“THE WHITE MAN NEVER WANNA HEAR NOTHIN ABOUT WHAT’S DIFFERENT FROM HIM”: REPRESENTATIONS OF LAW’S ‘OTHER’ IN AUSTRALIAN LITERATURE

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DECLARATION

I declare that this thesis is my own account of my research and contains as the main content work which has not previously been submitted for a degree at any tertiary institution. To the best of my knowledge, this thesis contains no material previously written or published except where due reference is made in the text.

Naomi Sidebotham
ABSTRACT

Law controls our everyday. It regulates our lives. It tells us what is and is not acceptable behaviour, it confers and protects our rights, and it punishes us for our indiscretions. But law does much more than this. It creates normative standards which shape the way people are treated and the way that we relate to each other and to society generally. The law defines people. It constructs identity. And it creates the ‘other’. This is a legacy of positivism’s insistence on identifying that which is ‘inside’ law, and so accorded legitimacy, and that which is not. That which does not conform to law’s constructed standards and values is identified as ‘other’ and marginalised and silenced. In this thesis, I demonstrate the way that the law constructs ‘other’, in particular, the Aboriginal ‘other’. I consider the way that Aborigines have been defined by the law to show the consequences that this has had for Aboriginal people beyond the purely legal. I argue that law’s construction of Aboriginality has contributed to the marginalisation of Aboriginal people and their exclusion from many aspects of the legal and the social, and that it has silenced them within the dominant domain, denying them the ability to challenge the wrongs perpetrated against them. I examine these issues through the medium of literature. I argue that literature’s contribution to exposing, critiquing and challenging law’s construction of ‘other’ is invaluable. It informs the reader about the way that the law has treated Aboriginal people and, more generally, about the structures and limitations of our positivist legal system. It thereby contributes to the community’s perception and understanding of the way the law works, and the impact that it has on the lives of its subjects. Perhaps most importantly, it also educates towards social change and reform.
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INTRODUCTION

... it might help if we non-Aboriginal Australians imagined ourselves dispossessed of land we have lived on for 50,000 years – and then imagined ourselves told that it had never been ours. Imagine if ours was the oldest culture in the world and we were told that it was worthless. Imagine if we had resisted this settlement, suffered and died in the defence of our land, and then were told in history books that we had given up without a fight. Imagine if non-Aboriginal Australians had served their country in peace and war and were then ignored in history books. Imagine if our feats on sporting fields had inspired admiration and patriotism and yet did nothing to diminish prejudice. Imagine if our spiritual life was denied and ridiculed. Imagine if we had suffered the injustice and then were blamed for it.

It seems to me that if we can imagine the injustice we can imagine its opposite. And we can have justice.¹

In his 1992 Redfern Park speech, former Prime Minister Paul Keating eloquently brings together two important forms of discourse: law and literature. He highlights the many injustices that have been wrought upon Australia’s Indigenous peoples by the law, from their dispossession and the denial of their culture, to the forced removal of their children.² And then he calls on all non-Aboriginal Australians to imagine what this would have felt like, what impact such injustices would have had on our lives. Literature is a powerful medium for the expression of the imagination. It can bring to life the kinds of social, political, cultural and legal realities that were (and are) encountered everyday by Aboriginal people in our society. Importantly, it can also imagine a different reality, a different future, one in which the injustices foregrounded by Paul Keating are remedied. It is this linkage between law and literature that I examine in this thesis. More specifically,

² Keating states: “… it was we who did the dispossessing. We took 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 practiced discrimination and exclusion. It was our ignorance and our prejudice. And our failure to imagine these things being done to us.” Ibid at 61.
I examine what literature can tell us about the structure, the operation and the limitations of our legal system.

Law is part of our everyday. It controls many aspects of our lives. It regulates our behaviour and sets rules with which we are required to comply. It categorises our actions as legal or illegal, it protects our rights and it punishes us for failure to comply with its prescriptions. But law is about much more than this. It does not only regulate the legal. It also orders the social. It extends past the specific prescriptive rules of a legal system into “the structure of truth and the interpretations we have of the world.”3 It creates normative standards that impact on our social and cultural interactions, and shape our perceptions of, and the way we are perceived by, others. It impacts on the way that we relate to each other and to society generally. Laws tell us where we can go, who we can marry, that we should not discriminate against people with a disability, what constitutes acceptable behaviour in a public place, when we can consume alcohol, what speed we can drive at, and so on. Law matters. It is not separate from society, but is part of the “machine of society.”4 Our entire world, as Margaret Davies has stated, “is structured by laws of one sort or another. The law is a form we cannot avoid, whatever its substance. We think and act in relation to laws.”5

One of the concepts I discuss in this thesis is the way in which the law constructs identity. That is, the way it defines and represents people in particular ways and creates categories of ‘otherness’. It has, for example, represented Aborigines as

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3 Davies, M. Asking the Law Question 2nd ed. (Sydney: Lawbook Co.) 2002 at 8.
5 Above n.3 at 4.
‘uncivilised’ or ‘inferior’, and used such constructions to legitimate and justify its treatment of them. Representations of Aboriginal people as ‘uncivilised’, for example, justified the law’s dispossession of them. Similarly, its representation of them as ‘inferior’ or ‘primitive’ legitimated the legally sanctioned discrimination that has been exercised against them. The consequences of being constructed as ‘other’ by the law are far reaching, long-term and often negative. Aboriginal people continue to feel the impact, at the level of the legal and the social, of the way that they have been constructed and treated by the law. They continue to experience higher rates of infant mortality and have a lower life expectancy than non-Aboriginal Australians. They do not enjoy the same employment and educational opportunities and they are disproportionately represented in our criminal justice system. They “remain at a disadvantage compared to the rest of the population.”

It is for these reasons that we should not unquestioningly accept the laws by which we are governed, or, more accurately, the underlying assumptions or reasons for those laws. This is not to say that laws are not necessary, or that we can ignore them or refuse to comply with them. Rather, it is to suggest that as members of society we have a responsibility to think about our laws. We should think about why the law tells us that we must vote in state and federal elections, for example, or why the law determines that certain days are public holidays while others are not, or why the law confines marriage to heterosexual partners. We should ask

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7 Scott, K. “Covered up with Sand” (2007) 66(2) Meanjin 120 at 121.

8 The Marriage Act 1961 (Cth) s.5(1) defines marriage as “the union of a man and a woman” and so excludes same sex relationships.
what kinds of values and knowledges, or norms, do these kinds of laws enshrine and impose on us, not just in the legal arena, but at the level of the social, in the way that they regulate our experiences and perceptions of society. If we do not think about these issues, or question them, then our assumptions, beliefs, reality, truth and knowledge become those determined by someone else.9 We should not “abdicate the responsibility of wondering about why we think the way we do, [and] why we act the way we do.”10

In this thesis, I argue that literature brings important insight into our understanding of these issues. As Melanie Williams has written: “literature … both reflect[s] prevailing values and problematise[s] those values. … [It is] a mirror to ourselves.”11 As an instrument of education, socio-political commentary and reform, literature is invaluable. Literature that is concerned with law, such as The Chant of Jimmie Blacksmith, Journey to the Stone Country, Benang and the other texts referred to in this thesis, informs us about the way in which our law promotes particular values and norms, and the impact that this can have on society at large.12 In particular, it exposes how the law constructs identity and marginalises and silences, within its domain, those who are different. It exposes that the law does not treat everyone equally. And, importantly, it encourages readers to question and to challenge the assumptions which underpin our legal system and our laws.

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9 Davies, above n.3 at 4 – 11.
10 Ibid at 5.
Asking such questions is important. They are a necessary precursor to law reform. Without questions Aboriginal people would not, for example, enjoy the (limited) legal recognition of their rights to land, and women would still not enjoy the right to vote. Questions being asked today concern the inhumanity of imprisoning asylum seekers, the right of our political leaders to take us to unprovoked wars and (still) the rights of Australia’s Indigenous peoples. If people wish to bring about a change in the laws by which they are governed they need to question them. If they are to question they need to be informed. One of the main ways in which people are informed about the law is through the media; television, movies, newspapers and books.\(^{13}\) The way the law is portrayed in literature is an important tool by which people can acquire knowledge and through which they can express their dissatisfaction (and satisfaction) with the status quo. The power of literature should not be underestimated. One need only look, for example, to the sales of John Grisham’s novels or to the hold that Harry Potter enjoys, to see that there is a powerful role for literature in popular consciousness.\(^{14}\)

The literature that I focus on in this thesis is Australian literature. There is an absolute wealth of Australian writing that comments on the way in which our legal system and our laws operate. Consider, for example, Peter Carey’s depiction of the law’s treatment of free settlers in *True History of the Kelly Gang*,\(^{15}\) or the law’s discrimination of Indigenous peoples that has been the subject of many literary

\(^{13}\) Although it should be noted that sometimes this information may be biased, or, for some other reason, questionable.


works, including *The Chant of Jimmie Blacksmith*, *My Place* and *Benang*.\(^{16}\) The plight of the convict and the settlement of Australia have also been the topic of many novels, from Marcus Clarke’s *For the Term of His Natural Life* to more recent works such as *Gould’s Book of Fish* and *The Secret River*.\(^{17}\) There is also much contemporary literature ranging from the works of Nicholas Hasluck and Andrew McGahan to those of Robert Drewe and Kerry Greenwood that deals with an array of legal issues from criminal law to the corruption of government.\(^{18}\)

This thesis does not profess to provide an exhaustive discussion of Australian literature that deals with law. Such a task is clearly beyond the scope of this work. Rather, I have chosen literary representations of the law’s treatment of Australia’s Indigenous peoples as my specific site of analysis. Since the beginning of colonisation Aboriginal people have been mistreated by the western colonial law. They suffered the violence of terra nullius in the law’s representation of them as insufficiently ‘civilised’ to own their land, and in its dispossession of them. They were then subjected to the injustice of protection and assimilation policies as contained in the repressive and inhumane legislative regimes which governed every aspect of their lives throughout much of the twentieth century and inflicted such wrongs on them as the forced removal of their children. They were completely subjugated by our colonial law. They were constructed, by this law, as

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\(^{16}\) Keneally, above n.12; Morgan, S. *My Place* (Fremantle: Fremantle Arts Centre Press) 1988; Scott, above n.12.


‘other’: ‘primitive’, ‘inferior’ and ‘uncivilised’, and were marginalised and silenced.\textsuperscript{19} The law refused to recognise Aboriginal perspectives and experiences and denied Aboriginal people a voice, within the dominant discourse, with which to testify to the wrongs perpetrated against them.

I argue in this thesis that by reading literature about the law’s treatment of Aboriginal people from a postcolonial perspective, the reader is clearly informed about the way in which the discourse of law constructs identity and marginalises difference, and about the way in which the law fails to treat people equally. Postcolonialism emphasises plurality, diversity and the local, and creates a space for alternative (minority) stories to be told that question and challenge dominant discourses such as the law. It allows for the voice of the ‘other’ to be heard. I use postcolonialism as a framework for reading the literary texts discussed here. That is, I find postcolonialism useful as a reading and interpretation strategy rather than as a basis upon which to select specific (postcolonial) literature. I argue that many texts can be read from a postcolonial perspective and so offer important insight into the way in which our law is structured and the way in which it treats its subjects.

Within this framework, I focus specifically on two substantive areas of law; namely, terra nullius and the rule of law. These two principles combine to provide the basis of Australia’s modern legal system. Terra nullius, which determined,

\textsuperscript{19} It should be noted here that the very notion of ‘primitive’ is problematic and depends on the criteria by which it is judged. By western colonial criteria which prioritized the cultivation of the land, dress and the ‘sophistication’ of technology, Aboriginal people were deemed to be ‘primitive’. If different criteria were applied, such as the sophistication of kinship groups and social organization, or the percentage of time applied to cultural pursuits, Aboriginal people would not be assessed as such. In this thesis I am examining the way that the western colonial law has treated Aboriginal people. This law determined that Aboriginal people were, by its standards and criteria, ‘primitive’. It is in this sense that I use the term ‘primitive’ throughout this thesis.
literally, that this land was empty, with no ‘civilised’ inhabitants, provided the
colonisers with justification for claiming sovereignty over, occupying and settling
Australia. It also authorised them to transplant their own legal system and their
own laws, to the exclusion of any other pre-existing laws, into their new
acquisition. The rule of law, as a fundamental principle of English law, was one of
those principles duly implanted into the new colony. It specifies that the law is an
impartial and objective arbiter and that all of its subjects should be treated equally
by it. I argue that terra nullius and the rule of law are both colonial, positivist
constructs that, when applied to Australia, resulted in the dispossession and
discrimination of Aboriginal people. Importantly, these two sites of analysis also
expose clearly that the law is not separate from society, and that the way that it
deals with people can have considerable (often negative) long-term consequences.
Aboriginal people today continue to feel the impact of being dispossessed and of
the discrimination exercised against them under the guise of equality.

I begin in Part One of this thesis with an examination of questions that are relevant
to law and to literature. My aim here is twofold. Firstly, to explicate the
importance of law as a mechanism of regulating both the legal and the social, and
secondly, to explain why literature is a useful medium by which to examine these
issues. In Parts Two and Three, I analyse specific literary texts that examine the
issues I raise in Part One. My argument, throughout, is that postcolonial readings
of literature expose the way that the law constructs identity and creates the ‘other’,
and that this has enormous long-term consequences beyond the purely legal.
In Chapter One, I begin with an examination of the reach that the law has into our everyday lives. Drawing on the work of Lyotard and Foucault, I argue that law is not separate from society but that its power extends into many aspects of the everyday, impacting on all forms of social, political and cultural interactions. The law is a discourse that contributes to the production of knowledge. It imposes on society a universal and totalising truth, one that denies alternative truths and alternative values. I argue here that the discourse of law marginalises and silences, within the dominant domain, those who do not fit within or conform to these constructed values or truths. That is, the law gives rise to a différend, in its inability (and unwillingness) to recognise alternative perspectives. It denies the ‘other’, those who do not conform, the ability or the right to speak and be heard within the dominant discourse.

The way in which the law constructs and marginalises the ‘other’ is examined in further detail in Chapter Two. In this chapter, I explain that the legal system that operates in Australia is a positivist one. That is, it is a system which stipulates that only those laws which are validly posited by the state are considered to be law, and that validly enacted laws must be complied with. More importantly, positivism attempts to provide a universal, totalising narrative of law, one which clearly and definitively identifies that which is law and that which is not. One of the important consequences of this concern is that it has created a discourse of law that is binary. Some things are law and some things are not. Some things are included within its domain and some things are not. That which is different or does not conform to law’s constructed standards and norms is excluded. And so, the law creates categories of non-conformity or difference. Those who fall within these
categories and definitions are constructed as ‘other’, are marginalised and are often excluded from the full protection of the law. Importantly, the way in which the law constructs the ‘other’ and marginalises difference further reveals that the law, despite its claim that it is impartial and that everyone is equal before it, is not an objective institution and does not treat everyone equally. In this chapter, I argue that if the law is to achieve this objective of equality, it must embrace pluralism. Pluralism emphasises diversity and respect. I argue that it thereby offers an alternative approach to the monism of positivism, one in which ‘otherness’ or difference can be accommodated by the law, not absorbed or digested by it. It allows for alternative voices to be heard, within the dominant domain, and challenge the conditions that give rise to Lyotard’s *différend*.

In Chapters Three and Four I focus on questions about literature. In Chapter Three, I argue that literature is an important form of representation that can either create and perpetuate, or critique and question authorised discourses, including the law. It is an important medium by which people are informed about the law and by which existing structures, systems and values can be represented and critiqued.

In Chapter Four, I suggest that postcolonialism provides a useful framework for the interpretation and analysis of literature about law. I argue that postcolonialism is useful for two reasons: firstly, it creates a space for alternative stories to be told. That is, it allows for the ‘other’ to be heard. Secondly, it offers a perspective or way of reading. Within this framework, I find the work of Bob Hodge and Vijay Mishra in *Dark Side of the Dream: Australian literature and the postcolonial mind*
particularly useful. They make a number of important points in this work. Firstly, they emphasise that heterogeneity is fundamental to an understanding of postcolonialism, and that we must be aware not to reduce the diversity of experiences of colonised peoples to an undifferentiated theory of the colonised ‘other’. Secondly, they highlight the difficulties of treating settler countries, such as Australia, where the colonial power remains intact, as postcolonial. Finally, they introduce their theory of Aboriginalism, which, like Said’s Orientalism, explains that Aboriginal people have been (and are) represented by the colonisers in such a way that they are denied the right to represent, or speak for, themselves within the dominant domain. I draw on Aboriginalism, in particular, in analysing the texts discussed in this thesis.

In Part Two, I focus on the application of the principle of terra nullius to Australia. I argue that the discourse of terra nullius legitimated, and was legitimated by, the representation of Aborigines as ‘primitive’ and ‘uncivilised’. It was this construction of them that enabled the English to occupy Australia and to dispossess Aboriginal people. The law represented them as unable to cultivate or own the land, and that therefore the land could be considered empty, available to be legally and legitimately occupied. This concept of terra nullius is further explored in Chapter Five. I explain what is meant by terra nullius, the way in which it provided the legal basis for the settlement of Australia, and challenges to the application of the principle. In particular, I explore the way in which the law has changed from the decision in Milirrpum v Nabalco, in which Aboriginal rights to land were denied, to that in Mabo v Queensland (No.2), which recognised the

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existence of common law native title rights in Australia. This chapter provides the legal background to the texts that are examined in Chapters Six and Seven.

In Chapter Six, I analyse Eleanor Dark’s *The Timeless Land*, Thomas Keneally’s *The Chant of Jimmie Blacksmith* and Mudrooroo’s *Doctor Wooreddy’s Prescription for Enduring the Ending of the World*. These texts tell of the settlement of Australia and of the impact that this settlement had on Aboriginal peoples. I argue that these stories inform the reader about how the law constructed Aboriginality in a way which justified Australia’s designation as terra nullius and the dispossession of Aboriginal peoples. I further argue here that these texts expose how the law’s representations of Aboriginality gave rise to a différend and silenced Aboriginal peoples’ voices within the dominant discourse.

