Chapter Four
Error Nullius Revisited

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My paper is only another dismal example of the imposition of intoxicating and brutal theory over reality.

Terra nullius is our original sin. Giving modern historians a bitter ethical superiority over our past, *terra nullius* is the intellectual foundation for the history writing of a generation. My argument is not about "correct" meanings of the term. A doctrine or theory of *terra nullius* had nothing to do with our colonial history. *Terra nullius* is part of the "history of the present".[1]

Before 1977, perhaps the only reference to *terra nullius* in Australia by an historian was by Sir Ernest Scott, and only in answer to an enquiry from an American academic. Just before the Second World War, a Professor of International Law at Columbia University wrote to Scott asking if the concept of *terra nullius* had any relevance to the British annexation of Australia. Scott's published reply defined the Latin term as "land not under any sovereignty". He scarcely mentioned Aborigines, being more concerned with the acts of European powers to gain and settle new territories. It was a slightly interesting essay in a specialist journal and had no influence on succeeding generations of historians.[2]

In 1965 Professor DP O'Connell, Professor of International Law at the University of Adelaide, used Australia to illustrate occupation as a mode of acquisition in his textbook *International Law* :

> "Since the Australian aborigines were held incapable of intelligent transactions with respect to land Australia was treated as *terra nullius*".[3]

It was no more than a sentence in a two-volume text book. O'Connell did not define the phrase, and he did not say Aboriginal Australia was *terra nullius*, but that it was treated as such.

The 1960s and 1970s reinvigorated earlier awareness of Aboriginal rights. Since 1788 this has been a strand of our history. In 1970 an article in the *Journal of the Royal Australian Historical Society* by Barry Bridges set out to examine *The Aborigines and the Land Question*.[4] It was one of the last considerations of the situation in 1788 before the superstition of *terra nullius* imposed itself. Bridges' explanation didn't require a Latin named doctrine. "Discovery and settlement", before these words acquired their modern distaste, told his story.[5]

Terra nullius came to Australia from Algeria, not England. An obscure term, confusingly defined, it was not the legal doctrine behind the 18th Century British occupation of Australia. An argument of modern racial politics, it is not the basis of national sovereignty. In 1977 Paul Coe of the Redfern Legal Service introduced *terra nullius* into a case he was arguing before Justice Mason of the High Court. Before then few Australians had ever heard the term. Coe, claiming restitution and compensation for Aborigines, argued Australia had not been *terra nullius* at the time of European settlement. No-one in the 18th Century had said it was.

Coe had not found *terra nullius* in the *Historical Records of Australia*, but in the International Court of Justice's *Advisory Opinion on Western Sahara*, on the 1975 dispute between Algeria and Morocco over Western Sahara. The Algerian lawyers defined *terra nullius* as a "territory belonging to no-one". Seldom reported is the Moroccan lawyer's comment on Algeria's arguments as a "real piece of intellectual conjuring".[6]

Coe rightly sensed the usefulness of *terra nullius* for the emerging political arguments in favour of Aboriginal land rights. Today it scarcely seems possible that in the mid-1970s

Senator Neville Bonner argued in the Senate for recognition of the Aborigines' prior ownership of the land without using the term. If *terra nullius* were accepted as the basis of British settlement, the opportunities for eternal legal battles over land were alluring, but Coe's arguments went nowhere. His case was dismissed by Justice Mason, and two years later, in 1979, his appeal was heard by four High Court Justices. Returning to the courtroom, Coe argued both *terra nullius* and that Australia had been conquered by the British. His case was disorganised and badly prepared. In dealing with it Justice Gibbs called it "embarrassing", while recognising "that some of the allegations hint at the existence of questions that might be regarded as arguable".[7]

It was the dissenting opinion of Justice Lionel Murphy which moved *terra nullius* into modern Australian politics. Summing up Coe's case, he made *terra nullius* – which appeared in no dictionaries or history books, and very few texts on international law – seem to be the accepted legal and historical explanation of Australian sovereignty.

