: Heritage Matters.

Clients and Staff of the Central Australian Aboriginal Legal Aid Service (1985) "Raymond Vincent Guiffre". *Aboriginal Law Bulletin*, 1 (17): 23

Davies, M. (2002) *Asking the law question: the dissolution of legal theory* (2<sup>nd</sup> ed.). Pyrmont, N.S.W., Lawbook Co.

Davis, M. (2001) "Law, Anthropology and the recognition of Indigenous Cultural Systems", *Law and Anthropology*, 11: 299-320.

Edney, R. (2002). "Indigenous punishment in Australia: jurisprudence of pain?" *International Journal the Sociology of Law*, 30 (2): 219-234.

Finnane, M. and McGuire, J (2001) "The uses of punishment and exile. Aborigines in colonial Australia", *Punishment and Society*, 3(2): 279-298.

Fison, L. and Howitt, A.W. (1880) *Kamilaroi and Kurnai: group-marriage and relationship, and marriage by elopement, drawn chiefly from the usage of the Australian aborigines: also the Kurnai tribe, their customs in peace and war*. Melbourne: George Robertson.

Foley, G. (1994) "The Pain of Faine goes mainly to my Brain", in *The Koori History Website* <[www://kooriweb.org/foley/essays/essay\\_21.html](http://www://kooriweb.org/foley/essays/essay_21.html)> accessed 15 December 2008.

Gandhi, L. (1998) *Postcolonial theory: a critical introduction*. St Leonards, N.S.W., Allen & Unwin.

Morphy, H. (1996) "More than mere facts: repositioning Spencer and Gillen in the history of anthropology", in Morton, S.R. and Mulvaney, D.J. (eds) *Exploring Central Australia: Society, the Environment and the 1894 Horn Expedition*. Chipping Norton, NSW: Surrey Beatty & Sons Pty Ltd, 135-149.

Nakata, M. (2007) *Disciplining the Savages: Savaging the Disciplines*. Canberra: Aboriginal Studies Press.

Nancy, J-L. (2002) *À l'écoute. Paris: éditions Galilée* (translated by Mandell, C. (2007) *Listening*. New York: Fordham University Press).

Pearson, N. (1996) "Concept of Native Title at Common Law", in *Land Rights – Past, Present and Future: 20 years of land rights, Our Land is Our Life, Conference Proceedings*. Canberra: Northern Land Council and Central Land Council, 118-123.

Perry, M and Lloyd, S. (2003) *Australian Native Title Law*. Pyrmont: Lawbook Co

Reynolds, H. (1988) *The Law of the Land*. Ringwood: Penguin

Short, D. (2007) "The social construction of indigenous "Native Title" land rights in Australia, *Current Sociology*, 55(6): 857-876.

Spencer, B. (1901) *Guide to the Australian Ethnographical Collection in the National Museum of Victoria*. Melbourne: Victorian Government Printer

Stanner, W.E.H. (2009) *The Dreaming and Other Essays*. Melbourne: Black Inc.

Strelein, L. (2006) *Compromised Jurisprudence: Native Title cases since Mabo*. Canberra: Aboriginal Studies Press.

Trivedi, H. (1993) *Colonial transactions: English Literature and India*. Calcutta: Papyrus.

## Cases

*Berg v University of Melbourne*, Unreported decision of the Supreme Court of Victoria, No. 2175 of 1984, 18 June 1984.

*Foster v Mountford* (1976) 14 ALR 17.

*Milirrpum v Nabalco Pty Ltd* (1972-73) ALR 65.

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

*Sainty v Allen*, Unreported decision of the Federal Court of Australia, No VG 643/1995.

## POSTCOLONIAL ACTION OR CONTINUING COLONISATION?

### **Legislation and International Instruments**

*United Nations Declaration on the Rights of Indigenous Peoples.*

*Native Title Act 1993 (Commonwealth).*

*Native Title (Prescribed Body Corporate) Regulations 1999 (Commonwealth).*