In Chapter Seven, I examine texts by Kate Grenville, Alex Miller and Andrew McGahan, all of which were written after the 1992 *Mabo* decision, and which retell stories of settlement and dispossession. I argue that these texts tell alternative stories to those examined in Chapter Six. That is, they allow for Aboriginal stories, experiences and perspectives to be told. They give a voice to the ‘other’ and so begin to challenge the conditions that give rise to the différend. Importantly, I argue that in telling these stories, these texts inform the reader about the law’s role in changing constructions of Aboriginality. They engage with the change in the law that occurred in *Mabo*, represent Aboriginal people as

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empowered and having the right to claim their land, and reveal how there is now a way for Aboriginal people to speak and to be heard within the dominant discourse.\textsuperscript{24}

In Part Three, I move away from stories about dispossession, and focus on the rule of law. In particular, I examine its assertion that everyone is equal before the law. I argue that, despite this assertion, the law does not treat everyone equally, and that it silences, within the dominant domain, the voices of those who are not treated equally by it. In Chapter Eight, I explain the concept of the rule of law. In particular, I examine Dicey’s formulation of the rule,\textsuperscript{25} its manifestation as equality before the law, and the distinction between standards of formal and substantive equality. It is against this background that I examine the texts discussed in Chapters Nine and Ten.

In Chapter Nine, I analyse stories about the 1905 \textit{Aborigines Act} (WA).\textsuperscript{26} This legislation instituted a repressive and discriminatory regime that regulated the lives of Aboriginal people in Western Australia throughout much of the twentieth century. It was intended to ensure the cultural and physical absorption of Aboriginal Australia into mainstream (white) Australia through a raft of inhumane and barbaric restrictions and controls imposed on Aboriginal people, from the regulation of who they could marry, to the forced removal of their children.\textsuperscript{27} I argue that the texts discussed here expose the way that the law used the discourse

\textsuperscript{24} It should be noted that, of course, there are individual Aboriginal people, such as Michael Mansell and Mick Dodson, and organizations, such as the Aboriginal Legal Service, that do speak out in public.


\textsuperscript{26} Scott, above n.12; Morgan, above n.16.

\textsuperscript{27} It was also about protection in the eyes of some.
of equality, in the form of assimilation as enshrined in the 1905 Act, to justify its
deliberate discrimination of Aboriginal people. It denied them equality, and it
denied them a voice, within the dominant discourse, with which to challenge the
injustices which they suffered.

In February 2008, Prime Minister Kevin Rudd apologised to Aboriginal people for
the discrimination, injustice and pain deliberately inflicted on them by the “laws
and policies of successive parliaments and governments.”28 In Chapter Ten, I
discuss the importance of apologising. I examine Gail Jones’s Sorry, Alex Miller’s
Landscape of Farewell and Kim Scott’s Benang.29 Sorry and Landscape of Farewell,
in particular, highlight the importance of apologising. They illustrate that saying
sorry allows for the unspoken to be put into words and forces the party that has
committed the wrong to name that which they have done. I argue that Kevin
Rudd’s apology, in acknowledging, and speaking of, the wrongs committed against
Aboriginal people by the law, is an essential precursor to the realisation of equality
for Aboriginal Australians. It also foregrounds the need to respect difference and
Aboriginal peoples’ ‘otherness’. I argue in this chapter that the law needs to respect
and accommodate this diversity, without assimilating or absorbing it. That is, it
needs to be more pluralistic in its treatment of, and relationship with, Aboriginal
people. As demonstrated by the texts discussed here, this recognition and
acceptance of difference is an essential precursor to achieving equality.

28 Commonwealth, Parliamentary Debates, House of Representatives, 13 February 2008 at 167
(Kevin Rudd, Prime Minister).
29 Jones, G. Sorry (NSW: Vintage Books) 2007; Miller, A. Landscape of Farewell (Crow’s Nest NSW:
Allen & Unwin) 2007; Scott, above n.12.
Finally, I offer some concluding comments about what the literature I have examined tells me about the way that our law has treated Aboriginal people, about the importance of the law beyond the impact that it has had on the lives of Aboriginal people, and about the ability of the law to change to accommodate, and to guide, changing community standards and values.
CHAPTER ONE

REGULATING THE SOCIAL: THE ROLE AND FORCE OF LAW

Introduction

Law can be defined in many ways. At a very basic (and functional) level one could say that law is the web of rules and regulations which order society. That is, it prescribes and regulates behaviour. Classical positivist conceptions would elaborate on this and describe law as a set of rules or commands validly enacted by a sovereign power, which demand compliance under threat of sanction.  

Natural law theorists would agree that law is a series of rules or commands. For these theorists, however, what is essential is that these orders derive not from a sovereign (human) power but from some higher authority, such as God. That is, law exists independently of human action and is reflective of higher or moral values. These are both narrow definitions of law, focusing predominantly on questions of authority and legitimacy. For both, law is defined as a set of rules emanating from a legitimate (if variable) authority.

Law is not, however, simply a series of commands which demand compliance. This is a conception of law that many critical theorists challenge. They highlight the

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2 Some leading natural law theorists include Aristotle, Thomas Aquinas and John Finnis.

3 It is, however, the positivist tradition with its emphasis on correctly created law that is the foundation of our modern (western) legal system.

4 There are many critical theorists writing in a number of areas, such as postmodernism, feminism and a variety of law in context movements. See, for example, Douzinas, C., Warrington, R. and McVeigh, S. *Postmodern Jurisprudence: The Law of Text in the Texts of Law* (London: Routledge) 1991; Cornell, D. *Beyond Accommodation: Ethical Feminism, Deconstruction, and the Law* (New York: Routledge) 1991. For an overview of some of the various theories see Davies, M. *Asking the
impact of law on society at large and critique the way that law operates in relation to issues such as gender, race or culture. They argue that law is not a determinate body of knowledge which is objectively applied, but that it is indeterminate, its application entailing exercises of discretion and value choices, which enable it to favour dominant power bases in society, based on gender or race, for example. They assert, that is, that law is not a discrete science that can be studied or considered separately from its wider social and political context.5

In this chapter, I examine the role of the law in regulating the social. My argument is that the law demands compliance with its rules, but that these rules do not just regulate the legal. Drawing on the work of Lyotard and Foucault, I argue that law’s power extends into many aspects of the everyday, impacting on all forms of social, political and cultural interactions. That is, I argue that the law is a web of power relations that structures the way society operates. I explain what I mean by my use of the term ‘law’, and examine the extent of the law’s reach into the everyday. In the second part of this chapter, I introduce some of the consequences of law’s regulation of the social.

**Law’s Power**

Law is powerful for a number of reasons. It sets rules, regulates behaviour and orders society. It issues commands which must be obeyed.6 These commands or orders may relate to anything from the imposition of restrictions on speeding, or

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5 This is obviously a generalisation and the different approaches have variant theoretical arguments and emphases. Some of these will be addressed in Chapters Two and Four.

6 These commands may be legislative, regulatory or judicial. They may also be positive or negative. This is a point to which I return later. That we suggest that the law has agency, and acts, rather than acknowledging that humans operate the law, is itself an example of law’s power.
the obligation to register your dog, to the proscription of murder or the requirement that, once eighteen, we all vote in state and federal elections. Compliance with these regulations is ensured, or at least encouraged, through the imposition of sanctions on those who fail to comply. The power (and assumed right) of the law to enforce such sanctions is displayed when offenders are brought before a court and duly punished. Generally, we are all aware of the existence and presence of the law. Generally, we all have some kind of working knowledge or understanding of the law, and what we can and cannot (or should and should not) do.\textsuperscript{7} We are made aware, through the imposition of sanctions, as reported by a variety of media, that certain actions incur certain consequences. Generally, as a community, we adhere to the law.

But law is powerful not simply because it issues commands that demand obedience. It is powerful because of the power relations that it creates within society at large. It is part of our everyday, wielding control in some form over many aspects of our lives, defining and dictating the way in which we should live. This is a point of absolute fundamental importance. The law is not simply a mechanism for ensuring that we do not harm others, that we observe road regulations, or that we comply with our contractual agreements. It is a mechanism for ordering the social. It orders our experiences and the way that we relate to and perceive the world.\textsuperscript{8} As stated by Davies:

\begin{footnotesize}
\textsuperscript{7} There are, of course, exceptions to this. For example, newly arrived residents in Australia may have little knowledge of Australian law. Also some Aboriginal people who live outside towns or who live in small enclaves within towns may have little knowledge of some law. For example, prior to the \textit{Mabo case}, the law of property may not have been an area in which many had knowledge. \textit{Mabo v Queensland (No.2)} (1992) 175 CLR 1 is discussed in detail in Chapter Five.

\textsuperscript{8} Davies, above n.4 at 6.
\end{footnotesize}
Law – broadly understood – orders the way we view the world: it shapes our perception, and therefore cannot be identified merely as an “object” of our perception. It enters into the process of cognition.9

Importantly, the impact of this is not always positive.10 Authority to determine the content of law traditionally resides with those who occupy positions of dominance within society. Consequently, the way in which we perceive, understand and experience the law is often dependent upon where we sit in relation to these dominant powers. That is, it will depend on “our language, culture, gender, race, class, and so on.”11

The way in which individuals experience the law is an issue emphasised by much critical legal theory. Since the middle of the twentieth century there have been a variety of critical legal theories, ranging from postmodernism and feminist legal theory to postcolonialism and law and literature, which have focused on highlighting the links between law and society and critiquing the law’s role in the creation of power relations within society.12 One of the central concerns of these critical theories is demonstrating that law is not separate from society. As expressed by Davies:

We frequently assume that law is separate and distinct from other aspects of our social existences. ... But how can law be even conceptually separate from its context? How can it be conceptually separate from the human lives who have created it, who apply it, who criticise it, and who relate to it?13

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9 Ibid at 7.
10 This is something that will be discussed in more detail in Chapter Two.
11 Davies, above n.4 at 9. This is something that is explored further in Chapter Two.
12 These theories also include the Critical Legal Studies movement, Marxism, deconstruction, poststructuralism and critical race theory. While I do not give a detailed account of these theories here, some, particularly postmodernism and postcolonialism, will be discussed further throughout this work.
13 Above n.4 at 4.
Hunt and Wickham make a similar point. They explain that law is part of the “machine of society.” They go on:

Law is part of power; it helps drive society … Law is a part of mundanely productive power, helping power produce all aspects of social life. Law is neatly tied into the equation whereby ‘power’ is simply another term for the process of governance. … we make this point … in an attempt to ensure the reader cannot understand law as separate from and in the service of some mysterious removed power.

One of the issues of importance raised by critical theorists in emphasising this interrelation of law and society is the creation of ‘norms’. Norms can broadly be identified as standards or principles. They may refer to a legal standard, such as when the law states that we must not speed. However, when the law proscribes or prescribes certain actions or behaviour it is not simply defining whether a particular act is legal or illegal. It is also creating and perpetuating general standards, or norms, of behaviour that have important social consequences. For example, recently enacted Commonwealth legislation requires that Aboriginal people living in the Northern Territory comply with a raft of restrictions and obligations (financial and social) in order to receive certain government benefits and assistance. This follows a long line of similar measures aimed at regulating the lives of Aborigines. The consequences of such laws have been to influence the way that Aboriginal people are viewed and treated by the community generally, and to affect the level of access that they have to various aspects of

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15 Ibid at 104. Yet, as discussed later, it can seem like law is separate from society, that it is removed from the everyday. See, for example, Keneally, T. The Chant of Jimmie Blacksmith (Sydney: Harper Collins) 2001. For Jimmie Blacksmith the law would have seemed like it was part of “some mysterious removed power”. This work is discussed in Chapter Six.
16 Northern Territory Emergency Response Act 2007 (Cth).
17 Some of these measures will be discussed in Chapter Nine.
The point is that the law demands compliance with its rules, and compliance means that we are required to submit, whether willingly or because we feel we have no choice, to the normative values and ideologies that are embedded within the content of its prescriptions.

This interest in the power of the law in setting normative standards is something of concern to postmodernist, poststructuralist and postcolonial theorists and writers. Generally, these theorists argue that the law operates by enshrining certain dominant values, such as those aligned with the white dominant monoculture, and presenting them as truth. The effect of this is to disempower those who do not fit within or conform to these values or truths, such as minority groups based on race, gender or culture, positioning them to resist if they do not wish to accept the status quo. One result of this is that they may then be silenced within the dominant discourse.

As Alex Reilly writes of Indigenous peoples’ experiences within this discourse:

It is only recently that the voices of Indigenous peoples have been heard publicly at all by non-Indigenous peoples. Generally, Indigenous peoples have been compelled to listen and pay heed to non-Indigenous peoples, and even to speak in non-Indigenous languages. Histories of Australia have excluded the rich and diverse cultural experience of Indigenous peoples and played down the degree of injustice under which they have suffered since first European settlement. Indigenous peoples still labour under the myth
of their physical extinction and the extinction of their traditional laws and customs. In issues of rights to land, sovereignty, reconciliation, and identity, Indigenous voices have too often been silenced, or when spoken, dismissed or trivialised.23

This silencing is something particularly emphasised by postmodernism, which:

defies the system, suspects all totalizing thought and homogeneity and opens space for the marginal, the different and the ‘other’. Postmodernism is … a celebration of flux, dispersal, plurality and localism.24

Postmodernism has as its concern a critiquing of totalising narratives, including that of law. It denies that it is possible (or even desirable) to construct a narrative that provides an overarching sense of order and reason to the world.25 It opposes the totality and unity sought to be created by grand narratives and seeks to critique them with smaller local narratives. Postmodernist legal theory foregrounds the role of the law in perpetuating dominant power structures and relations in society. Law has, for example, traditionally favoured men at many levels of society so that women have been denied a public voice and a range of rights.26 White colonial law has promulgated an image of the western legal system as superior, and other, non-western, systems of law as inferior, and thereby provided colonial powers with justification for colonial expansion. Similarly, it has perpetuated an image of Aboriginal people as ‘primitive’ and ‘inferior’ so that they too have been denied a public voice and access to many aspects of society.27 In defying this discourse,

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24 Douzinas et al, above n.4 at 15.
26 They have, for example, been denied equal pay, the right to vote, and the right to own property.
27 The way that the law has constructed Aboriginality and restricted Aboriginal rights is discussed in Parts Two and Three.
postmodernism seeks to legitimate and give a voice to the ‘other’ that has for so long been suppressed by law’s totalising power.28

The work of Jean-François Lyotard provides insight here. According to him, attempts to put forth a totalising discourse of law result in what he labels a différend. It is with this creation of a différend that I am mostly concerned here.

Lyotard explains it as:

the unstable state and instant of language wherein something which must be able to be put into phrases cannot yet be. This state includes silence, which is a negative phrase, but it also calls upon phrases which are in principle possible. This state is signalled by what one ordinarily calls a feeling: “One cannot find the words,” etc. A lot of searching must be done to find new rules for forming and linking phrases that are able to express the differend disclosed by the feeling, unless one wants this differend to be smothered right away in a litigation and for the alarm sounded by the feeling to have been useless. What is at stake in a literature, in a philosophy, in a politics perhaps, is to bear witness to differends by finding idioms for them.29

A différend arises because of a feeling. It arises because of “phrases that have been neither spoken nor heard: phrases that are at the level of sense feeling, and/or phrases that have been marginalised or silenced even before they are spoken.”30 It can derive from an injustice and is signalled by an inability to speak of it, as where a “plaintiff is divested of the means to argue”,31 or where the resolution of a dispute

28 There are many examples of the law’s inability to cater to the ‘other’. See, for example, The Queen v Carlton James Winmar decided in the District Court of Western Australia by Keall J. in which an Aboriginal man was sentenced for lighting a fire in contravention of the Bushfires Act 1954 (WA). This was despite the Court’s acceptance that Winmar’s actions were prompted by his belief that Pulyarts, evil spirits, were hiding in the bushes. As Winmar had his child with him and as Pulyarts, which are afraid of light and fire, sometimes take children, he lit the fire to ward the Pulyarts away. This case is discussed in Moore, L. “The Queen v Carlton James Winmar (Repelling the Pulyarts – cultural clash and criminal responsibility)” (1990) 2(46) Aboriginal Law Bulletin 17.
31 Lyotard, J-F. “The Différend, the Referent, and the Proper Name” (1984) 14(3) Diacritics 3 at 5.
“is done in the idiom of one of the parties while the injustice suffered by the other is not signified in that idiom.” As Lyotard explains:

As distinguished from a litigation, a differend would be a case of conflict, between (at least) two parties, that cannot be equitably resolved for lack of a rule of judgment applicable to both arguments. One side’s legitimacy does not imply the other side’s lack of legitimacy. However, applying a single rule of judgment to both in order to settle their differend as though it were merely a litigation would wrong (at least) one of them (and both of them if neither side admits this rule.)

Rodan summarises it as follows:

The differend arises where there are conflicts, disputes, differences, incommensurabilities that are not spoken, or if they are, they are not heard. A differend occurs because other versions of reality are either silenced or already judged. It marks the impossibility of consensus between heterogeneous language games.

Silence is a key indicator of a différend:

The différend is signaled by this impossibility to prove. He who lodges a complaint is heard, but he who is a victim, and who is perhaps the same, is reduced to silence.

It is because of this silencing that, according to Lyotard, disputes, conflicts or differences do not get spoken or, perhaps more importantly, if they are spoken, are not heard. He writes:

It would be absurd to suppose that human beings “endowed with language” cannot speak in the strict sense, as is the case for stones. Necessity would signify here: they do not speak because they are threatened with the worst in the case that they would speak, or when in general a direct or indirect attempt is made against their ability to speak. Let’s suppose that they keep

32 Ibid at 5.
33 Above n.29 at xi.
34 Above n.30 at 86.
35 Lyotard, above n.31 at 6.
quiet under threat. A contrary ability needs to be presupposed if the threat is to have an effect.  

It is this silencing that is of interest to me here. The *différend*, in this sense, results from the power of discourse to perpetuate dominant ideology and silence those who do not fit within its ideal. It denies those who do not conform, the right, and the ability, to speak and to be heard within the dominant discourse. It is those who are part of the dominant discourse who are able to determine, and deny, the rights and voices of those who are not; that is, the ‘other’.  

Lyotard’s theory of the *différend* is useful in highlighting the difficulties and inadequacies of law’s discourse. For example, one of the founding principles of Australia’s legal system is equality before the law. This is supported by everyone (formally) having access to the law. This is not, however, the (substantive) reality. If those seeking access do not speak the language of legal discourse they cannot be heard, and the injustices which they cannot voice are thereby legitimated. As Rodan explains:

Within the discourse of law, citizens who are visibly different and are from a minority race, ethnicity, and/or gender can also be ‘already judged’ as not credible before they speak. The structure of logic, within the law, already judges what realities are credible and what realities are illegitimate, because a plaintiff’s reality is already judged as not credible, so what is unjust can be legitimated. Lyotard questions, then, why there is a testimony given at all.