The term moved from the High Court to the historians, seemingly as something that had always been firmly imbedded in the 18th Century.

In 1980 Professor Alan Frost wrote an article, *New South Wales as* Terra Nullius: *the British Denial of Aboriginal Land Rights*".[8] He defined it as " 'no person's land', that is, belonging to no-one". Perhaps it could have been made clearer that *terra nullius* was something to do with international law. Frost gave it historical reality when he wrote that James Cook, on seeing Australia, had to ask two questions:

> "Had a population established a right to possess the territory ; or, was it a *terra nullius*? [I]f it were a *terra nullius* , was he the first European discoverer of it?".[9]

This is supposition, speculation, imagination, but it reads as if it actually happened on the *Endeavour*.

The phrase was unknown to 18th and 19th Century Australian colonists; it was not referred to in colonial courts or the Privy Council; it was never used by the British government to explain their appropriation of New Holland. It was so new that it didn't appear in the first edition of the *Macquarie Dictionary* in 1981. It isn't in the *Oxford English Dictionary*. If *terra nullius* had been sitting in the dictionaries all the time, perhaps it would not so effectively have been able to colonise modern minds.

In 1970 Charles Rowley's *The Destruction of Aboriginal Society* put forward a modern tragic version of Australian history, and did not mention *terra nullius*. Building on Rowley's work, Henry Reynolds rapidly became the best known and most trusted historian on Aboriginal and white conflict. He was prolific; he dealt with the media skilfully, and his books were quickly accepted into schools and universities. Admitting he had never heard of *terra nullius* as late as the 1960s, by the late-1980s it was the theoretical underpinning for his best-selling narratives of racial conflict.[10]

In 1987 Reynolds published *The Law of the Land*. A book called *The Law of the Land* should never have been written by an historian. A lawyer, a judge should have done it – and preferably a dull, boring, conscientious creature seriously concerned to do justice to the topic.

This sad book, tedious but tragically influential, is still in print, updated by its author; it offered the definitions of *terra nullius* which have influenced subsequent dictionary makers and textbook writers. Here rests the conscience of our nation. The whole magnificent edifice of a generation's history writing is based on this. Law making has been influenced by it. What a muddle, what a mass of eloquence has sprung from it. Books, articles, sermons, passion, bitterness, self-righteousness, Higher School Certificate courses, university courses: all from ten and a half lines in a Penguin paperback. On page 12, in 101 words, Henry Reynolds forged a career: successful for him, heartbreaking for Australia, a third of a page that guarantees Henry Reynolds his own place in our history.[11]

Reynolds stated that:

> "..... the doctrine underlying the traditional view of settlement was that before 1788 Australia was *terra nullius*, a land belonging to no-one".

Note that he may be suggesting that this is only theory – it is "the doctrine underlying the traditional view of settlement".

There was no 18th Century "doctrine" of *terra nullius*.

The definition of *terra nullius* offered by Professor Frost had grown. The Reynolds definition is that now given in the *Oxford Companion to Australian History*:

> "Confusion has abounded because *terra nullius* has two different meanings, usually conflated. It means both a country without a sovereign recognized by European authorities and a territory where nobody owns any land at all, where no tenure of any sort existed".

Reynolds actually offers three meanings, introducing a literal meaning of "uninhabited".

This should have been the end of *terra nullius*. For purposes of analysis it is useless; it doesn't clarify, it confuses. At any time it has to be established, should be established, must be established what meaning the user is attaching to it. Without this clarity, meaningful communication is impossible.

This was the beginning of my interest because I couldn't quite see how these meanings could be "conflated", turned into and/or. And of course Reynolds has muddled *terra nullius* with a real legal term, *res nullius*, "a thing which has no owner", and is "conflating" sovereignty and land ownership.