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37 Lyotard, above n.29 at 10 – 11. This is evidenced, for example, in the way that the characters in *Benang* are unable to speak within the dominant discourse. Scott, K. *Benang* (Fremantle: Fremantle Arts Centre Press) 2000. *Benang* is discussed in Chapters Nine and Ten.

38 For example, in Keneally, above n.15 Jimmie Blacksmith does not have the language to get his needs met, as when he wants to be paid correctly for the fencing work he has done. Also in Dark, E. *The Timeless Land* (Sydney: Harper Collins) 2002 and Mudrooroo, *Doctor Wooreddy's Prescription for Enduring the Ending of the World* (Melbourne: Hyland House) 2001, the Aboriginal characters are unable to defend their land within the new dominant discourse. These works are discussed in Chapter Six.

39 The idea of equality before the law is enshrined in the rule of law. This is explained in Chapter Eight and examined in further detail in Chapters Nine and Ten.

40 Rodan, above n.30 at 89.
when the victim has not even entered into the phrase “universe” of the tribunal. It is only when a person enters into a phrase universe legitimated by the tribunal, within the discourse of law, that their testimony exists for the tribunal. A person who is outside the legitimated phrase universe, does not exist for the tribunal. 41

In the context of this work the existence of a différend is clear. The expansion of colonialism meant that those who were colonised were denied, by the colonisers, their language, their social system, their legal system and their rights. They were denied a voice and silenced, within the dominant domain. 42 A différend was created by the inability of Aboriginal people to use the colonisers’ discourse to assert the injustice of the colonisation of Australia and the taking of their land. The relationship that Aborigines had with their land was “judged as not credible”, and their dispossession thereby legitimated. Until the Mabo decision, Aboriginal plaintiffs were not heard. 43 They had not “entered the phrase “universe” of the tribunal.” 44 As explained in Chapters Five and Seven, it was only once they had entered this “universe” and made their claim in a way western law could understand that this law was able to recognise the existence of common law native title rights. As Rodan explains it, Eddie Mabo’s feelings of injustice about the dispossession of his people “gave rise to a different opening up the possibility of justice to come for indigenous people.” 45

41 Ibid at 90.
42 It is important to appreciate that this silencing was (and is) within the dominant domain and not always within the private domain. For example, in Morgan, S. My Place (Fremantle: Fremantle Arts Centre Press) 1988, Gladys says to her children to tell people in the public domain that they’re Indian. My Place is discussed in Chapter Nine.
43 Although it should be noted here that there was some limited statutory recognition of Aboriginal rights to land. For example, the Aboriginal Lands Trust Act 1966 (SA); the Aboriginal Land Rights (Northern Territory) Act 1976 (Cth); the Pitjantjatjara Land Rights Act 1981 (SA); the Maralinga Land Rights Act 1984 (SA).
44 Rodan, above n.30 at 90.
45 Ibid at 87.
One of the issues that emerges through a consideration of Lyotard’s work and which is of importance in the current context is the power and importance of discourse. Discourses, as stated by Hunt and Wickham:

> have real effect; they are not just the way that social issues get thought and talked about. They structure the possibility of what gets included and excluded and of what gets done or remains undone. … In the most obvious sense discourse authorises some to speak, some views to be taken seriously, while others are marginalised, derided, excluded and even prohibited. Discourses impose themselves upon social life, indeed they produce what it is possible to think, speak and do.46

For Lyotard, discourses are important because they create, legitimate and so authorise a particular version of reality and, in so doing, exclude other ways of constructing reality.47 As Rodan puts it:

> One of the key points Lyotard makes is that it is legitimation which enables a genre of discourse to generate hegemony over other discourses. Thus one genre of discourse becomes the authorised version of the ‘event’. It is this authorised version which constructs a hegemony that causes a differend. The differend occurs because the other versions are silenced, or already judged.48

In Parts Two and Three of this thesis I examine the impact of the colonisation of Australia on Indigenous peoples. Discourses including social Darwinism and anthropology promulgated ideas and images about Aboriginal people as ‘primitive’ and destined to ‘die out’.49 Governments and the law drew on these ideas to legitimate policies of protection and assimilation. These discourses created an authorised reality about Aboriginal people, based on race, judging them, silencing them and so creating a différend.50 Said makes a similar point in his discussion of the ways western discourses constructed the Orient by:

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46 Above n.14 at 8.
47 Rodan, above n.30 at 94.
48 Above n.36 at 155.
49 Some of these theories are discussed in more detail in Parts Two and Three.
50 Rodan, above n.30 at 94. These policies are discussed in more detail in Chapter Nine.
dealing with it by making statements about it, authorising views of it, describing it, by teaching it, settling it, ruling over it: in short Orientalism [is] a western style for dominating, restricting, and having authority over the Orient.51

What is important here is the relationship between discourse, power and knowledge. This is an issue that is also of interest to Foucault. In Discipline and Punish he wrote:

We should admit … that power produces knowledge … that power and knowledge directly imply one another; that there is no power relation without the correlative constitution of a field of knowledge, nor any knowledge that does not presuppose and constitute at the same time power relations.52

Discourse contributes to the production of knowledge and truth and for Foucault it is the creation of knowledge that is necessary for the basis and continuance of power. Legal discourse is one of the mechanisms that play a role in generating knowledge and normative standards, and so in creating and controlling the subject. It creates knowledge or truths by normalising certain values; legal, political, and social.53 The imposition of sanctions, such as fines, community service or a period of imprisonment, for failure to comply with legal regulations further serves to reinforce these values and beliefs. In this, the discourse of law is enormously powerful. And so, for me, in the context of this thesis, the importance of Foucault’s work lies in its suggestion of law as a mechanism of power and one of the means by which knowledge is produced and subjects created. It controls (regulates and

53 This can be seen in the variety of policies and legislation directed at controlling the lives of Aboriginal people. These normalised, for example, views that Aboriginal people could not properly care for themselves and their families, that they were ‘lazy’ or ‘alcoholics’, or that they could only be educated to a certain (low) standard. Some of these policies and legislative enactments are discussed in Chapter Nine.
disciplines) these subjects and so creates norms that are effective in the everyday. This, in turn, perpetuates the power relations created by the very discourse of law and thus contributes to the marginalisation of certain groups within society.

It is important here to clarify Foucault’s use of the word ‘power’. He does not use the term in the way it is described above to refer to something that is specifically exercised by one individual over another or something that any one person holds. Rather, he sees it as part of the system of relations within society, something that exists within a social context. As Foucault expresses it:

power is not to be taken to be a phenomenon of one individual's consolidated and homogeneous domination over others, or that of one group or class over others. … Power must be analysed as something which circulates, or rather as something which only functions in the form of a chain. It is never localised here or there, never in anybody's hands, never appropriated as a commodity or piece of wealth. Power is employed and exercised through a net-like organisation."54

This is an important point in the context of this work. I agree that power is something that exists within a system of meaning, within a social context. Foucault’s work is therefore important for two main reasons. Firstly, because it highlights the impact that law has on the everyday through the creation of norms. Secondly, because it exposes the way that discourse produces truth and knowledge and so perpetuates current dominant power relations within society.

These understandings of law are enormously important and are ones with which I voice general agreement. They emphasise that law is not separate. It is not an objective body of knowledge that is somehow ‘out there’. It is made by people. It is integral to our everyday lives and our very existence. It regulates and controls.

But it doesn’t just prescribe that we drive at forty kilometres an hour in a school zone. It is not just used in court to resolve disputes between competing parties. It defines who we are and how we should lead our lives. It delegitimises certain social relationships or certain cultural practices and beliefs and so defines what appropriate or ‘normal’ behaviour is and what is not. Those who do not comply with these norms are marginalised and castigated as ‘other’. And so what becomes apparent is that law matters. It is not just some mysterious entity that springs into action as disputes arise. Law is always present, creating and enforcing power relations and ordering the social. For me, when I talk about law throughout this work, I mean law as it extends beyond the legal into the everyday, and structures knowledge and truth and impacts on the way we perceive and experience the world. Law, in this context, is not just the institutions of law in the sense of courts and legislatures, but includes legal discourse. That is, law’s:

surrounding context, including language and cultural norms, which interact to give certain acts a legal significance. ... legal discourse is not just the formal rules of the game of law, but includes all of the contextual systems which contribute to the significances established by law.

And, importantly, it includes the silencing and judging, that is, the différend, created by law’s discourse when it is unable to hear and respond to other points of view.

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55 This is a point which will be discussed in detail in Chapter Two.
56 This ordering of the social may be positive or negative. For example, in Keneally, above n.15 for Jimmie Blacksmith the law was negative, but for the squatters it worked in a positive way. So while the law may be negative for Aboriginal Australians, it may be positive for white Australians. This is discussed further in Parts Two and Three.
57 Davies, above n.4 at 8.
Law’s Impact

The issues discussed above are not of purely theoretical concern; law matters. Its decisions about how, or even whether, to deal with particular issues have very real and long-term consequences. Often these consequences may be negative.\(^59\) The content of our laws creates ideologies to which we, willingly or otherwise, generally submit, and this influences the way we perceive and experience the everyday.

The extent of law’s hegemony is demonstrated in the way it defines and categorises certain groups of people. Traditionally, for example, the law has defined and treated women differently from men, classifying them as the property of men, denying them the right to vote and denying them the right to own property, amongst other things. While many of these restrictions may no longer exist the social impact of them is still being felt. Men continue to dominate many areas of society from politics to the boardroom to the judiciary, and so on. Women continue to struggle for equality in areas such as wage parity and for recognition of, for example, maternity leave entitlements and the provision of child care. While such issues may well be about legal rights, they are not just questions of law. They demonstrate the real, long-term social consequences of law’s discourse, for it is the

\(^{59}\) Despite this the law continues to enjoy general obedience and its power to regulate the social is reinforced by the community’s general adherence to it. There are many suggested theories as to why the law enjoys such a level of compliance. It may, for example, be because of a fear of retribution. That is, a fear of the consequences of failure to comply. I would agree with this to an extent. This certainly may account for why, generally, we do not steal or commit murder, for example. Sometimes, however, the penalties may not be sufficient to discourage us from breaking the law, as in the case of parking regulations, for example. Maybe we obey the law because of a general sense of obligation to do so. Maybe we don’t necessarily choose to obey, but the law is something that is so ingrained as part of the everyday that we unthinkingly follow its commands. This is an issue of some importance, but not one that I will address in this work.
law’s definition and treatment of people based on gender that has contributed to the marginalisation of women.60

The law can be seen to be deliberately exclusive of certain groups of people in many areas of the law. Consider, for example, the way it defines terms such as ‘marriage’ and ‘family’. The former is defined in the Marriage Act to mean “the union of a man and a woman” and so excludes same sex relationships.61 This conception of heteronormative families is further reinforced in the Family Law Act.62 In this way the law tells society that some relationships constitute a marriage or a family while others do not. As a result, alternative families that do not fit within this legally endorsed and enshrined norm are stigmatised for their difference. They are not considered to constitute a ‘proper’ family. They suffer at a social level and are excluded from a range of services and remedies.63

The area I have chosen for analysing law’s regulation of the social, in this work, is the consequences of England’s colonial expansion into Australia. When England claimed ownership of Australia it determined that it was empty, unoccupied by civilised inhabitants, and so it asserted absolute ownership of all the land and

60 This has been the subject of much analysis by feminist legal theory. See, for example, Cornell, above n.4 and Graycar and Morgan, above, n.21.
61 Marriage Act 1961 (Cth) s.5(1).
63 These issues are analysed in Summerfield, T. Families of Meaning: Dismantling the Boundaries Between Law and Society (Doctoral Thesis: Murdoch University) 2004. There are numerous examples of the ways in which law’s regulations influence the social. For example, the law prohibits the taking of certain ‘illicit’ substances such as heroin, yet permits the use of other ‘non-illicit’ drugs such as alcohol. One of the effects of this is to stigmatise those who are consequently identified as ‘drug-addicts’ but not those who ‘enjoy a few drinks’. Conversely, law’s regulations can have positive social effects. For example, various state and commonwealth laws prohibit discrimination against people who have a disability. Measures such as these encourage the community to treat people with disabilities equally to able bodied people and so operate to counter the stigma that has been attached to being disabled.
introduced its own laws and customs into this country. It denied the existing inhabitants the right to their own laws, culture and land as their overriding way of living.\textsuperscript{64} Their entire legal and cultural existence “was foreclosed from the very being of law.”\textsuperscript{65} The new sovereign introduced new laws that regulated all aspects of Aboriginal people’s lives; legal, political, economic, moral and social.\textsuperscript{66} The consequences of this are still being felt by Aboriginal people today in a number of ways from the ongoing struggle for rights to land, to lower life expectancy, higher infant mortality rates, lower employment levels, lower standard of education, higher representation in our criminal law system, and so on.

What becomes clear from this brief consideration of these examples is that law is not separate from society. The way in which law creates and perpetuates normative standards and knowledge impacts on the social and has real and long lasting consequences. This is a theme to which I will return throughout this work.

**Conclusion**

In this chapter, I have presented some of the arguments which underlie this work. In particular, I have discussed the extent of law’s reach beyond the legal to its regulation of the everyday, the social. I have argued that law and legal discourse are important and powerful mechanisms by which law is able to extend and exert its sphere of influence. That is, I have argued that law is important not just because

\textsuperscript{64} Although people still had their own laws, customs and traditions. The continuance of these was central to the recognition of their rights to land in *Mabo*. They were, however, relegated to the private sphere.

\textsuperscript{65} Davies, M. “Exclusion and the Identity of Law” (2005) 5 *Macquarie Law Journal* 5 at 21. Although, it was not this simple. As explained in Chapter Five, Governor Phillip had instructions not to disturb Aboriginal culture and to get to know Aboriginal people. However, the reality was quite separate from this, even though Phillip did try to carry out his instructions.

\textsuperscript{66} Although, of course, some Aboriginal people lived in isolated areas beyond the practical reach of the law and, in some cases, remained unknown by the law.
it prescribes behaviour but because, in so doing, it imposes normative standards with which it demands compliance. It creates knowledge by which it is able to regulate and control its subjects. It is thereby able to regulate virtually every aspect of the social. The ramifications of this are material and far reaching. The law has a large social impact and often this can be negative. These are points which I take up in my discussion of the novels analysed in Parts Two and Three.

In the next chapter, I examine further how the law operates, and the techniques it adopts, to maintain this position of dominance. In particular, I argue that the discourse of law that underscores the modern Australian legal system is largely concerned with determining that which lies within law’s domain and that which does not. I argue that this discourse has contributed to one of the major consequences of the reach of law’s power; namely, the exclusion of those who do not conform to law’s conception of itself and to law’s enforced normative standards. That is, it has led to the creation of the ‘other’ and to the silencing and exclusion of the voices of those so identified.\(^\text{67}\)

\(^{67}\) Note that by exclusion I mean that these ‘other’ are excluded from the positive aspects of the law, such as its protection, but that they are not excluded from its negative aspects, such as criminal sanctions and procedures. That is, they are included in a way that positions them negatively. This is a point that will become clearer through my discussion of the literary texts. See, for example, Keneally, above n.15, discussed in Chapter Six, and Morgan, above n.42 and Scott, above n.37, discussed in Chapter Nine.
CHAPTER TWO

INCLUSION AND EXCLUSION: THE BOUNDARIES OF LAW

Introduction

One of the issues that I raised in the previous chapter is that the law exercises its power to marginalise those who do not conform to its standards of appropriate or acceptable behaviour. In this chapter, I explore this issue further. In particular, I argue that the discourse of law operates and is structured so that it creates categories of non-conformity or difference. Those who fall within these categories are then treated as ‘other’ and often excluded from the full protection of the law. In this way, law’s discourse serves to reinforce dominant power relations within society and to impact on the lives of those designated as ‘other’ in many ways beyond the purely legal. At the same time, it also presents law as a body of rules applied equally to all members of society, regardless of individual differences, thus perpetuating an image of the law as objective and impartial. However, the law is not an objective institution. It does not treat everyone equally. Law tells only one story and confers legitimacy according to this story.\(^1\) Those who do not conform are categorised as ‘other’ and treated differently.\(^2\)

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\(^1\) It should be noted at the outset, that I am not suggesting that the law, although conservative, is not an inflexible or immutable institution. This is evidenced, for example, in the decision in \textit{Mabo v Queensland (No.2)} (1992) 175 CLR 1, as discussed in Chapters Five and Seven. It is also evidenced in the Prime Minister, Kevin Rudd’s recent apology to Aboriginal people. Commonwealth, \textit{Parliamentary Debates}, House of Representatives, 13 February 2008 at 167 (Kevin Rudd, Prime Minister).

\(^2\) Or they are treated the same, which is in effect different because, as introduced in Chapter One, while everyone is (formally) equal before the law, our access to the law (through language, education, and so on) is not equal, and therefore the same treatment can have quite unequal results. The issue of equality before the law is discussed in Part Three.
In the first part of this chapter, I explore one of the central concerns of much western legal theory; namely, identifying what is and is not law. That is, defining what is inside and what is outside law’s domain. This creation of a binary opposition between the inside and the outside of law is something fundamental to western jurisprudence. My concern here is more specifically with the consequences of law’s endeavour to define its inside and its outside. That is, in seeking to identify that which is inside and outside it also stipulates what or who is included and excluded. This question of exclusion, and the creation of ‘other’, is the focus of the second part of this chapter.

In the final part of this chapter, I introduce the concept of pluralism. I suggest that if the law is to accommodate ‘otherness’ and difference without incorporating them into itself, and making them the same, pluralism is one way in which this may potentially be achieved.

**Inside and Outside: Defining Law**

One of the main concerns of western jurisprudence has traditionally been determining what law is about. Jurisprudence is the study of law and not ‘other’ (non-law) things. It has, therefore, as its focus defining what constitutes this ‘law’ as opposed to the ‘other’. As stated by Douzinas et al.

Jurisprudence sets itself the task of determining what is proper to law and of keeping outside law’s empire the non-legal, the extraneous, law’s other. It has spent unlimited effort and energy demarcating the boundaries that enclose law within its sovereign terrain, giving it its internal purity, and its external power and right to hold court over the other realms. For jurisprudence the corpus of law is literally a body: it must either digest and transform the non-legal into legality, or it must reject it, keep it out as excess and contamination. Jurisprudence’s task is to impose upon law the
law of purity and of order, of clear boundaries and of well-policed checkpoints.³

The creation of this binary opposition between that which is inside law and that which is outside, that is, defining what law is, is one of the legacies of positivist legal theory which has dominated much western legal thought since the nineteenth century. For positivists the distinction between what is internal and what is external to law is relatively straightforward. Simply stated, it is only the posited law of the state that can be considered to be law.⁴ It is human law, as opposed to non-human law, and its validity is dependent upon its correct creation, not its content. This conception of law owes much to John Austin, one of the founders of modern positivism. He contended that laws “properly so called are a species of commands”⁵ that are “set by political superiors to political inferiors.”⁶ That is, a law is a command issued by a sovereign that confers an obligation to obey and is enforced by a threat of sanction.⁷ It was these laws “properly so called” that were the “appropriate matter of jurisprudence.”⁸ Other concerns, such as the laws of God, morality and social norms, did not fall within the ambit of Austin’s jurisprudence. His project was to identify a clear and determinate boundary of law. It was to define and describe law as it is, not to prescribe its content.⁹

⁴ This is obviously a very simplistic definition and there are many different theories of positivism. Some of these will be discussed below.
⁶ Ibid at 1.
⁷ Ibid at 5 – 6.
⁸ Ibid at 4.
This emphasis on description rather than prescription is also evident in the theories of Hans Kelsen and H.L.A. Hart, two of the dominant positivist thinkers of the twentieth century. Kelsen, like Austin, also sought to identify a clearly defined realm of legal study. This took the form of his science or ‘pure theory’ of law, which he described as clearly distinct from other sciences dealing with matters such as sociology, ethics or psychology. As he put it:

That all this is described as a “pure” theory of law means that it is concerned solely with that part of knowledge which deals with law, excluding from such knowledge everything which does not strictly belong to the subject-matter law. That is, it endeavours to free the science of law from all foreign elements.10

He also stated that “[a]s a theory it is exclusively concerned with the accurate definition of its subject-matter. It endeavours to answer the question, What is the law?”11 Kelsen, therefore, was not just concerned with delineating the ambit of his theory. He also focused on the substantive issue of defining law. This he does by explaining that law is a complex hierarchy of norms, which “may have any kind of content”12 and deal with any kind of human behaviour.13 These norms are valid only when legally created in accordance with superior norms, which ultimately gain their validity from the highest norm, the grundnorm. The validity of the grundnorm is simply presupposed. It does not depend, for its validity, upon the existence of a further norm. That is, it is not a positive law per se. Its authority is derived from its efficacy and general acceptance by the community at large. So,

10 Kelsen, H. The Pure Theory of Law extracted in Freeman, ibid at 291.
11 Ibid at 291.
13 Ibid at 113.
whereas for Austin law is a command issued by a sovereign, for Kelsen it is a norm justified by another higher norm.\textsuperscript{14}

For Hart law is neither a command issued by a sovereign nor a hierarchy of norms.\textsuperscript{15} He rather defined law as a formal and coherent system of rules.\textsuperscript{16} A valid legal system, according to Hart’s theory, consists of two components, “primary rules” and “secondary rules”. The former are largely substantive laws that control or regulate behaviour. The latter contain the procedural rules that specify how the primary rules may be enacted, varied and enforced.\textsuperscript{17} These rules combine to form a legal system due to the presence of an overarching “rule of recognition”. It is this rule that gives a legal system its authority and legitimacy, and which, in a similar vein to Kelsen’s \textit{grundnorm}, separates legal rules from non-legal rules. Also like the \textit{grundnorm}, the rule of recognition is not dependent upon another rule for its validity. Its authority derives from its acceptance by legal officials. According to Hart:

\begin{quote}
For the most part the rule of recognition is not stated, but its existence is \textit{shown} in the way in which particular rules are identified, either by courts or other officials or private persons or their advisors.\textsuperscript{18}
\end{quote}

For Hart, law is a system of positive rules which derive their legitimacy from an ultimate non-positive rule.

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\begin{footnotesize}
\textsuperscript{14} For a discussion of Kelsen’s theories see, for example, Stewart, I. “The Critical Legal Science of Hans Kelsen” (1990) 17 \textit{Journal of Law and Society} 273.
\textsuperscript{15} For a general discussion of Hart see Freeman, above n.9 at 344 – 356.
\textsuperscript{16} Hart, above n.9.
\textsuperscript{17} Ibid at chapter Five.
\textsuperscript{18} Ibid at 101. Emphasis in original.
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Like Austin and Kelsen, for Hart morality, sociology, politics and the like were not properly included within the realm of law. This is not to say that he thought that these issues were unimportant or irrelevant to law. He even prescribed a “minimum content of natural law” necessary for the survival of human beings, thus allowing for some overlap between law and morality. Importantly, however, while there may be overlap, he emphasised that law is not dependent on morality for its validity or identity. There is no necessary connection between law and morality. “As Hart has explained, morality is not considered to be part of the definition of law as the positivists see it.” For positivism the question of law’s validity is separate from questions of content. What Austin, Kelsen and Hart share, therefore, is their concern for describing what the law is. Their objective, to use the language of Raz, is to identify “a test which distinguishes law from what it is not.” The identifying criterion may be a command issued by a sovereign, or the existence of a grundnorm or a rule of recognition. All, however, seek to limit the boundaries of law and in so doing create an outside, that which does not fall within the realm of law so defined.

It is apparent from a consideration of these theorists that in determining what constitutes law they are concerned with two separate yet related issues. The first is delineating the boundaries of their field of study. That is, identifying a determinate ambit of jurisprudence or legal science. The second is defining that which they

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19 Ibid at 193 – 200. This “minimum content” includes such things as restrictions on killing or inflicting bodily harm and “some minimal form of the institution of property.”
20 Davies, M. Asking the Law Question 2nd ed. (Sydney: Lawbook Co.) 2002 at 91. Emphasis in original.
21 Arguably, this goes some way to explaining the law’s refusal to appreciate Aboriginal peoples’ emotional and spiritual connection to the land and their rights to their own systems of law.
consider to constitute the object of that study, namely, law. The distinction between the two is not always easily drawn. As stated by Davies:

Austin and Kelsen, despite a common emphasis on legal theory as a descriptive activity, arguably both cross over into the realm of the prescriptive. They prescribe a separation between legal science and law, but the prescription, definition or determination of legal theory excludes certain entities as non-legal or methodologically impure, thus also prescribing what can be seen as law.23

Delineating the limits of the theory shapes the identity and limits of the object itself. Both are defined by exclusion. That is, the exclusion of that which is not considered to be law, and the exclusion of that which is not deemed to fall within the domain of legal theory. It is with this issue of exclusion that I am predominantly concerned here. In particular, I am concerned with how the object, law, is defined, how attempts to define it have created a distinction between that which is inside law and that which is outside, and the way that this translates into a discourse of inclusion and exclusion and the creation of ‘other’.

Positivism is not the only theoretical approach which foregrounds identifying that which is inside law. Nor has positivism been accepted without criticism. Ronald Dworkin, in particular, has been a major critic of much positivist theory, particularly that of Hart.24 He is, for instance, critical of positivism’s concentration on rules, arguing that there also exist background policies, standards and principles which inform lawyers and judges and so are a legitimate part of legal argument and judicial decision making. These non-rule standards which allow for the

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24 For an example of Dworkin’s theory see Taking Rights Seriously (London: Duckworth) 1977. His theories have been subject to much criticism and debate about whether they are positivist themselves. See, for example, Freeman, above n.9 at 1270 – 1283.
consideration of questions such as fairness and justice are, for Dworkin, part of the law.\textsuperscript{25}

Likewise, natural law theory does not agree with all positivist precepts. In contrast to positivism’s emphasis on human made law, natural law theory argues that law exists independently of human intervention or action. While the specific principles of natural law are diverse they include “objective moral principles which depend upon the nature of the universe and which can be discovered by reason.”\textsuperscript{26} These principles may derive from God, as argued by Aquinas, or reason, as suggested by Finnis.\textsuperscript{27} They clearly derive from a source that is external and superior to the positive law of the state. A natural lawyer would argue that these external principles should be incorporated into the law. As summarised by Douzinas \textit{et al}:

\begin{quote}
Natural law in its various guises claims that there is a small number of fundamental principles, universals, ideals or standards that every posited legal system ought to and does include. These norms, although not legislated, are legal rules that belong to an order superior to positive law; their violation weakens or suspends the obligation to obey the legal order. The content of these principles differs in each school of natural law, as a result of changes in their perceived source and origins, site of operation or method of identification.\textsuperscript{28}
\end{quote}

The issue of importance here is that natural law theorists and Dworkin alike are engaged in a task of defining law’s boundaries. Natural lawyers extend the boundary of what is included within law to incorporate principles which dictate

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\textsuperscript{25} They are not, however, principles that give judges scope to reshape the law. Rather, they are simply background principles that state the pre-existing rights and obligations of the parties to a dispute. Thus, the judge is simply declaring the law as contained within these principles.

\textsuperscript{26} Freeman, above n.9 at 81.

\textsuperscript{27} Finnis is perhaps the most prominent modern natural law theorist. See, for example, Finnis, J. \textit{Natural Law and Natural Rights} (Oxford: Clarendon Press) 1980. His theories are also discussed and critiqued in Davies, above n.20 at 80 – 86.

\textsuperscript{28} Above n.3 at 19.
\end{footnotesize}
what the law ought to be. Dworkin defines law as inclusive of non-rule based standards. The divide between that which is internal to law and that which is external nevertheless remains, and, as explained below, it is this divide, this concern with excluding the non-law, which has fundamentally influenced the way that the law has perceived, constructed and (mis)treated difference.

Of these theories, it is positivism that remains the most prominent. It is positivism that provides the foundation of our modern legal system and underpins our understanding of law. It is positivism that specifies that law must be validly enacted and that a validly enacted law must be complied with. It is also positivism that has left us with a number of important legacies. Firstly, it leaves us with an essentially modernist theory of law. As explained by Davies:

Positivist legal thought is “modernist” because it is an attempt to provide law with a “metanarrative”, that is a universal explanatory framework of theory which is located outside the history or context of the discipline.29

Modernism will be examined in more detail in Chapter Four in the context of postmodernism. What is immediately important is that positivist legal theory remains committed to the modernist task of providing an overarching, universal, truth of law. One of the consequences of this, and the focus of the next section of this chapter, is that in so doing it silences those who do not fall within its metanarrative. It ignores local voices and perspectives.30 In seeking to present a universal theory of law, positivism promotes homogeneity and marginalises and silences, difference.

29 Above n.20 at 28.
30 Such perspectives include the postcolonial. Postcolonialism is discussed further in Chapter Four.
The second (and arguably more important) of positivism’s legacies is that it has created a discourse of law that is binary. Some things are law and some are not. They are either law or non-law. This definition of law by reference to what it is not arguably draws on the linguistic structuralism of Ferdinand de Saussure, who argued that exclusion is central to defining identity.\(^{31}\) That is, identifying what something is requires the identification of what it is not. As encapsulated by Douzinas et al:

> An entity, work or field can claim unity only if it can be clearly delineated from its outside. … this is the first law of jurisprudence. … In other words what is non-legal is always necessary to make law properly legal. The frame between the two, rather than being a wall, is a point of passage. Law’s empire, as proper, united and coherent, depends on what is legally improper and denies law’s imperialism.\(^{32}\)

There are a number of important consequences that flow from this discourse of law as binary. Firstly, it has resulted in the law’s failure to recognise the validity, or even the existence, of systems of law that are different from it. Hart, as explained above, considered that a valid legal system was founded on two components, ‘primary rules’ and ‘secondary rules’. The absence of ‘secondary rules’ and the overarching ‘rule of recognition’ meant that only a ‘primitive’ legal system could exist. For him, ‘primitive’ systems simply set standards for living. There was no process for changing these rules. Nor could they be authoritatively enforced. Such systems could not be considered to be real, or ‘developed’ systems of law.\(^{33}\) In the context of this work, when the English occupied Australia they considered the land to be empty, unoccupied by civilised inhabitants with a ‘developed’ system of law. The positivist English law did not recognise Aboriginal customary law as law.

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31 For a discussion of de Saussure’s theories see Davies, above n.20 at 307 – 313.
32 Above n.3 at 26.
33 Hart, above n.9 at 91 – 95.
From the outset, it excluded Aboriginal social systems and Aboriginal law as ‘primitive’, as failing to meet the standards of a ‘proper’ positivist legal system. Traditional law was ignored, and legislation was enacted that controlled the lives of Aborigines as if it was the only law that governed how they should live, denying the existence of a continuing underlying Aboriginal law.34

Secondly, it is inherent in this conception of a divide between law and non-law that law is separate from society and its subjects. It exists “out there” as something “separate and distinct from other aspects of our social existences.”35 I raised and questioned this issue in Chapter One. I explained that law is not separate from society, but that it is an integral part of our everyday existence. Positivism’s desire to maintain the divide between law and society is important. As stated by Davies:

one of the foundations for legally-sanctioned oppression – which I see as the inability of law to appreciate (as opposed to appropriate) difference – is the positivist myth of the separation of law from its subjects.36

This is something discussed further in the next section of this chapter.37

The separation of law from society, and positivism’s emphasis on the descriptive rather than the prescriptive, further gives rise to a conception of law as a neutral and impartial arbiter. Positivism does not concern itself with what the law ought to be, but simply with what the law is. This translates into an image of an objective and validly created law being impartially and equally applied to all people. This

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34 See, for example, the Aborigines Act 1905 (WA). The impact of this legislation is depicted in Morgan, S. My Place (Fremantle: Fremantle Arts Centre Press) 1988 and Scott, K. Benang (Fremantle: Fremantle Arts Centre Press) 2000. These works are discussed in Chapter Nine.  
35 Davies, above n.20 at 4.  
37 It is also discussed in Chapter Ten.
A positivist view of the law as objective, determinate and impartial continues to provide one of the fundamental foundations of our western legal system. As stated by Davies “the naïve thought that judges simply apply the law has enormous popular hold.” Yet it has also been subject to some criticism, and one of the issues that will be examined further in this work is that the law is not a neutral, objective or impartial arbiter, but that it is inherently ideological, often favouring particular privileges based on gender, race and culture, for example.

Finally, and perhaps most importantly in the context of this work, in phrasing law in terms of the inside and the outside, and in seeking to create a single, unified metanarrative of law, law perpetuates, and is about, inclusion and exclusion. This conception of law is challenged by recent jurisprudential theorists such as feminists, race theorists, postmodernists and the various law in context movements. These theorists question existing discourses, structures and definitions of law in order to expand and challenge its boundaries of the internal and the external, and also to show that the very dichotomy is itself problematic and so should be rethought. This is an important point, for it is law’s persistence in seeking to define an inside and an outside that leads to the creation of ‘other’.

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38 It is, for example, embodied in the rule of law and the notion that everyone is equal before the law. This is discussed in Part Three.
39 Above n.36 at 40.
40 This is experienced, for example, by the characters in Keneally, T. *The Chant of Jimmie Blacksmith* (Australia: Harper Collins) 2001 and Scott, above n.34. These works are discussed in Chapters Six, Nine and Ten.
41 This challenge is sometimes reflected in literature. See, for example, Morgan, above n.34 and Scott, above n.34, which question the right of the law to restrict the rights of Aboriginal people, and Miller, A. *Landscape of Farewell* (Crow’s Nest NSW: Allen & Unwin) 2007 and Jones, G. *Sorry* (NSW: Vintage Books) 2007, which highlight the need for reconciliation and a consideration of pluralism. These works are discussed in Chapters Nine and Ten.
The Creation of ‘Other’

The impact of law’s concern with defining the ambit of its boundaries is significant. It has, as explained above, created a dichotomy between that which is inside law and that which is not. The practical ramifications of this dominant discourse are considerable. It has entrenched a distinction between ‘law’, as defined by those inside it, and ‘other’, those outside it who have no particular right, legitimacy or authority to be heard. In so defining ‘law’ and ‘other’, law, as the instrument of definition, is “intrinsically exclusionary”. It gives legitimacy and authority to that which it recognises as inside the law and devalues and dismisses that which is external to it.

In this way, the distinction between the inside and the outside operates to control and repress difference. The law seeks either to appropriate and homogenise difference or to exclude it altogether. It operates, that is, as a mechanism of oppression. As Davies explains it:

The norm is a homogenising limit circumscribing a category of the same, determining what is identical and what is different, demarcating a present interior of like cases opposed to an exterior of cases which fail to fit the norm’s paradigm and which possibly will not be measurable by any legal standard. At the borders, human finitude, perversity or fallibility present some difficult, or deviant, or not-quite normal, cases. But when such unpredictable cases arise, the law, in all of its omnipotent self-sufficiency,

42 In using the term ‘other’ there are some cautionary points that should be noted. First, it is a term that has the potential to be too general and too homogenising. My use of the term here is not meant to indicate that all those who are somehow ‘different’ share the same differences or the same exclusions or concerns. It is also not meant to reduce the issues raised here to a simple binary of difference and sameness. This is a problem considered by Rodan, D. Identity and Justice: Conflicts, Contradictions and Contingencies (Brussels: P.I.E.-Peter Lang) 2004. In this section, however, my discussion does remain at a general level. More specific analysis occurs in Chapter Four, in particular, in relation to the use of the term ‘other’ in reducing and homogenising the experiences of colonised peoples.