Reynolds's definition of *terra nullius* may be the most cited page of history writing dealing with our sin of settlement. What then of his own referencing for the definition he offers? If *terra nullius* was the "doctrine" Reynolds claimed it was, he was incredibly careless in locking into place evidence to support his view. He gives authorities for only the first half of his definition: three texts are given, but only one of them actually agrees with him – a 1938 book which says *terra nullius* means "land not under any sovereignty".[12] This definition was that used by Professor Scott in 1940 – not surprising, since Scott was using the same book. Reynolds does not point out that just before this definition its authors state:

> "It has been found necessary, in certain instances, to adopt a particular terminology for the purposes of this book".

Neither of the other two references mentions *terra nullius*. One of these texts, *The Principles of International Law* by TJ Lawrence, was originally published in 1895.[13] It was an odd choice on which to base a definition of *terra nullius*, for the author uses the phrase *res nullius*, not *terra nullius*:

> "All territory not in the possession of states who are members of the family of nations and subjects of International Law must be considered as technically *res nullius* and therefore open to occupation".

Later Reynolds quoted some of these words, and altered the author's text to agree with his own. Replacing clarity with confusion, he deleted "*res nullius*" and inserted "*terra nullius*" within square brackets. They are not good synonyms. A *terra nullius* is not always a *res nullius*, and a *res nullius* is not necessarily a *terra nullius*.

In *Yanner v. Eaton*, before the High Court in 1999, the *res nullius* was a crocodile. In that instance the *res nullius* was killed, and went into the respondent's deep freeze.[14]

Before his confused/confusing definitions Reynolds wrote:

> "We need to ask what this obscure Latin concept actually means and if it was legitimately applied to Australia in the late eighteenth century".

TJ Lawrence's discussion, in a section on "occupation", clearly refers to the modern world of the 1890s, and is not relevant to the 18th Century:

> "We will endeavour to state as clearly as possible what may be termed the modern

doctrine, warning our readers, however, that in some of its parts it must be taken to represent tendencies towards law rather than rules of universal acceptance".[15]

Reynolds's definitions overlook the most common modern usage of *terra nullius* – an unpeopled land, such as Antarctica – even though, in his own books, he commonly uses the phrase in this sense and makes it synonymous with "uninhabited".

After fixing the term in place, Reynolds's career was based on disproving its validity. The work of the mirrors was done. His mangling of international law, common law, and translation produced a late 20th Century superstition. Once introduced, the Latin tag was quickly loved by historians, social scientists, lawyers, clergy, journalists, and racial activists. It meant whatever its users wanted it to mean. Impressive sounding, it was ridiculously easy to mock. It was possible, and quite probable, that when two people discussed *terra nullius*, they could imagine they were agreeing, when at any time they could have been using quite different meanings.

We all became infatuated with *terra nullius*, to the exclusion of all other explanations for the founding of the first Colony – and it became so elastic that it was used by *Mabo* Justices to explain the later acquisition of the Murray Islands by the Colony of Queensland. And anything which suggested that Aborigines in 1788 were not able to deal in a meaningful way with rights to the land they lived on became signs of incipient colonialism and racism. It was only in 1965 that Professor O'Connell made the statement that "the Australian aborigines were held incapable of intelligent transactions with respect to land". Few law, or history, professors would dare to make such a claim in 2004. A lot has happened.

Confusion over supposed correct meanings of *terra nullius* make it a mutating linguistic virus. If you bought the third edition of the *Macquarie Dictionary* in 1997 your definition was illustrated with a 1988 quotation by Al Grasby, which made the phrase synonymous with "uninhabited": "a land without people, the evil fiction that no one lived here when Captain James Cook arrived". What "evil fiction"? Was the *Macquarie* licensing stupidity, or catching popular usage? From Phillip onwards every colonial Governor was loaded with instructions for dealing with the Aborigines.

In 2001, after *Mabo*, after *Wik*, the *Macquarie* revised itself, deleting Grasby and inserting a 1980 quote from Professor Alan Frost:

> "According to international notions, New South Wales was *terra nullius*, to be occupied on the basis of first discovery, without purchase from the indigenous inhabitants".

Both Grasby and Frost accepted *terra nullius* as the unbearable darkness at the center of our nationhood.