43 Davies, above n.20 at 13.

44 This is seen, for example, in the Aborigines Act 1905 (WA) as discussed in Scott, above n.34 and Morgan, above n.34. See also the discussion on Chapter Nine.
adopts the delinquent case into its fold, homogenising its peculiarities, reducing its differences and its idiosyncrasies, and reconsolidating the total control of the law.45

There are numerous examples of the way in which law operates to control that which it considers different or to exclude that which falls outside its self defined boundaries. Feminist legal theory, for example, emphasises the role of gender in the law and the way in which the law has controlled, oppressed and marginalised women, both through directly discriminatory laws and the law’s entrenched favouring of patriarchy. Postcolonial and race theory challenge law’s exclusion of the racial or ‘ethnic’ other, again through the application of specifically discriminatory laws and through a general favouring of white, colonial institutions and structures.46 One of the issues discussed in this work is the way in which colonial law excludes Aboriginal law from mainstream (colonial, positivist) law and Aboriginal people from full protection of this law. Categories of difference based on gender, race or culture have traditionally been treated with suspicion and fear and in categorising them as different and excluding them from the discourse of law, law is able to control this difference and re-assert its own superiority. As Douzinas and Gearey state:

Orders establish and perpetuate themselves by rejecting, silencing and banning certain ‘others’ as mad, ‘deviant’ or criminal, but in all instances she is both inside and foreign to dominant culture. The other is excluded either because she is cognitively unthinkable, beyond the ability of current knowledge to comprehend her difference, or because her existence is inimical to the systematic nature and political claims of dominant power relations. But this position of the ‘enemy within’ turns her into the great threat that must be incarcerated and silenced, or subjected to the objectifying gaze of science in order to yield her secrets and allay the danger she poses to order. In jurisprudence, the other becomes the unthought, that

45 Above n.36 at 39.
46 There are many versions of postcolonialism. Postcolonial theory will be considered in more detail in Chapter Four.
which must be forgotten or translated into the – alien and hostile – terms of
the legal system in order to protect law’s coherence and systematicity.47

There are two issues of importance that emerge from this discussion. First,
determining where the boundary between the inside and the outside lies is not a
politically neutral or value free exercise. One of the foundations of our modern
legal system is that the law is an impartial and objective arbiter and that it treats
everyone equally.48 As pointed out by much critical legal theory, however, this is
not always the case. The law is not always objective and impartial. This theory
emphasises that issues of gender, race or culture, for example, often form the basis
for deliberate exclusion and discrimination, and the marginalisation of particular
groups by the law and by society generally. It highlights the contingent
relationship of the legal and the social, demonstrating that, under the guise of
objectivity, law’s exclusions reinforce social exclusions. Consider, for example, the
numerous laws that have been enacted controlling the movement and rights of
Aboriginal people. The effect of such laws has been to perpetuate the exclusion of
Aboriginal people from many benefits of society such as health care, education, and
access to the law.49 Law’s discrimination of Aboriginal people in these and many
other ways has resulted in, and reinforced, their social exclusion and
stigmatisation.50

47 Douzinas, C. and Gearey, A. Critical Jurisprudence: The Political Philosophy of Justice (Oxford:
Hart Publishing) 2005 at 60.
48 The rule of law, which embodies conceptions of objectivity and impartiality and the ideal that
everyone is equal before the law, is discussed in Chapter Eight.
49 It should be noted here that while Aboriginal people can now access mainstream services this has
not always been the case. See, for example, the discussion of the Aborigines Act 1905 (WA) in
Chapter Nine.
50 This is an issue that will be explored in Parts Two and Three.
The second important issue is that the law operates to exclude in many different ways. Some of these exclusions may not necessarily be negative. For example, the imposition of minimum age requirements that exclude young people from driving, drinking and other such rights are intended to protect them until they are deemed sufficiently responsible to undertake such activities safely. The kinds of exclusions that I am concerned with, however, are negative. These include, for example, the exclusion of specific groups based on gender, race, class, sexuality or religion, from the benefits and protection of the law. Often such groups are included by the law for some purposes and excluded for others. For example, as discussed in Chapter Five of this work, when England claimed ownership of Australia the legal, social and cultural systems of Australia’s already existing inhabitants were dismissed and excluded from the law (and society) of the new occupants. That is, entire Indigenous legal and cultural systems were excluded from the formation of a new dominant law and society. This is not to suggest that Aboriginal people were themselves entirely excluded from the law. As stated above, the law can be both inclusive and exclusive, and Aboriginal people were extensively legislated about by the new law. They were subjected to specific discriminatory laws that variously sought to ‘deal with’, ‘protect’ or ‘assimilate’ Aborigines. These enactments governed virtually all aspects of the lives of Aborigines and, in so doing, excluded them from many of the rights and protections that non-indigenous Australians enjoyed, such as the right to live

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51 It is also important to note that often these exclusions are contested by some and supported, or denied, by others.
52 Davies, above n.20 at 15.
53 These laws and policies, particularly as they relate to Western Australia, are discussed in Chapter Nine.
wherever they chose, the right to marry or to work without permission, the right to drink and so on. Larissa Behrendt explains:

Indigenous Australians intuitively know the power of the law. It is a system, concept and language imposed upon Indigenous communities. It is a tool of dispossession: it is a regulator of peoples’ lives: it delivers the biased hand of justice. Whether land rights, or deaths in custody, stolen generations or sovereignty, Indigenous peoples have an intimate understanding of the pervasive force of law without opening a case book or reading a judgement.54

As recently as 2007, Commonwealth legislation has singled out Aboriginal people as having to meet a number of requirements in order to receive government benefits and assistance.55 In these instances, Aboriginal people are included within the law. But it is in a way which positions them negatively. They have generally not been included within the law in a positive way. As Davies argues:

We should not forget that people (say, Indigenous Australians) who are often excluded from the benefits and protection of the law, are not ordinarily excluded from its criminal implications, and indeed, it may often be said that they are given special consideration in this area.56

We should also not forget that it was not until 1967 that Aborigines were officially included within the Commonwealth Constitution.57

As well as these more explicit forms of discrimination, the law can also exclude and discriminate against those lacking education, citizenship or knowledge about the law.58 For example, Aboriginal people, or refugees or new migrants, may not always have at their disposal the knowledge or resources to be able to establish

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55 Northern Territory Emergency Response Act 2007 (Cth).
56 Above n.20 at 15.
57 The 1967 referendum gave the Commonwealth the power to legislate about Aboriginal people and allowed for Aboriginal people to be counted, for the first time, in the census.
58 Rodan, above n.42 at 85. This is evident, for example, in Keneally, above, n.40. This work is discussed in Chapter Six.
their native title rights, or to challenge decisions effecting their status and well being. Furthermore, the standards, language and perspectives that are reflected in law’s prescriptions can also be intrinsically exclusionary. For example, in Chapter One, I cited the example of the definition of marriage in the *Marriage Act* as “the union of a man and a woman”.

This reflects the assumed (and preferred) normative standard of heterosexual relationships, to the exclusion of same sex relationships, and seeks to uphold and protect this standard. Forms of exclusion such as these have contributed to the marginalisation of certain groups within society.

The consequences of being labelled and treated as ‘other’ are considerable. It is a categorisation that operates to control and repress difference, or, more accurately, deny people’s humanity, regardless of difference, and deny the value and productiveness of that difference. It also, and perhaps more importantly, silences. The law’s favouring of certain normative standards and privileging of particular groups within society reinforces dominant constructions of law and silences those who do not conform to these constructs. In this way, exclusion:

> conceal[s] the person from law’s radar: it is an internal exclusion, which takes the form of silencing the subject who does not fit the predetermined legal stereotype.

Once again, Lyotard provides useful insight here. In Chapter One, I introduced his concept of the *différend*. As explained there, a *différend* arises where there is an

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59 *Marriage Act* 1961 (Cth) s.5(1).
60 See Davies, above n.23 at 19 – 21 for a discussion of different forms of exclusion.
61 New forms of exclusion would seem to be emerging constantly. Consider the recent manifestation that has taken the form of being either Australian or un-Australian, the implication clearly being that those who are un-Australian are not deserving of inclusion in our society (or law).
62 Davies, above n.23 at 21.
incommensurability of idioms. One of the key indicators of a différend is a silencing of the ‘other’, the marginalised. Lyotard highlights that the discourse of law silences those who do not speak its language. It does not recognise that the ‘other’ speak in their own idiom, which the law does not hear and therefore cannot engage with. This inability to communicate results in the dominant discourse excluding the ‘other’. It denies the ‘other’ the ability to testify to the injustices or wrongs to which they have been subjected, and is in itself an injustice. In other words, Lyotard’s theories about discourse, legitimation and the différend foreground the way in which particular groups in society are constructed and represented as different and marginalised and silenced, and how the injustices they consequently suffer are legitimated through the authority of the discourse of law. As Rodan puts it:

In contemporary societies, injustice occurs when groups of people are treated as invisible, and as ‘already judged’. Injustice is perpetuated through the legitimation of norms, which ultimately become the authorised version of reality.63

What is important here is that it is the legitimation of particular norms and particular versions of reality that perpetuate exclusions and injustice.

In Australia, for example, the legitimated discourse operates to exclude Aboriginal peoples’ laws, cultures and perspectives. This was the case from the very beginning of colonisation when the first settlers brought with them a colonialist discourse that legitimated their own superiority on the basis of being both colonisers and being white.64 Colonised and non-white, Aborigines were not part of this discourse.65 As explained by Rodan:

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63 Above n.42 at 85 – 86.
64 It should be noted here that there were, of course, distinctions amongst the colonisers, between the free settlers, the convicts, the English and the Irish, for example. These people all had a
In each of these genres of discourse – … colonialism and whiteness – there is a suppression of other ways of being in the world. The overriding problem is the representation of the ‘Other’ as being outside the … cultural norm, that is, as being different from the identity of ‘Sameness’.66

This exclusion is evidenced by a consideration of Aboriginal claims to land. The classification of Australia as terra nullius deemed that this land was empty. It had no sovereign, no legal system, and Aboriginal people did not own it.67 They did not exist within the discourse of terra nullius and so had no particular right or legitimacy, within this discourse, to speak or to be heard. In relation specifically to land, the law excluded (and excludes) relationships with land that are different from its own conceptions of ownership.68 Aboriginal relationships with land are different and cannot be expressed in a form understandable by the law. That is, to use the language of Lyotard, there is a différend. The only way the law can cater for Aboriginal rights to land is in the form of native title.69 Yet here the exclusions continue, because native title is, firstly, a recognition of rights to land within white, colonial law. Aboriginal systems of ownership are invalid and excluded from this legal discourse. Secondly, as Rodan explains:

Currently in Australia, one of the practices of exclusion indigenous people experience is through litigation, specifically with claims on the Native Title Act. Through their inability to prove particular land claims within the discourse of law in Australia, indigenous communities are often not heard in the terms that support their claim and relationship to the land.70

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66 Ibid at 188.
67 See the discussion in Chapter Five.
68 Hence, in Mabo v Queensland (No.2) (1992) 175 CLR 1, the majority was able to accord the Meriam people native title rights because the relationship that they had with the land and the way that they managed the land was similar to the way that the English common law defined property rights. This is discussed in more detail in Chapters Five and Seven.
69 See discussion in Chapter Five.
70 Above n.42 at 85. The issues of terra nullius and Aboriginal dispossession are the focus of Part Two.
It is not just in relation to land that such injustices and exclusions occur. It is also evidenced in the government policies of protection and assimilation that were adopted throughout most of the twentieth century. The legitimation of these policies silenced Aboriginal people. They were unable to speak or to be heard within the colonial Anglo-discourse which legitimated and perpetuated the removal of Aboriginal children from their families and the belief that skin colour was an indicator of the potential for assimilation into white society.\footnote{Ibid at 101 – 102. The policies and legislation which governed the lives of Aboriginal people are discussed in Chapter Nine.}

**Pluralism: A Challenge to Positivism?**

Wherever there is an Other which cannot simply be accommodated within a system of thought, monism is under challenge. Faced with such an Other, we can try to assimilate it and make it fit within the unity (the attitude of singularity) or recognise its difference in its own right (the attitude of pluralism).\footnote{Davies, M. “The Ethos of Pluralism” (2005) 27 Sydney Law Review 87 at 94.}

As introduced above, one of the issues central to postmodernist theory is an emphasis on multiplicity and the local. That is, it emphasises that there is not simply one narrative that tells everyone’s story or that orders everyone’s world. Rather, it foregrounds that there are many stories, perspectives and experiences. There is, that is, an emphasis on plurality.\footnote{This is not to suggest that postmodernism simply means pluralism, but that pluralism is one of the points central to postmodernism. Postmodernism will be discussed further in Chapter Four.} Our legal system, however, does not embrace plurality. It is a modernist, positivist system, with an emphasis on unity, order and coherence. Positivism, as explained above, theorises a unitary system of law that promotes one singular, totalising and ordered legal system.
In terms of Australian law, the effect of this totalising (or what Uhlmann labels ‘monologic’) approach is clear. From the beginning of colonisation the laws and legal systems of Aboriginal peoples were neither recognised nor allowed to co-exist with positivist, colonial law. Colonial legal systems, as Uhlmann explains, favour a monologic, totalising discourse, and deny the possibility of an alternative, dialogic (or non-totalising) approach. As he goes on, “monologic translation, rather than opening the potential for justice, closes down such potential: ... [it] excludes any possibility of recognition.” This is borne out by an examination of the Mabo decision, for example, in which the High Court recognised the existence of native title rights to land at common law. While according (limited) rights to Aboriginal people to their land, Mabo is a decision which in no way recognises or acknowledges Aboriginal law or Aboriginal rights to land within Aboriginal law. It is a decision which promotes the supremacy and dominance of one legal system, that of the colonisers. It promotes legal monism. In allowing Aboriginal rights to land to be recognised within the colonisers’ law, it simply absorbs those rights into a common law conception of native title to the exclusion of Aboriginal law and Aboriginal rights to land within that law. There is no recognition of an independent Indigenous system of law that exists outside of the Australian colonial law. While the recognition of native title rights within the common law indicates

75 This is discussed further in Part Two.
76 Above n.74 at 47. Uhlmann is discussing here the work of Patton, P. “The translation of indigenous land into property: the mere analogy of English jurisprudence” (2000) 6(1) Parallax 25.
77 Ibid at 47.
78 Mabo v Queensland (No.2) (1992) 175 CLR 1.
80 Davies, above n.72 at 102.
a shift towards recognition of Aboriginal rights to land, it does not constitute a move towards pluralist understandings of law. As stated by Davies:

in a weak sense, Australian law has recognised Indigenous law on this issue, but it is a recognition which does not subvert the basic centralist dogma of Australian law, because it is fully effected within that law. Native title illustrates a continuation of standard colonial practices (in Australia and elsewhere), whereby Indigenous laws can achieve some status, but strictly within the framework of colonial recognition.81

Perhaps more importantly, she goes on:

The recognition of such differences as ... European law/Indigenous law, to the extent that they are contained within dominant law, are no threat to the doctrine of centralism because they are structurally subsumed within state law.82

Monism, and positivism, is not challenged by the recognition of native title rights. In refusing to acknowledge the existence of Indigenous legal systems and Indigenous peoples’ ‘otherness’, Australian law perpetuates an injustice. Monism “prevent[s] equal dialogue between two systems”83 and does not allow the voice of the ‘other’ to be heard within the dominant domain. In this way, it contributes to the creation of the différend discussed above.

Pluralism suggests a possible alternative to this approach. Pluralism can refer to the existence of two or more systems of law operating side by side,84 or it may simply be an acknowledgement that, within the dominant system, there is diversity and fragmentation.85 By pluralism, I mean a recognition and respect for difference, and

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81 Ibid at 95.
82 Ibid at 95. Emphasis added.
83 Ibid at 102.
85 Davies, above n.72. Much work has been done on pluralism, defining it, theorizing it, examining its practical ramifications. See, for example Griffiths, above n.84; Manderson, D. “Beyond the Provincial: Space, Aesthetics, and Modernist Legal Theory” (1996) 20 Melbourne University Law Review 1048. I am not seeking here to provide a comprehensive theory of pluralism. In the context
a recognition that there exist multiple and diverse perspectives, experiences and approaches to law. Pluralism suggests that it is possible for recognition and respect to be accorded to “multiple types of law” and emphasises “the heterogeneity of narratives constituting the law.” As Davies explains it:

In contrast to the monistic and centralist narrative about law, the ‘ethos of pluralism’ enshrines an attitude which celebrates multiplicity and difference in the law. A pluralist approach rejects the view that law is one system, imposed on one society. It sees law as diverse and fragmented, not systematic and cohesive.

As she goes on to explain, pluralism is normatively preferable to monism “because it presents opportunities for the legal recognition of social diversity.” It allows for the recognition, as opposed to the assimilation, of ‘otherness’. It allows for the creation of a space where alternative voices can speak and be heard. In this way, pluralism can be seen as one way in which the incommensurable, or Lyotard’s **différend**, can be put into words.

In Australia, the need for a more pluralistic understanding of law is imperative. As explained above, the law’s failure to respect and accommodate ‘otherness’ has resulted in Aboriginal rights to land being recognised and given limited protection only within our common law understanding of property rights. The law’s refusal to respect Aboriginal peoples’ ‘otherness’ has also led to the policies of assimilation and absorption which guided the regulation of Aboriginal people’s lives in Australia for much of the twentieth century. Further, as argued by McRae *et al,*

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86 Davies, above n.72 at 88.
87 Ibid at 93.
88 Ibid at 94.
89 This is discussed in Chapter Ten.
Australia is a country in which two (and given the differences in Aboriginal groups, multiple) systems of law continue to exist; colonial and Indigenous.\footnote{Indigenous law itself varies within groups, although groups are connected by their spiritual relationship to land.} As they state:

For the colonists, the doctrine of terra nullius may have consigned indigenous legal issues to legal oblivion, but as far as indigenous communities were concerned their legal systems continued to regulate their lives as they had always done. Although never officially recognised as such, a pluralistic legal system has operated in Australia since the British colonists introduced the Australian legal system.\footnote{McRae, H., Nettheim, G., Beacroft, L. and McNamara, L. Indigenous Legal Issues: Commentary and Materials 3rd ed. (Sydney: Lawbook Co.) 2003 at 75.}

They explain the impact that the introduction of colonial law had on Indigenous laws, and how Indigenous laws continue to operate in contemporary Australia.\footnote{Ibid at Chapter Two.} Aboriginal customary law, for example, while recognised by many Aboriginal people, has generally not been recognised by, or accorded any status within, the dominant law.\footnote{Customary law is not just about punishments or ‘payback’, for example. It is about the traditional rules that govern daily life, both legal and social. For a discussion of customary law in the context of the legal see ibid at Chapter Two.} It is the colonial law which takes precedence, while Indigenous law is generally excluded as not part of the dominant law.\footnote{As McRae et al. note, on the whole the Australian legal system has proved “incapable of accommodating indigenous laws.” Ibid at 75.} In the interests of ‘equality’, the same (that is, white, colonial) law is deemed to apply to everyone. As summarised by McRae et al, “to date, recognition has been very much on terms set by the dominant legal system, with problematic results in many areas.”\footnote{Ibid at 76. Likewise, Davies states that, “Indigenous law is … assimilated and / or excluded by the institutions of law, but is not recognized as law in its own right.” Davies, above n.72 at 101.}
What is highlighted most clearly here is the need for an understanding and conception of difference that does not reduce it to the same.\(^{96}\) If the dominant legal system is to accommodate, as opposed to assimilate and absorb, the Aboriginal ‘other’, pluralist understandings of both the legal and the social need to be embraced. In the context of this work, therefore, I use the term pluralism to mean alternative ways of thinking about our laws, our legal system, and our society. In particular, I view it as a means of allowing for the recognition and acceptance of difference and ‘otherness’ in a way which caters for its existence, without assimilating and absorbing it.\(^{97}\) In this I am suggesting that, of necessity, our conception of law must become less singular.

**Conclusion**

In this chapter, I have raised a number of important issues and arguments that will be examined throughout this work. In the first section, I argued that law is theorised as a unitary and discrete object that can be conclusively and determinately identified and that, consequently, the discourse of law is structured by a delineation or distinction between that which is inside law and that which is outside. In the second section, I proposed that this binary opposition between the inside and the outside translates into a discourse of inclusion and exclusion and that those who are excluded are treated differently, often denied full protection of the law and often discriminated against. This, in turn, defies one of law’s foundation principles, that of equality and objectivity. In the final section, I suggested that law’s ‘other’ needs to be acknowledged and accommodated, not assimilated or made

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\(^{96}\) The effects of the failure to appreciate difference are demonstrated, for example, in the protection and assimilation policies that are discussed in Chapter Nine.

\(^{97}\) This is highlighted in Jones, above n.41 and Miller, above n.41. These texts are discussed in Chapter Ten.
the same. One of the ways in which this may be possible is to adopt a position of pluralism, which allows for the questioning of law as a unitary object and so challenges the positivist distinction between the inside and the outside and inclusion and exclusion.

In this and the previous chapter, I have presented arguments about law that underlie the rest of this work. It is on issues of law’s control of the social, law’s power to include and exclude and the lack of law’s objectivity and equality that I focus in my analysis of literature in the following chapters. Before moving on to examine how particular literary texts deal with these issues, however, in the next two chapters I examine some more general questions that are relevant to literature; namely, the importance of literature as a form of representation and medium for critiquing the operation of law, and theories relevant to the reading of literature, specifically postmodernism and postcolonialism.
CHAPTER THREE

LITERATURE: WHAT IS IT AND WHY IS IT USEFUL?

Introduction

In Chapters One and Two, I discussed some important issues in relation to law. Namely, that law regulates many aspects of our social and everyday existences beyond the purely legal, and that it creates boundaries of inclusion and exclusion which construct, marginalise and silence the ‘other’. In Chapters Three and Four, I move away from law and focus on literature. In particular, in this chapter, I examine the importance of literature as a medium for informing about social, political and legal issues, and for critiquing and encouraging thought about existing structures, systems and values. In Chapter Four, I argue that postmodernism and postcolonialism provide useful frameworks for the interpretation and reading of literature about these issues.

In the first section of this chapter, I discuss how ‘literature’ can (or cannot) be defined, and clarify my use of the term. I also identify the literature that I examine in this thesis. In the second section, I argue that literature, through its representations and commentary, teaches about, and offers useful critical insights into, many aspects of society. In particular, I take up Lyotard’s point here that “what is at stake in a literature … is to bear witness to differends by finding idioms for them.”¹ Some of the literary texts that I examine in Parts Two and Three of this thesis “bear witness” and seek to give expression to the différend that is created by

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the law. In this way, as argued throughout this thesis, literature is a valuable resource in contributing to the community’s perception and understanding of the way the law works, the extent of its impact, and in educating towards reform.

What is Literature?

There are many diverse definitions, and approaches to the study, of literature. Some of these identify literature by reference to its 'literariness', that is, whether it has a sufficient (if vaguely defined) inherent quality that renders it ‘literary’. This quality is usually evident in the classic literature of Ancient Greece or Rome, the writings of Shakespeare, or romantic nineteenth century English literature, for example. According to this conception, literature is privileged in form and content over lesser, inferior works, those that do not possess ‘literary’ qualities. It can include, for example, writing produced by, and supportive of, dominant (colonising) cultures, but exclude that of colonised peoples. As Ashcroft et al. state:

One of the most persistent prejudices underlying the production of the texts of the metropolitan canon is that only certain categories of experience are capable of being rendered as ‘literature’. This privileging of certain types of experience ... [denies] value to the post-colonial experience itself, as ‘unworthy’ of literature.

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3 See Eagleton, T. *Literary Theory: An Introduction* 2nd ed. (Oxford: Blackwell Publishing) 1996 at 1 – 14 for a discussion and criticism of some of the ways that literature has been defined.

4 So while works such as Forster, E.M. *A Passage to India* (London: Penguin Classics) 2005 or Dark, E. *The Timeless Land* (Sydney: Harper Collins) 2002, for example, may be deemed literary, those written by Aboriginal and other minority writers have not always been considered worthy of the label ‘literary’. As I show in Parts Two and Three, this is, however, starting to change.

Other definitions of, or approaches to, literature emphasise its structure and the way that it uses language. Russian formalism and structuralism, for example, focus on defining “in linguistic terms what makes a verbal message a work of art.”\(^6\) Literature, in this sense, is about language, structure and form, not content. As Terry Eagleton explains, these theories emphasise that “literature is a ‘special’ kind of language.”\(^7\) Poststructuralists and postmodernists, in contrast, deny that literature is a unified whole with its own set of immutable rules. Rather, they highlight its multiplicity of voices, forms, languages and meanings, and emphasise that literature is dependent on interpretation and ways of reading.\(^8\) Other definitions focus purely on the content of literature, confining it to fictional or creative writing.\(^9\)

As Eagleton points out, none of these definitions are conclusive, or entirely satisfactory. Clearly, defining literature is dependent on value judgements.\(^10\) As he states:

> It would not be easy to isolate, from all that has variously been called ‘literature’, some constant set of inherent features. In fact it would be as impossible as trying to identify the single distinguishing feature which all games have in common. There is no ‘essence’ of literature whatsoever.\(^11\)

How literature is defined will vary according to numerous variable factors such as time, culture and the perspective or ideology of the reader. It is not an object

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\(^7\) Above n.3 at 4. See, for example, Shklovsky, V. “Art as Technique” in Lodge, ibid at 16; Jakobson, R. “Linguistics and Poetics” in Lodge, ibid at 32.

\(^8\) See, for example, Barthes, R. “The Death of the Author” in Lodge, ibid at 167; Foucault, M. “What is an Author?” in Lodge, ibid at 197.

\(^9\) Williams, whose focus is law and literature, would seem to limit literature’s ambit to fictional or imaginative works, stating that “literature must be … the progeny of art, imagination, fantasy, ego.” Williams, M. *Empty Justice: One Hundred Years of Law, Literature and Philosophy* (London: Cavendish Publishing) 2002 at xxix.

\(^10\) Eagleton, above n.3 at 9.

\(^11\) Ibid at 8.
capable of a single determinate definition and attempts to ascribe such to it are futile. It is neither stable nor unified. As Eagleton concludes:

Some kinds of fiction are literature and some are not: some literature is fictional and some is not; some literature is verbally self-regarding, while some highly-wrought rhetoric is not literature. Literature, in the sense of a set of works of assured and unalterable value, distinguished by certain shared inherent properties, does not exist.12

Not only is literature incapable of conclusive definition, but, perhaps more importantly, how it is defined, perceived and critiqued is itself an ideological and political exercise. As explained by Eagleton:

the so-called ‘literary canon’, the unquestioned ‘great tradition’ of the ‘national literature’, has to be recognized as a construct, fashioned by particular people for particular reasons at a certain time.13

This is something that is also emphasised by Hodge and Mishra in relation to Australian literature. They argue that “there is [not] a single agreed object, ‘Australian literature’.”14 They state that, rather, literature is an entity:

constructed by various agencies attempting to prescribe what texts should be written, what they should be taken to mean, and what authors and texts should be deemed to count as the major landmarks in the national tradition.15

They highlight, in particular, that the way in which literature is defined in Australia has had (and continues to have) considerable impact on the way in which Australian society has been shaped, and, in particular, on the treatment of

12 Ibid at 9.
13 Ibid at 10.
14 Hodge, B and Mishra, V. Dark Side of the Dream: Australian literature and the postcolonial mind (Sydney: Allen & Unwin) 1990 at x.
15 Ibid at x. They go on to discuss this in relation to literary history, focusing particularly on the Oxford History of Australian Literature, comparing what they label the nationalist and the eternalist model of literature and their competing ideologies, strategies and objectives, at 1 – 6. See also the Introduction of Ashcroft et al., above n.5 for a general discussion of the development, evolution and definition of literature in the English colonies.
Australia’s Aboriginal people. This is an important point, in the context of this thesis. As they note, until the 1967 referendum “it was taken for granted that ‘Australian literature’ did not include Aboriginal texts.”16 This exclusion of Aboriginal literature has impacted considerably on the way in which literature (and history) has been studied. By excluding Aboriginal texts from the literary ‘canon’, Aboriginal stories and accounts of their lives and experiences were marginalised, and, perhaps more importantly, Aboriginal voices were silenced. This restricted the knowledge available to the wider Australian public about Aboriginal people and their experiences to that promulgated by anthropologists, government agencies, and the like. That is, it was confined to representations of Aboriginal people as ‘primitive’, ‘the noble savage’, or a people who, having previously lived an idyllic existence, were, in accordance with theories of social Darwinism, destined to ‘die out’.17 In this way, literature “act[ed] in parallel to the repressive government policies that attempted to ‘eliminate’ the ‘Aboriginal problem’.”18

I am not concerned here with presenting a comprehensive definition of literature. My objective is simply to demonstrate that the object ‘literature’ is open to interpretation, that its definition, at any given point in time, is not ideologically or politically neutral, and that, as highlighted by both Eagleton and Hodge and Mishra, how it is defined and presented is a construct. More importantly, I also wish to clarify what I mean by the term ‘literature’ in the context of this thesis. In

16 Hodge and Mishra, ibid at xiv. The 1967 referendum allowed for Aborigines to be included within Commonwealth legislative power and also allowed them to be counted in the census.
17 These representations are dominant in Dark, above n.4, for example. This work, and the way that it represents Aboriginal people this way is discussed in Chapter Six.
18 Hodge and Mishra, above n.14 at xiv.
particular, I wish to emphasise that my interpretation of what constitutes literature is not confined to the ‘canon’ of literature. Rather, I mean it to include the telling of minority stories, such as those of colonised and Aboriginal peoples.\textsuperscript{19} As Ashcroft \textit{et al.} state:

More than three-quarters of the people living in the world today have had their lives shaped by the experience of colonialism. It is easy to see how important this has been in the political and economic spheres, but its general influence on the perceptual frameworks of contemporary peoples is often less evident. Literature offers one of the most important ways in which these new perceptions are expressed and it is in their writing, and through other arts such as painting, sculpture, music, and dance that the day-to-day realities experienced by colonized peoples have been most powerfully encoded and so profoundly influential.\textsuperscript{20}

For Aboriginal people, literature is a way of telling stories about how the law has treated them and, importantly, of critiquing and commenting on the law, the western legal system and its effects on Aboriginal people. As explained further below, I am less concerned with the ‘canon’ of literature, and more concerned with this conception of literature as a vehicle for critique.

It is important in this context to acknowledge, however, that the very medium of literature is in itself a privileged one, and therefore is itself part of the dominant discourse. The literary form was one, at least initially, that was forced upon Aboriginal peoples (who themselves had their own extensive oral and pictorial languages and traditions) as part of colonisation and assimilation. And although it has recently given both Indigenous and non-indigenous peoples space to address Lyotard’s différend it remains, at least within mainstream Australia, a medium with

\begin{footnotesize}
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  \item[\textsuperscript{19}] Lyotard, reminds us that we need to listen to minority voices. This is discussed in more detail in Chapter Four. It should also be noted here that I do not confine my understanding of these minority stories to only those that are told by Aboriginal writers. It also includes stories about Aboriginal experiences written by non-Aboriginal writers.
  \item[\textsuperscript{20}] Above n.5 at 1.
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a history closely linked to the status quo.\textsuperscript{21} Notwithstanding this, literature, as demonstrated in this thesis, is a useful medium for informing readers about the law and through which the stories of those who have been marginalised and mistreated by the law can be put into the dominant public domain.

Bearing the above in mind, when I talk about literature in this thesis, I mean (generally) novels and (generally) fictional works. I say generally because these boundaries are fluid. In some of the texts I discuss, the subject matter is not always entirely fictional, as in *The Chant of Jimmie Blacksmith* or *The Secret River*, for example.\textsuperscript{22} Both of these works are based, to some extent, on historical events. They are not, however, presented as non-fictional works, but as fictionalised tellings of events in our history. Other works, such as *My Place* are not fictional, but biographical accounts of the treatment of Aboriginal people by Australian governments, authorities and society.\textsuperscript{23} *My Place* is, however, written in an idiom easily accessible by both Aboriginal and non-Aboriginal readers, and does not read as a strictly biographical work. Other works, such as *Sorry*, while relating a story that has important and real implications, are entirely fictional.\textsuperscript{24}

The literature on which I focus is Australian literature of the twentieth and twenty-first centuries. It is written by Aboriginal and non-Aboriginal Australian writers, and is generally readily available and widely read.\textsuperscript{25} I acknowledge that

\textsuperscript{21} It should be noted here that this privilege is associated with social, economic, cultural and political distinctions within in non-indigenous communities also.

\textsuperscript{22} Grenville, above n.2 and Keneally, T. *The Chant of Jimmie Blacksmith* (Australia: Harper Collins) 2001. These texts are discussed in Chapters Six and Seven. As discussed in Chapter Seven, Grenville has, however, arguably presented her novel as more than a work of fiction.

\textsuperscript{23} Morgan, S. *My Place* (Fremantle: Fremantle Arts Centre Press) 1988.

\textsuperscript{24} Jones, G. *Sorry* (NSW: Vintage Books) 2007.

\textsuperscript{25} Much of it has also been awarded, or shortlisted for, major prizes, such as the Miles Franklin Award.
the specific works that I have chosen may reflect my particular ideological preferences. However, as introduced above, definition necessitates limitations and choices. That my choice of literature does not include, for example, the poetry of Henry Lawson or the plays of Jack Davis, does not mean that I do not consider these works to be ‘literature’, or that they do not provide useful insight into various aspects of Australian life. I have simply chosen texts that are relevant to my argument (as demonstrated through a consideration of the effects of terra nullius and the rule of law) that law is a powerful mechanism that controls many aspects of the social and that it creates boundaries of inclusion and exclusion that have very real and long-term consequences, both for those who are identified by it as ‘other’, and for those who are part of its dominant discourse.

Why is Literature Important?

As a form of discourse, literature is important for a number of reasons. Discourses, as explained in Chapter One, are a form of knowledge. They can promote particular (official) knowledges and normalise particular constructed values and perspectives. The truth and the reality that are thereby perpetuated impact on the way in which we live our lives and perceive and relate to others and to society generally. As Eagleton states:

> Discourses, sign-systems, and signifying practices of all kinds, from film and television to fiction and the languages of natural science, produce effects, shape forms of consciousness and unconsciousness, which are closely related to the maintenance and transformation of our existing systems of power.26

The discourse of law is one discourse that is examined in detail in this thesis. The official story of the law is one of uniformity, objectivity, equality and justice. It is about the impartial application of neutral rules by unbiased institutions and

26 Above n.3 at 183.
officers. The discourse of colonialism is another discourse that I examine. As explained in Chapter Four, the consequences of this particular discourse are far reaching, devastating (at least for some) and continuing. It has contributed to the dispossession of Aboriginal people, and their subjection to assimilationist practices that have led, for example, to the removal of their children. These discourses, or narratives, have an enormous hold. They authorise who has the right to speak, and what gets said. As Lyotard states:

Narratives … define what has the right to be said and done in the culture in question, and since they are themselves a part of that culture, they are legitimated by the simple fact that they do what they do.28

Literature, as a form of narrative, is a medium of representation that serves an important function. It can contribute to the knowledge we have about people, and so influence the way identities are constructed and the way that we relate to each other and to society generally. It can, that is, contribute to genres of discourse, such as colonialism or the law. And it can do so in two important ways. Firstly, literary representations may support official narratives that tell official stories. Literature may, that is, promote particular knowledges and, in its representations, normalise particular constructed values and perspectives. In so doing, it can contribute to the perpetuation of injustice “through the kinds of representation that judge certain kinds of identities as ‘lesser’ or ‘inferior’.”29 This is evidenced, for example, in the images of Aboriginal people that have been perpetuated by literary

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27 Some of these practices are discussed in Chapter Nine.
representations of them as ‘primitive’ or as the ‘noble savage’. As Marcia Langton highlights, non-Aboriginal people acquire their knowledge and understanding of Aboriginality from a variety of sources, including by reading a book about Aboriginal people. She states:

Textual analysis of the racist stereotypes and mythologies which inform Australian understanding of Aboriginal people is revealing. The most dense relationship is not between actual people, but between white Australians and the symbols created by their predecessors. Australians do not know and relate to Aboriginal people. They relate to stories told by former colonists.

This form of representation is damaging for two reasons; firstly, it results in the marginalisation and oppression of Aboriginal stories and Aboriginal voices. It silences them, denies them authority and delegitimises their right and ability to challenge official narratives and official truths about the injustices that they have suffered. Secondly, it denies Aboriginal people the right to represent themselves so that the knowledge and image of Aboriginality that they acquire is that of the colonisers. In this way, the representation of Aborigines as the object of colonialism helps to construct and perpetuate an authorised version of history about colonisation. That is, it contributes to the legitimisation of one particular discourse, one version of events, and, as stated by Rodan, “it is this authorised version that constructs a hegemony and so causes a differend.” In this way,

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30 Ashcroft et al., above n.5 at 3. This is discussed in more detail in Chapter Six, particularly in reference to Dark, above n.4.
31 Langton, M. Well I heard it on the radio and saw it on the television … (Sydney: Australian Film Commission) 1993 at 31.
32 Ibid at 33.
33 As Hodge and Mishra state: “since they … cannot represent themselves, ‘they must therefore be represented by others’ who know more about them than they know about themselves.” Above, n.14 at 27.
literature is a medium by which “conceptions of ‘truth’, ‘order’, and ‘reality’ become established.”

But literature can also question and challenge these authorised versions of truth and offer alternative realities. As Anthony Uhlmann writes:

One of the most powerful capacities of a work of literary fiction, is … to reflect an ideological horizon, an overview of a world as it is experienced, which does not present us with formulas and completed theories but with the representation of the process through which ideologies are generated and reformed. …

For this reason literature is well placed to point us towards justice.

This is something encouraged by postmodernism and postcolonialism. As explained in Chapter Four, these theories emphasise that there are forms of narrative other than the official grand narratives. For postmodernism and postcolonialism, these local, or personal, narratives are important for it is these narratives that question and challenge official metanarratives. Literature is one way in which these local stories can be told, and alternative (minority) voices heard. These voices may be those of the colonised. But they may also be those of women, refugees, or other marginalised groups. Kim Scott, talking about the telling of Aboriginal stories states:

I’d like to think that writing fiction is sometimes a way to explore, to rethink and possibly to retrieve or create something from between and behind the lines on the page. As such it can help the revitalisation and regeneration of an Indigenous heritage, in so far as it involves ‘shaking up’ and making space within the most readily available language – that of the colonizers – for other ways of thinking.