Even as the *Macquarie* was being revised, its publisher, Susan Butler, used the "Australian Word" column in *The Weekend Australian* on 16 June, 2001 to explain that *terra nullius* was "a legal term introduced into Australian legal jargon and popular knowledge by first the *Mabo Case* and then *Wik*". In her explanation she talked of "civilised people who owned property, basically – and people who didn't count – uncivilised people who didn't own property". Even as her own dictionary was dumping the previous Grasby citation, she illustrated usage with another quotation from the same source,[16] and ended: "The phrase *terra nullius* sums up the colonial view, even though it was never actually used at the time". Many academics were still under the impression that this really was vocabulary from the 18th Century.

It is possible to go through a university education from first year to doctorate without actually reading a book from cover to cover. It is possible to talk confidently of Locke, Hobbes, Vattel, Blackstone without having read these authors. University history writing is assembled from quotations, often taken from secondary sources.[17]

On All Saint's Day, 2002, over a year after the *Macquarie* publisher had pointed out that *terra nullius* had not been used in the 18th Century, there was a request on an internet site for

academic historians, H-ANZAU:

> "Dear colleagues, does anyone out there know when the TERM itself, 'terra nullius', was first used to describe the principle of colonization in Australia? And who by and in what context?"[18]

The responses were:

- "The effluxion of time, and the Lawyers' love of dog latin [sic], have taken the idea of the land of no-one and perverted [it] into the fiction of terra nullius. I do not have access to an original edition of Vattel, but I suspect the phrase was first used by him. He is cited as a source by Chief Justice [sic] Brennan in the Mabo (No2) decision".
- "May I suggest Fr Frank Brennan at ANU as a most likely informant".
- "Why do I feel that the Dutch explorers used this term in reference to Australia? I might be wrong, but I think I read it somewhere..."
- "As far as I understand it – the 1889 privy council decision on Cooper v Stuart was the first ruling asserting TN. This was the judgement overturned by Mabo".

These are real people, academic historians who teach and make their livings from *terra nullius*. In these responses to a genuine query, not one seemed worried that they didn't really know the source of something with which they were so familiar.

Lawyers and judges are as confused as the historians. The *Mabo* Justices, who introduced *terra nullius* into their deliberations, thought the phrase was imbedded in the past. Both Justices Brennan and Toohey quoted identical words from the opinion of the Vice-President of the International Court of Justice in its *Advisory Opinion on Western Sahara*:

> "Vattel, who defined *terra nullius* as a land empty of inhabitants".[19]

Vattel did not define a thing called *terra nullius*. He wrote in good, clear, 18th Century French, not Latin. In his *The Law of Nations or the Principles of Natural Law*, Chapter 18 was titled "Occupation of Territory by a Nation".[20] Vattel discussed, in section 207, taking possession of "a country uninhabited and without an owner": "*pays inhabité et sans maître*". Section 208 deals with difficulties in this matter, and he moves on, in section 209, to deal with another subject. He has finished his discussion of uninhabited and unowned territory and clearly addresses a new topic. He wrote:

> "There is another celebrated question ... It is asked whether a Nation may lawfully occupy any part of a vast territory in which are to be found only wandering tribes where small numbers can not populate the whole country".

Incredibly, Justice Brennan claims this as the first "justification for the application of the theory of *terra nullius* to inhabited territory".[21]

Vattel gave two examples of what he was talking about here: New England, and William Penn and his colony of Quakers in Pennsylvania. Vattel praised these colonial occupiers, for "they bought from the savages the lands they wished to occupy". Vattel was discussing two quite distinct aspects of "occupation". New South Wales does not fall under the first – it was not considered uninhabited – but under the second, a "vast territory" with "wandering tribes". Vattel discussed two separate matters: it is illogical to conflate them under a single dodgy Latin tag.

Vattel wrote of international law in the 18th Century, New South Wales was founded in the 18th Century. A Vice-President of the International Court, and two High Court Justices, believed Vattel's description of "a country uninhabited and without an owner", was his definition of what they called *terra nullius*. If Henry Reynolds was seriously seeking an 18th Century concept, surely this was the 18th Century source he needed: not those doubtful texts of the 1890s and 1930s and '40s.