35 Ashcroft et al, above n.5 at 7. This is something explored in the context of the colonial by Edward Said, for example, whose work will be discussed in Chapter Four.


37 Scott, K. “Covered up with Sand” (2007) 66(2) Meanjin 120 at 123.
Literature can, that is, allow that which has not been put into words to be, and open up the possibility for justice and alternative realities. In this way, it is, as Trees notes, “often a site of contestation, a cry for legitimacy and therefore acknowledgement as a counter-history.”

Literature, then, serves an important function in challenging the exclusions that were discussed in Chapter Two of this work. It is one way in which the dominant standard against which behaviour, actions and perspectives are measured can be questioned. And it is a way in which the law can be critiqued. This happens every time a novel represents a legal process or the consequence of a judicial decision or the operation of particular legislation, for example. It allows, that is, for an interrogation of law. There are a vast number of theorists who write in the area of law and literature, and who critique a wide range of issues, from Richard Posner’s economic analysis of law through the use of Kafka’s *The Trial*, for example, to the laws of marriage and cohabitation as revealed in Thomas Hardy’s *Jude the Obscure*. Equally, there has been much criticism of the law and

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38 Trees, K. “My Place as Counter-Memory” (1991) 32 *SPAN*66 at 69.
39 And, as stated by Patton, “[s]o long as the standard itself is never questioned the only two possible attitudes towards the other are exclusion or assimilation.” Patton, P. “Post-structuralism and the Mabo Debate: Difference, Society and Justice” in Wilson, M. and Yeatman, A. *Justice and Identity: Antipodean Practices* (Sydney: Allen & Unwin) 1995 at 160.
40 The way legislation operates is written about in Morgan, above n.23 and Scott, K. *Benang* (Fremantle: Fremantle Arts Centre Press) 2000. These works are discussed in Part Three.
literature movement. I do not intend to provide a discussion of the law and 
literature movement here. This thesis is not concerned with law and literature as a 
thoretical discipline. It is concerned with the way in which postcolonial readings 
of literature can educate about and critique the way in which the law, as it operates 
in Australia, has constructed, marginalised and silenced Aboriginal people. That is, 
at a theoretical level I am more concerned with the issues of exclusion and the 
creation of the ‘other’, discussed in Chapters One and Two, and with 
postmodernism and postcolonialism, which are discussed in Chapter Four. My 
argument is that literature is important not just in educating about or representing 
how the law or the courts work. Its importance lies in the insights it conveys about 
legal structures, practices and assumptions. Its use is not limited, that is, to 
demonstrating what the laws of evidence require, for example, but in its discussion 
of how law includes and excludes and in its analysis of law’s myths of equality and 
objectivity. In this way, it exposes the shortcomings of law’s underlying 
assumptions, and the substantive and long-term consequences that these have on 
the everyday lives of real people. As Terry Threadgold states:

Literature may help us to see how institutions like the law are themselves 
constituted and, more importantly, what they look like from somewhere 
else and how they could be constituted differently.44

The texts that I examine throughout this thesis represent, critique and comment on 
the legal structures, systems and values that underpin the modern Australian legal 
system.

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43 For an overview of some of the writers in this area and criticisms of the movement see, for 
example, Douzinas, C. and Gearey, A. Critical Jurisprudence: The Political Philosophy of Justice 
Melbourne University Law Review 830 at 834.
Conclusion

In this chapter, I have clarified what I mean by the term ‘literature’, and argued that, as a form of representation and narrative, literature is vital in both reinforcing and questioning dominant discourses and practices. I have argued that literature is a valuable medium through which local stories and voices can be heard, and which can challenge and critique discourses that result in the construction, marginalisation and silencing of the 'other'. I have argued, that is, that literature is vital in questioning the exclusions that were discussed in Chapter Two of this thesis.

In the next chapter, I examine further the ways in which narratives can be interpreted. In particular, I examine postmodernism and postcolonialism. I argue that these theories are enormously important in the way they create a space for local stories to be told and heard and in providing useful frameworks within which all literature can be read and particular discourses and authorised narratives questioned.
CHAPTER FOUR

WAYS OF READING

Introduction

Texts, whether legal or literary, can be written, read and interpreted in a variety of ways. They are open to a multiplicity of meanings. The definition of such words as ‘reasonable’, ‘careless’ or ‘family’, for example, can take on different meanings depending upon whether they are being used by a layperson in ordinary conversation, or by a lawyer in the course of legal argument. Likewise, how one reads literary texts can depend upon their context, the way they are written and the perspectives and ideologies that the reader brings to the text. Some readers, for example, may read The Chant of Jimmie Blacksmith as nothing more than a tale of gratuitous violence.\(^1\) Others may read it simply as a fictionalised telling of an historical event. Others may interpret it as an account of the injustices perpetrated against Aboriginal people as a result of the occupation and colonisation of their country. Thomas Keneally, in writing the novel, wanted an Aboriginal voice and story to be heard. The point is that reading is not always a neutral or value free exercise. Literary texts do not have determinate, objective meanings.

In the previous chapter, I argued that literature is an important mode of representation, education and criticism. In this chapter, I discuss two theoretical approaches which have framed the reading and interpretation of the literary texts that I discuss. I begin this chapter with a discussion of postmodernism. Some of the key concepts of postmodernism were introduced in Chapters One and Two. Here, I

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focus more specifically on the way in which postmodernism challenges the telling of one universal story and advocates for alternative stories to be told and listened to.

In the second part of this chapter, I examine postcolonialism. I explain what I mean by this term, and why I find it a useful perspective to adopt in the reading of literature about law. It is also useful, in this context, to note Leiboff and Thomas’s observation that while postmodernism and postcolonialism “originated outside law, [they] flowed through into legal thought during the 1980’s.” Larissa Behrendt expresses a similar view. She argues that:

Indigenous Australians approach the law with a particular subjugated resisting eye. From this position, they have the least to lose and the most to gain from questioning the canonical structures of law. As such, their experience and critique is essential in a post-colonial approach to law.

In Parts Two and Three of this thesis, I examine literary texts that comment on the law’s treatment of Aboriginal people. Postmodernism and, more specifically, postcolonialism is the framework of analysis that I adopt in that discussion. I do not do this naively. I appreciate Leiboff and Thomas’s point that:

Postcolonialism can have the effect of essentialising colonial and postcolonial experience, assuming that there is a single set of characteristics which define the intersection of colonising and colonised cultures.

This is undoubtedly true, and is a point which I examine further in this chapter.

What I find useful about postcolonialism, however, is that it allows for the voice of the ‘other’ to be heard. It creates a space for alternative (minority) stories to be told

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2 Leiboff, M. and Thomas, M. *Legal Theories in Principle* (Sydney: Lawbook Co.) 2004 at 5. They continue: “These theories operate at a conceptual level but can have highly practical consequences.” This is a point that I take up in Parts Two and Three.


4 Above, n.2 at 307.
in the public domain. Postcolonialism also offers a set of guidelines for reading in ways that allow us to deconstruct and critique colonial representations. All texts, that is, can be read from a postcolonial perspective, and thereby offer important insight into the way in which our law is structured, and the way that it treats its subjects. It is important, within this framework, to remember that law, too, is a text. My argument is that the positivist legacy, which underlies our law, masks the truth that law is neither objective nor treats everyone equally. Rather, it constructs, marginalises and silences the ‘other’.

**Postmodernism**

Postmodernism is generally a response to modernism, or, more particularly, modernism’s desire for universality, reason and order. This emphasis on order and reason has had considerable impact, providing the foundation for much of modern western society. The law is one area where modernism has been (and continues to be) enormously influential. As discussed in Chapter Two, legal theory largely focuses on identifying a unified, totalising theory of law. As Leiboff and Thomas explain:

The belief in underlying unity has led natural law theorists to try and explain law by reference to universal principles which hold true regardless of where or when you are. A similar belief saw positivists try to close off the analysis of law from things which are not law, and to describe an idealised structure of the ‘legal system’. In both cases, such theorists are attempting to provide ‘one right answer’, independent of its context.⁵

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⁵ I take this point up in Chapter Nine in my discussion of Morgan, S. *My Place* (Fremantle: Fremantle Arts Centre Press) 1988.

⁶ Above, n.2 at 229.
Law, according to these models, is about imposing order, and prescribing rules and obligations with which the legal subject must comply. It is a reasoned, ordered and objective institution and set of practices.

It is this conception of law as a reasoned and objective institution that gives it its legitimacy, and, as explained in Chapters One and Two, the power and the right to regulate and control how people should behave and act. This is an important point. In creating boundaries of acceptable and unacceptable behaviour, the law reflects modernism’s polarisation between order and disorder, and its assertion of the former’s superiority and the latter’s illegitimacy. That which is not part of the ordered dominant discourse, not, that is, white, heterosexual, or male, becomes part of the disorder, is labelled as ‘other’ and is often marginalised and silenced. As such, the principles of modernism have done much to contribute to the perpetuation of the dichotomy of inclusion and exclusion that I discussed in Chapter Two.

Postmodern theorists critique modernist discourses, such as the law. Leiboff and Thomas explain that:

Postmodernism is a broad term which encompasses an approach to analysis which rejects (or at least critiques) Enlightenment values and the belief in absolute values which had characterised modern philosophy, including legal theory.
Postmodernism is suspicious of authority, received wisdom and values, and does not accept that rationalism represents an unbiased, neutral and independent tool for seeking truth.\(^7\)

Rather than focusing on unity and totality, postmodernism embraces diversity and plurality. Whereas modernism contributes to the perpetuation of the suppression and victimisation of difference, postmodernism seeks to legitimate and give a voice

\(^7\) Ibid at 229.
to the ‘other’ that has been suppressed. It questions, critiques and challenges dominant discourses, and rejects modernism’s telling of grand narratives. It emphasises smaller local narratives. As encapsulated by Rice and Waugh:

We live in a pluralized culture surrounded by a multiplicity of styles, knowledges, stories that we tell ourselves about the world. To attempt to impose an overarching narrative on such experience is to perpetuate the violences of modernity with their exclusions and terrors. The relativization of styles which is postmodernism, throws into doubt the claims of any one discourse or story to be offering the ‘truth’ about the world or an authoritative version of the real.

In the context of the legal, postmodernism denies that the law is something that has a single, unified identity or meaning. It seeks to deconstruct the combination of reason and law that characterises modernist jurisprudence. It focuses on the legal subject and the understanding and perception they have of, and bring to, the legal system. It:

is a way of looking at the world which rejects the underlying unity which drives modernist approaches to law. For postmodernists, there can be no absolute or universal principles which are true in all circumstances – or at least, if there are, then we cannot fully know them. ‘Truth’, from a postmodern perspective, is always contingent, and as such, loses its capital ‘T’ and becomes plural – there is not one ‘Truth’ but many localised ‘truths’, which change according to when and where they relate to, and who is claiming them as truth.

And so, postmodernism promotes a re-thinking of the legal order and foregrounds the plurality of law’s subjects. As Douzinas et al explain:

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11 Freeman, above n.8 at 1149 – 1150.
12 Leiboff and Thomas, above n.2 at 230.
The orthodox jurisprudence of modernity constructs theories that portray the law as a coherent body of rules and principles, or of intentions and expressions of a sovereign will. Jurisprudence is obsessed with the self-confessed and well-documented desire to dress the exercise of political power in legitimacy. Its predominant strategy is to try to weave the legal texts into a single, seamless veil in which authorised and symmetrical patterns are endlessly produced, circulated and repeated.

In this, postmodern theory could not be more different. It distrusts all attempts to create large-scale, totalising theories in order to explain social phenomena. It refuses to accept that there is a ‘real’ world or legal system ‘out there’, perfectly formed, complete and coherent, waiting to be discovered by theory. It tells small-scale, provisional, open stories about our lives and the world.13

Opposition to modernism’s grand narratives is something of particular concern to Lyotard.14 He expresses disillusionment with two of modernism’s grand narratives, namely, the political (advocating humanity and emancipation) and the philosophical (advocating a unity of spirit and totalisation).15 He argues that the pursuit of these narratives, these “tall tales of emancipation or totality”16 can only “end in terror.”17 Indeed, “the attempt to put them into practice led respectively to the Gulag and Auschwitz.”18 This all leads Lyotard to conclude that:

The nineteenth and twentieth centuries have given us as much terror as we can take. We have paid a high enough price for the nostalgia for the whole and the one, for the reconciliation of the concept and the sensible, of the transparent and the communicable experience. ... Let us wage war on totality, let us be witness to the unrepresentable; let us activate the differences and save the honour of the name.19

13 Above n.10 at ix – x.
14 Lyotard’s theories were also discussed in Chapters One and Two.
15 Douzinas et al., above n.10 at 16.
16 Ibid at 16.
17 Ibid at 17.
18 Ibid at 16.
Importantly, Lyotard desires to see that the unrepresentable are represented, are given a voice, and for this to occur modernism’s totalising and homogenising grand narratives must be dismantled:

For Lyotard, universals do not allow for other stories that are incommensurably different from the great history. Evidence of this problem is to be found in the exclusion (from authorised perspectives of history) of stories by women, people of colour, indigenous people, and non-Christian groups or individuals. Only recently has there been an acknowledgement and recognition that there are other ways of seeing and constructing the world. Despite this, other versions of history written by some women, indigenous people and people of colour are considered not ‘truthful’ or ‘right’ because they are represented as confessional, testimonial, or personal accounts and do not, therefore, conform to master narrative notions of historiography.20

Lyotard is concerned about the nature of discourse and its ability to perpetuate dominant ideology and silence those who do not fall within it. He argues that the discourse used ensures that these ‘outsiders’ are denied a voice of opposition, or at least one that is heard or considered legitimate within the dominant domain. As explained in Chapter One, Lyotard expresses this in his theory of the différend. It is this issue of the différend, and the call for the voice of the local to be heard that is of most interest to me in this thesis.

In the reading of literature, postmodernism is, therefore, useful in a number of ways. Firstly, it allows the reader to be critical of texts that tell only one story and exclude those who challenge, disagree or fail to conform to that narrative or who are denied the right or the ability to speak within it. It allows us, that is, to bear witness to the différend. And so, when reading a text such as The Chant of Jimmie Blacksmith, postmodernism allows us to read it not simply as a story of murder by

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an Aboriginal man, but as an account of the exclusion of Jimmie Blacksmith and his people by and from mainstream (non-indigenous) society and law. It allows us to read it as an account of the consequences of denying Jimmie access to the dominant discourse. Secondly, postmodernism has advocated for the creation of a space that allows smaller local stories to be told and to be heard. It has, for example, allowed for stories such as Sally Morgan’s *My Place* and Kim Scott’s *Benang* to be told.\(^{21}\) It is in reading such texts that we are made aware of the unrepresented. These are issues that will be addressed in relation to the specific literary texts analysed later in this thesis.

**Postcolonialism**

Postcolonial theory draws on, or has at least been facilitated by, postmodernism and, to some extent, post-structuralism. Postmodernism’s denial of universality, and recognition and celebration of plurality, post-structuralist conceptions of the nature of knowledge and Foucauldian notions of the relationship between government, knowledge and power, all call for the creation of space for local and minority voices to be heard.\(^{22}\) This includes the voice of the colonised. At a general level, therefore, it can be said that postcolonialism shares with these other theories a focus on marginality and local voices and the relationship between the centre and the periphery, an emphasis on plurality,\(^{23}\) a concern with relationships of power and knowledge,\(^{24}\) and a rejection of totalising universalism. This is not to suggest, however, that these movements share purely common concerns. There are crucial

\(^{21}\) Morgan, above n.5; Scott, above n.3.

\(^{22}\) Foucault’s theories were discussed in Chapter One.


\(^{24}\) Ibid at 70; Rice and Waugh, above n.9 at 291.
differences between them. Mishra and Hodge, in particular, emphasise the distinct political agendas of postmodernism and postcolonialism. They emphasise a need to clearly define the subject, stating that:

If for postmodernism the object of analysis is the subject as defined by humanism, with its essentialism and mistaken historical verities, its unities and transcendental presence, then for post-colonialism the object is the imperialist subject, the colonized as formed by the processes of imperialism.\(^{25}\)

They warn against postcolonialism being subsumed by postmodernism, with its own totalising tendencies, and potential to homogenise “particularities … into a more or less unproblematic theory of the Other.”\(^{26}\) They also express concern with settler colonies being incorporated into a general theory of postcolonialism, asserting that the “‘justifying’ discourse which allows this settler incorporation into post-colonialism is clearly postmodernism.”\(^{27}\)

Defining the space of postmodernism and postcolonialism is, however, only one area of concern. As I discuss briefly there are also considerable divergences over exactly what is meant by postcolonialism, what postcolonialism seeks to achieve and how to deal with settler colonies, indeed whether settler colonies can even be considered postcolonial.

Bearing this in mind, at an introductory level postcolonialism can be defined simply as a response to colonialism. Largely, this colonialism is that wrought by the European imperialism of the last four centuries. Arguably, it was the British Empire that represented the pinnacle of European imperialism. At its peak in the early twentieth century the Empire stretched as far as India, Africa, the Middle East, the

\(^{27}\) Ibid at 405. This is discussed further below.
West Indies, South Asia, New Zealand, Canada and, of course, Australia. With this independence came the opportunity for the inhabitants of these diverse countries, anglicised for so long, to re-assert their own cultural identities. It is here that we can find the beginnings of postcolonialism as a specifically articulated theory. Thus, while postcolonialism may well be a response to colonialism it is much more than a mere reaction to imperial domination. It is about culture, identity and self. As Franz Fanon argues in *Wretched of the Earth*:

> [b]ecause it is a systematic negation of the other person and a furious determination to deny the other person all attributes of humanity, colonialism forces the people it dominates to ask themselves the question constantly: “In reality, Who am I?”