Reynolds dipped into this section. He took one sentence, and ignored the next, on uninhabited and unowned land, which modified the first and was the core of Vattel's discussion. Vattel's 18th Century ideas on the rights of occupation of uninhabited and

unowned land under contemporary international law, are excluded from *The Law of the Land* discussion of *terra nullius*. If included, those conflating Reynolds's definitions may have been controlled, or *terra nullius* deleted from his discussion of our sovereignty.[22]

Twentieth Century *terra nullius* is magical; unlike non-magical phrases it has "enlarged" notions to fit any circumstances. Justice Brennan tied it to inhabited territory, and the Legal Information Access Centre performed this hocus pocus:

> "In the 1979 case of *Coe v. Commonwealth*, which directly challenged the legitimacy of Crown sovereignty over Australia, the doctrine of *terra nullius* was expanded yet again, this time to apply to lands which 'by European standards, had no civilised inhabitants or settled law' ".[23]

The judge they quoted was Justice Gibbs. He had not mentioned *terra nullius*, and was actually writing of the common law.

At all times there were two little things which should have been known about *terra nullius*: it has something to do with international law, and it is not part of common law. Introducing a collection of legal essays on the *Mabo Case*, Sir Harry Gibbs was puzzled that the Court had reportedly overturned *terra nullius*, which he found "unknown to the common law".

Few legal writers noted his words, and judges and lawyers continue to reveal their own confusion: for instance, Justice Michael Kirby, who said here in Perth:

> "It was lawyers who invented the notion of *terra nullius* and denied Aboriginals their land rights until, in *Mabo*, lawyers changed the law's direction".[24]

Kirby has written of the "common law doctrine of *terra nullius*".

Geoffrey Robertson, in his book *Crimes Against Humanity*, referred to:

> ". . . . . the pernicious common law theory of *terra nullius* – which in countries 'discovered' by European explorers allowed native inhabitants to be treated as if they were part of the flora and fauna".

Law and history are two different disciplines which have come together without a true understanding of each other. Justice Brennan wrote that:

> "International law recognised conquest, cession, and occupation of territory that was *terra nullius* as three of the effective ways of acquiring sovereignty. No other way is presently relevant".[25]

That's interesting. Perhaps that is how the discipline of the law understands these matters. To write history only within those parameters is the constipation of the historical imagination. An historian has a responsibility to the records, not the courts. Histories have been written as though they were submissions in land rights cases.

If we removed *terra nullius*, would historians continue to tell the same story?

And perhaps our expectations of historians have changed. Must the historian be a constitutional lawyer?

In 1955, in the pre-*terra nullius* period of history writing, AGL Shaw in his long-selling history *The Story of Australia* asked:

> "How could the nomadic food-gathering tribes be protected 'in the full enjoyment of their possessions', when they owned no land but all the land, and every new arrival was likely to impinge upon some ancient hunting ground?".[26]

In a 2001 *Australian Historical Studies* article, Merete Borch examined official documents influenced by the evidence of Sir Joseph Banks to the 1785 Commons Committee:

> "The government seems to have believed that there would be room for everybody without further arrangements; however, revision of this policy in the light of better knowledge of actual conditions was clearly allowed for".[27]

Phillip's Commission asserted sovereignty over a vast area. It was a cheeky try on that was never tested by another power setting up a colony on the land. The actual settlements in

1788 were two, not very big, prison farms. Towards the land ownership there was a nuance in Phillip's Commission:

"And Wee do hereby likewise give and grant unto you full power and authority to agree for such lands tenements and hereditaments as shall be in our power to dispose of ...".[28]

It was three years before Phillip made the first land grants. In those three years a lot had happened.

Aboriginal land was taken by the British government and the settlers. Loss, dispossession, theft, are far clearer in plain English. The gradual way colonisation happened is not served by *terra nullius*, and does not allow for the real stories; for each Aboriginal community faced, at different times, and in different ways, the trauma of dealing with an encroaching civilisation. Their individual responses deserve detailed study, detailed accounts.

There is also the question of chronology: 1788 and 1830 and 1879 are vastly different. *Terra nullius* seduces the legalistic modern mind, which can't believe that a great swathe of territory could be possessed without a sheltering legal theory. The history of our beginning needs a new beginning. It needs examining without 20th Century error and prejudice. Go into the archives with a preconception, and that is only what you will find.

Terra nullius is the present's denial of the past. In this misordering the colonists become vile racists, and the Aborigines are struck from the record. Accept the incantation of *terra nullius*, and it is possible to believe that the government and settlers simply did not see the Aborigines. The colonists are despised, but the Aborigines of 1788 are made to appear passive nonentities. We have taken the land from the Aborigines, we are not going to rob them of their history. Pierre-Bernard Milius was with the Baudin expedition. On 13 January, 1802 he wrote of his first sight of the Tasmanian Aborigines: "We are burning with impatience to communicate with the inhabitants".[29] The creators and users of *terra nullius* threaten to extinguish that fire, and have damaged Aborigines, Europeans, and the soul of the joint entity called Australia.

In 1788 Aborigines on the shores of their harbour were joined by colonists from another world. Some of those moments have been preserved in the writings of one of those two groups. *Terra nullius* destroys an utterly unique memory in the history of the world by pretending that one party was completely, utterly, oblivious to the other.

And sometimes with these records we have scarcely scratched the surface of their meanings. When Aborigines encountered Europeans for the first time, they sometimes seemed confused about the sex of their male visitors, and humorous incidents followed where trousers were opened to reveal the hidden key. This was not what was going on at all. The Aborigines, probably, were seeking to see if the strangers were initiated men. This was not the comedy early visitors relate, and historians repeat, but the basis of male Aboriginal communications between strangers.

History is being written with both eyes on the law courts, and sometimes in the pay of parties arguing in the courts. Disputes between historians are exciting and interesting and necessary, but they are not for the courts. The two disciplines do not mesh; we really don't understand each other. Historians have enough problems sifting the materials of the archives; to have their selections taken into the courts as "evidence" will only end in tears. There is always an old document waiting to be rediscovered, there must always be new interpretations. Historians, and their theories, date very rapidly.

Law Professor O'Connell wrote that bad history makes bad law. History makes bad law. We act to cure the past, we sow problems for the future. Laws are for the living, they can't bandage the past. Attempt to do so and you make the present even worse. Conciliation must be between the living.

History does not belong to the conquerors, to the winners. She is the unfaithful mistress of every generation, to each of them she whispers a different story. The classic historians can

be read by all generations. The volumes of conformity of the last twenty years will not be read for beauty of language, or originality of ideas, but for amazement at the fawning stupidity, cupidity of a generation, and their willingness to believe the unbelievable.

Poor fellow my country.

Endnotes:

1. A nice phrase attributed to George Kennan in Timothy Garton Ash, *History of the Present: Essays, Sketches, and Dispatches from Europe in the 1990s* (New York, 1999), p. xii.
2. *Journal of the Royal Australian Historical Society* in 1940.
3. DP O'Connell, *International Law*, Volume 1, 2nd edition (London, 1970 [1965]), p. 409.
4. Barry Bridges, *The Aborigines and the Land Question*, in *Journal of the Royal Australian Historical Society*, Volume 56, Part 2, June, 1970.
5. *op. cit.*, p. 93.
6. Malcolm Shaw, "The *Western Sahara* Case", in *The British Yearbook of International Law: 1978* (Oxford, 1979), p. 131.
7. *Coe v. The Commonwealth of Australia*, 1979.
8. Alan Frost, *New South Wales as* Terra Nullius: *the British Denial of Aboriginal Land Rights*, in *Historical Studies*, Volume 19, 1980-81, pp. 513-523.
9. *Ibid.*, p. 519.
10. Henry Reynolds, *Why Weren't we Told?: a Personal Search for the Truth about our History* (Ringwood, 1999), p. 186.
11. Henry Reynolds, *The Law of the Land* (Ringwood, 1992 [1987]), p. 12.
12. The three references cited by Henry Reynolds are: TJ Lawrence, *The Principles of International Law* (London, 1910 [1895]), pp. 151 and 160; GH Hackworth, *Digest of International Law* (Washington, 1940), 1, p. 402; AS Keller et al, *Creation of Rights of Sovereignty through Symbolic Acts, 1400 – 1800* (New York, 1938), p. 4.
13. *loc. cit.*.
14. *Yanner v. Eaton* [1999] HCA 53.
15. Reynolds offers another page from this same book which says that, because Australia has a large number of settlements, it has "a perfectly valid title" even though other countries would have been entitled to make colonies when the only settlement was at Botany Bay. This does not seem to have any relevance to a definition of *terra nullius*. See TJ Lawrence, *op. cit.*, p. 160.
16. "Despite his professed admiration for the New Hollanders, Cook took their lands as if they did not exist; they became from that moment a shadow people with no rights of any kind to their hearths and home. This was an application of the dictum [sic] of *terra nullius* (land without people); following it no restrictions were recognised on occupation or exploitation". Credited to Al Grassby [sic] and Marji Hill, *Six Australian Battlefields* (1988) in *The Weekend Australian*, 16 June, 2001.
17. Author John Connor writes:

    > "The argument of *terra nullius*, first cited by John Locke in his *Second Treatise on Government* (1689 – 90) to justify the British dispossession of the native Americans, was used to ignore native sovereignty of the Adaman Island in 1789 as

well as to claim that Australian Aborigines had no title to their land".

Locke did not mention *terra nullius*. Connor's footnote references are to secondary historical studies and not to Locke. (John Connor, *The Australian Frontier Wars 1788 – 1838*, Sydney, 2002, p. 7).

18. This material was taken from a search for *terra nullius* on H-ANZAU discussion site: www.h-net.org/~anzau/ .

19. See Brennan on p. 28, and Toohey on p. 142, of Richard H Bartlett, *The Mabo Decision* (Sydney, 1993).

20. E de Vattel, *La Droit des Gens, ou Principes de la Loi Naturelle Appliqués à la Conduite et aux Affaires des Nations et des Souverains*, Volume 1, reproduction of 1758 edition (Washington, 1916), pp. 193-196. Alternatively, E de Vattel, *The Law of Nations or the Principles of Natural Law*, Volume 3, translation of 1758 edition (Washington, 1916), pp. 84-85.

21. Justice Brennan: "a justification first advanced by Vattel at the end [sic] of the 18th century", in Richard H Bartlett, *op.cit.*, p. 21.

22. Reynolds quotes only from the first of the following two sentences. He also deletes Vattel's word "men", and inserts "people":

> "All men have an equal right to things which have not yet come into the possession of anyone, and these things belong to the person who first takes possession. When, therefore a Nation finds a country uninhabited and without an owner, it may lawfully take possession of it, and after it has given sufficient signs of its intention in this respect, it may not be deprived of it by another Nation". (E de Vattel, *The Law of Nations or the Principles of Natural Law*, *op.cit.*, p. 84).

See Reynolds, *The Law of the Land*, *op.cit.*, p. 13.

23. http://www.austlii.edu.au/au/other/liac/hot_topic/hottopic/2000/2/1.html.

24. Michael Kirby, *85 Journeys to Perth*, Law Society of Western Australia, High Court Dinner, 24 October, 2001.

25. Richard H Bartlett, *The Mabo Decision* (Sydney, 1993), p. 21.

26. AGL Shaw, *The Story of Australia* (London, 1960 [1955]), p. 23.

27. Merete Borch, *Rethinking the Origins of* Terra Nullius, in *Australian Historical Studies*, Volume 117, 2001, p. 235.

28. *Historical Records of Australia*, Series I, Volume I, p. 7.

29. 13 January, 1802: "*nous brûlons d'impatience de communiquer avec les habitons*". Pierre-Bernard Milius, *Voyage aux terres Australes* (le Havre, no date), p. 30.