Colonialism is a part of modernism, with its concern for order, unity, rationality and universality. This need for a rational world order, combined with the expansion of scientific knowledge (that is, biological and evolutionary theory, with the work of Darwin and Spencer) which treated human beings as an object of study, rendered it necessary to classify, categorise and order human beings. Consequently, a construct of race emerged that allowed for the ordering of the races into a hierarchy. This construct of race naturally reflected the culture and values of its propagators. And

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28 There are many writers who write about the layers of non-European colonialism and the meeting of these different colonial experiences.
29 At least for most. As a settler colony, Australia today, although formally an independent nation, is still very much attached to Britain, as will be discussed below.
30 Although, as noted by Ashcroft, B., Griffiths, G. and Tiffin, H.: “‘post-colonial theory’ has existed for a long time before that particular name was used to describe it.” *Post-colonial Studies Reader* (London: Routledge) 1995 at 1.
31 Fanon, F. *Wretched of the Earth* (Hammondsworth: Penguin) 1967 at 15.
32 As we now know, there is no such thing as race. This construct of race was driven by theories of social Darwinism that were prevalent at the time, as expressed, for example, in one Western Australian parliamentarian’s statement that: “All we can do is protect them [Aborigines] as far as possible and leave nature to do the rest. It is a case of survival of the fittest but let the fittest do
so it is no surprise that it was the Europeans who occupied the dominant position within this new hierarchy or that the non-European was depicted as ‘inferior’ or ‘other’. According to this model they were ‘uncivilised’ and lawless. This constructed knowledge of, and associated assumptions about, race had enormous impact. At a foundational level, it provided a moral and political justification and obligation for colonial expansion. It also allowed for and encouraged exclusion. That is, it gave the dominant colonial powers the power to exclude the ‘other’, the colonised, as ‘uncivilised’, ‘primitive’, and ‘inferior’.

In the context of the legal, these precepts of colonialism have played a central role in the construction and legitimation of law’s narrative. The distinction between ‘civilised’ and ‘primitive’ has shaped the development of colonial legal systems. As explained in Chapter Two, one of the key concerns of positivist legal theory is to describe an ordered legal system. For Hart, in particular, this translated into a distinction between ‘civilised’ and ‘primitive’ systems of law. Only the former consisted of primary and secondary rules, and only the former possessed the all important ‘rule of recognition’. As Douzinas and Gearey state:

> A central concept of western jurisprudence is that of ‘primitive’ law. Primitive law represents a crude beginning that must be superseded. This is a view of history that takes as its central reference point the birth of the modern western state. The ‘gift’ of law to the ‘savage’ becomes one of the central justifications of the colonial project and becomes synonymous with the modern nation.

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33 Davies, M. Asking the Law Question 2nd ed. (Sydney: Lawbook Co.) 2002 at 262 – 264.
34 Although they were also hierarchised. Aborigines, for example, were considered lowest in the hierarchy. Only ‘half-caste’ Aborigines, that is, those with white blood, were considered fit to be assimilated into white Australia. This is discussed more fully in Chapter Nine.
35 See discussion in Chapter Two.
In the case of Australia, the English colonisers were able, as part of law’s narrative, to completely foreclose the ‘primitive’ law of Aboriginal peoples and, in an effort to contain and control (and, for some, protect) Aborigines, bring them within the fold of the colonial law and so ensure and legitimise their subordinate status.\textsuperscript{37}

As indicated above, postcolonial theories and responses to colonialism vary. One particularly influential version of postcolonialism is that of Edward Said. He first put forward his theories in his work \textit{Orientalism} published in 1978. His main concern was knowledge and power, or, more specifically, the way in which the production of knowledge was itself power. Applying his theories to the Orient, he argued that the West was concerned with the creation of knowledge about those ‘others’ who were under its rule, and so to create a construct of the Orient. He defined Orientalism as:

\begin{quote}
the corporate institution for dealing with the Orient – dealing with it by making statements about it, authorizing views of it, describing it, by teaching it, settling it, ruling over it; in short, Orientalism as a Western style for dominating, restructuring and having authority over the Orient.\textsuperscript{38}
\end{quote}

This knowledge about and imagery of the non-West, or non-European, was presented in such a way as to make the latter appear ‘lesser’. Less civilised, less intelligent, less cultured. This construct was then used in the assertion and maintenance of power.\textsuperscript{39} That is, Said’s argument is essentially that Orientalism was simply the West exercising control and power over the Orient. It constructed a cultural representation of the Orient, creating a Western / Orient discourse that

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\begin{itemize}
\item \textsuperscript{37} Ibid at 284.
\item \textsuperscript{38} Said, E. \textit{Orientalism} (London: Penguin) 2003 at 3.
\item \textsuperscript{39} This is similar to the way the \textit{Aborigines Act} 1905 (WA) deals with Aborigines. This is taken up in Scott, above n.3. It is also discussed further in Chapter Nine.
\end{itemize}
“gave (and still gives) the West power over its object, justifying Western imperialism.”

Said argued that, as such, the construct of the Orient represents the paradigm of colonialism. As summarised by Rice and Waugh:

In each case, the mysterious and duplicitous ‘other’ which is the colonised culture functions as a means of stabilising and affirming the identity of the imperialist power. Said’s book emphasised the centrality of cultural representation in this process. … Said shows how imperialism maintains power through the designation of a discursive space which makes silent and invisible all those perspectives which are excluded by and from its frame. He shows … how the construction of ‘them’ is necessary for the affirmation of ‘us’.

The dichotomy created between ‘them’ and ‘us’ had a further purpose. The imagery and educational institutions used to perpetuate this image of ‘them’ in the West were also used in the colonies to subjugate the colonised population so that they too were forced to believe this entirely western view of themselves. Slemon explains that in Said’s thesis colonialist power operates through a complex relationship between apparatuses that he labels institutional (colonialist educational apparatuses) and semiotic (textuality). This operates, according to Slemon, as follows:

a scholarly educational apparatus called ‘Orientalism’ … appropriates textual representations of ‘the Orient’ in order to consolidate itself as a discipline and to reproduce ‘the Orient’ as a deployable unit of knowledge. … Said’s thesis is that a function at the top of this line is employing those representations created at the bottom of the line in order to make up ‘knowledges’ that have an ideological function … ‘Orientalism’ manufactures the ‘Orient’ and thus helps to regulate colonialist relations. … But in Said’s analysis, colonialist power also runs … in a downward movement, where the

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40 Davies, above n.33 at 279.
41 Rice and Waugh, above n.9 at 291.
42 Ibid at 291.
43 Slemon, S. “The Scramble for Post-colonialism” in Ashcroft et al., above n.30 at 46.
scholarly apparatus of Orientalism is understood to be at work in the production of a purely fantastic and entirely projected idea of the ‘Orient’.44

Said’s theories have proved both useful and controversial. They are useful in the extent to which his work has contributed to the development of thoughts and discourses of the theorised colonised ‘other’. But Said’s work also presents a number of difficulties. One of these is pointed to by Mishra and Hodge. That is, that Orientalism is a totalising theory that reduces the “multiplicity of languages and ideologies into a homogenized European discourse.”45 That is, it reduces all difference into one theory of the ‘Other’. This is an important point to remember in light of one of the defining characteristics of postcolonialism being its emphasis on the local and the individual. Any totalising theory of postcolonialism that homogenises all ‘others’ into one ‘Other’ is itself a form of colonialism or imperialism. This is something that is particularly important in the context of the application of postcolonial theory to the ‘aboriginal’ within Australia.46 As Marcia Langton states, there is:

an ancient and universal feature of racism: the assumption of the undifferentiated Other. More specifically, the assumption is that all Aborigines are alike and equally understand each other, without regard to cultural variations, history, gender, sexual preference and so on.47

Kim Scott makes a similar point. He reiterates that emphasis must be on the local. He states:

It seems to me that any ‘global discourse’ has strong homogenising tendencies, and therefore we need to strengthen regional voices so they remain true to their own imperatives at the same time as being empowered

44 Ibid at 47.
45 Mishra and Hodge, above n.25 at 402.
46 Bearing these criticisms in mind, Orientalism is, however, important in its influence on the development of the concept of Aboriginalism. This is discussed further below.
47 Langton, M. Well I heard it on the radio and saw it on the television … (Sydney: Australian Film Commission) 1993 at 27.
to enter into exchange and dialogue. That means being willing to change, but also to cause change, and that seems out best hope for a transformation that increases, rather than reduces, the possibilities available to us – particularly for expressing who we are and what we might be.\textsuperscript{48}

Ashcroft, Griffiths and Tiffin emphasise this complexity and heterogeneity of postcolonialism. They state:

All post-colonial societies are still subject in one way or another to overt or subtle forms of neo-colonial domination, and independence has not solved this problem. The development of new elites within independent societies, often buttressed by neo-colonial institutions; the development of internal divisions based on racial, linguistic or religious discriminations; the continuing unequal treatment of indigenous peoples in settler / invader societies – all these testify to the fact that post-colonialism is a continuing process of resistance and reconstruction. This does not imply that post-colonial practices are seamless and homogenous but indicates the impossibility of dealing with any part of the colonial process without considering its antecedents and consequences.

Post-colonial theory involves discussion about experience of various kinds: migration, slavery, suppression, resistance, representation, difference, race, gender, place and responses to the influential master discourses of imperial Europe.\textsuperscript{49}

\textsuperscript{48} Scott, K. “Covered up with Sand” (2007) 66(2) Meanjin 120 at 124.

\textsuperscript{49} Above n.30 at 2. It should be noted, however, that concerns have been raised in relation to Ashcroft, Griffiths and Tiffin’s earlier work, The Empire Writes Back., above n.26. In this work they examine literature written by people once colonised by Britain. In this endeavour, they use the term postcolonialism “to cover all the culture affected by the imperial process from the moment of colonization to the present day. This is because there is a continuity of preoccupations throughout the historical process initiated by European imperial aggression.” At 2. This work has received much criticism. Mishra and Hodge, for example, above n.25, argue that the authors here try to present a theory that is too totalising and so simplifications are made. They accuse the work of being essentially postmodernist in its focus on a unified subject. This is of particular concern to them in the Australian context. They state “EWB’s version of post-colonialism, it seems to us, cannot, as a unified field, operate without it. The central problematic arises out of the status of settler cultures, and their place in this unified field. The ‘justifying’ discourse which allows this settler incorporation into post-colonialism is clearly postmodernism.” At 405. Likewise, Trees, K. Narrative and Co-existence: Mediating Between Indigenous and Non-indigenous Stories (Doctoral Thesis: Murdoch University) 1998 agrees that the definition of post-colonialism in The Empire Writes Back is “too inclusive.” She is concerned that the width of the authors’ use of the term is such that it leaves no space for a “local focus”. She agrees with Mishra and Hodge that The Empire Writes Back fails sufficiently to “critique neo-colonial practices” and recognise the “unequal treatment of indigenous peoples in settler / invader societies”. At 102. I discuss this issue of the applicability of postcolonialism to settler colonies further below.
Similarly, Margaret Davies highlights that there is no clear dividing line between colonial and postcolonial states and that colonial practices continue to impact on those who were (and are) colonised:

where speaking of “colonialism” implies a clear dividing line between the colonisers and the colonised, “postcolonialism” implies a more complex situation, where the mentality and culture of the (physically departed) colonisers has been brought to bear on the colonised people: the term recognises that decolonisation does not result in a return to a pre-colonial state, but rather movement into a “postcolonial” state, where the effects of colonialism have become an inextricable part of the culture and of its legal, educational, and political institutions, and where the colonial state still serves as a reference point in local discourse.50

Importantly, these understandings of postcolonialism emphasise its complexity and highlight that it is not simply something “post” colonialism. Rather, it is about the ongoing impact of colonialism, and its continuing, pervasive presence.

Hodge and Mishra also emphasise the “heterogeneity that is intrinsic to the postcolonial complex”.51 They distinguish between “oppositional” and “complicit” postcolonialism. They argue that:

it is useful to distinguish between the postcolonial as an historical moment, and something broadly akin to Lyotard’s postmodernism, a postcolonialism (like postmulticulturalism) in which certain tendencies are always inherently present. Postcolonialism in this second sense is the underside of any colonialism, and it can appear almost fully formed in colonial societies before they have formally achieved independence. Conversely, ‘postcolonialism’ as the period that follows a stage of colonisation is not necessarily subversive, and in most cases it incorporates much from its colonial past.52

Importantly, Hodge and Mishra foreground the distinction between settler and non-settler postcolonialism. They argue that the postcolonialism that characterises

50 Above n.33 at 278.
52 Ibid at xi.
the latter is not applicable to the former. In non-settler colonies, such as India, for example, the colonising powers have left, giving them independence. In countries such as Australia, however, where the position of the colonisers remains intact, it is difficult to separate the postcolonial from the colonial and the neo-colonial. This distinction between settler and non-settler colonies is an important issue and one to which I will return below.

The subject matter of post-colonialism is vast and complex. There is no uniform postcolonial experience. It will vary depending on time, location and situation. Nowhere is this more pronounced than in a consideration of the experiences of settler countries and those of the post-independent nations. There are many forms of postcolonialism, and there is a danger in oversimplification. Generally, however, it can be stated that the theme of these many postcolonialisms is a challenge to the assumption of the superiority and universality of European culture and the consequent marginalisation of the non-western. It questions the representations of the colonised in western discourse and seeks to create a space for the voice of the colonised to be publicly heard. It engenders debate about forms of representation of the colonised ‘other’. And, perhaps most importantly, it is about specific, local experiences and local voices. As expressed by Stephen Slemon:

We need to remember that resistances to colonial power always find material presence at the level of the local, and so the research and training we carry out in the field of post-colonialism, whatever else it does, must always find ways to address the local.\(^{53}\)

\(^{53}\) Above n.43 at 52.
Postcolonialism in Australia?

One issue that needs further attention, particularly in the context of this thesis given my focus on Australian literature, is that of settler (or invader) colonies. As introduced above, one question that arises is whether postcolonialism is applicable to these countries. The Indigenous peoples of Australia are in a different position to the peoples of formally independent nations such as India, for example. This is because in Australia the colonial power remains firmly in place. Consequently, so do its laws, institutions, educational and other power structures. To put it simply, in countries such as Australia it is difficult to talk of postcolonialism given that the colonial power remains in control. We are, after all, still here.

The pervasiveness and continuance of colonial law is prevalent in many areas. It is, for example, pertinently demonstrated by a consideration of native title. By virtue of Mabo v Queensland (No.2) native title is now clearly a recognised part of Australian law. However, the level of recognition it is accorded is limited. Mabo does not recognise Aboriginal ownership of the land, but simply allows for the recognition of limited rights within the colonial legal system. It does not provide for the return of land that has otherwise been alienated, nor does it provide for compensation for the mass dispossession of Aboriginal peoples. The colonisers, that is, have simply allowed for a new construct of native title to be allowed to fall within their colonial law. While the decision accepts that it was wrong for the colonisers to have assumed that the land was without ‘settled inhabitants’, the right and legitimacy of colonial law was not questioned in the High Court’s judgment. The colonisers’ sovereignty over Australia was not denied. And so, despite the

54 (1992) 175 CLR 1.
55 See Chapter Five for a more in depth discussion of this case.
obvious importance of this decision, arguably it simply presents another explanation
(and justification) for Aboriginal dispossession and so remains part of the colonial
discourse that sanctioned (and sanctions) this dispossession. As Irene Watson, a
lawyer and Indigenous woman from the Coorong in south-east South Australia, puts
it:

Many people might argue that terra nullius was put to rest by the High
Court in the Native Title decision. The decision was celebrated as being an
initiative in reconciliation, when it overturned the application of terra
nullius to Australia’s law of real property. However the High Court did not
fully reject the terra nullius doctrine. This was avoided through their failure
to question the legitimacy of the British occupation of Australia. The High
Court decided that the invasion and the British Crown’s acquisition of
sovereignty over the Australian colony was an ‘act of state’ that could not be
challenged in any Australian court. In reaching this conclusion the High
Court sanctioned colonialism, dispossession and disempowerment of Nungas,
as a legitimate ‘act of state’.56

Clearly, therefore, it may be inappropriate to use the term postcolonial in the
Australian context. This is a point emphasised by Marcia Langton. She argues that
an anti-colonial approach is more appropriate than a postcolonial one. By anti-
colonial she means:

A practical commitment to the political consequences of representation.
Anti-colonialism requires a rupture and a positive awareness of the way
colonial representation has shaped, and misshaped, reality for coloniser and
colonised alike.57

This approach recognises that Australian institutions, including the law, cannot be
decolonised. The law remains a colonialist institution. An anti-colonial approach is
one way in which the law can be critiqued, and colonial hegemony undermined.58

56 Watson, I. “Indigenous Peoples’ Law-Ways: Survival Against the Colonial State” (1997) 8 The
Australian Feminist Law Journal 39 at 47.
57 Above n.47 at 5.
58 Ibid at 8.
It can challenge colonial representations of, and knowledges about, Aboriginal people that underpin decisions made by the law about them. It can, that is, “make law mindful of its propensity to further colonise indigenous people.” For Langton, an anti-colonial critique is a deliberate political critique of how institutions such as the law represent, and silence, Aboriginal people. In this, her work is useful as it highlights the existence of, and reason for, the différend.

Langton is also useful in highlighting the heterogeneity of ‘otherness’. As stated above, postcolonialism must be aware not to reduce or homogenise the diversity of ‘otherness’ into a totalising theory of ‘Other’. To do so reduces postcolonial theory to another form of colonialism. Langton highlights this in the context of Aboriginality. Her concern is that all Indigenous Australians are constructed as Aboriginal, that is, as one homogenous group of people. However, when we are talking about Aborigines there is not a unified ‘otherness’ of being Aboriginal. There is not a single Aboriginal culture or language. There are many Aboriginal peoples. This is recognised in native title law, which requires Aboriginal people to identify themselves in their specific relationship to land. It is also expressed by Irene Watson when she states, “[a]s an Indigenous woman of the Tanganekald Peoples, I don’t make-out that I speak for all indigenous peoples.” In using postcolonialism in the Australian context, therefore, the emphasis on the local and diversity is fundamental.

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59 Trees, above n.49 at 114.
60 Although this approach may be useful, my focus here is on postcolonialism.
61 Above n.56 at 39.
62 For a discussion on the potential for postcolonial to become neo-colonial see Griffiths, G. “The Myth of Authenticity” in Ashcroft et al., above n.30 at 237.
Bearing these limitations and dangers in mind, I do, nevertheless, adopt a postcolonial framework of analysis in this thesis. My understanding and use of postcolonialism is one which emphasises that in the Australian context the ‘post’ is not temporal. Postcolonialism does not simply mean the end of colonialism. Australia remains a colonial country. When I use the term postcolonialism, therefore, I am referring to the telling of, and listening to, local stories, the stories of different experiences of (continuing) colonisation and the many forms of exclusion that these stories reveal. I also use it to mean the reading of all literature from a postcolonial perspective. In adopting such a perspective or framework in reading literary texts we are able to learn about our history and our position within society.63

There is one final point that I wish to raise here which has particular relevance to this thesis: namely, the concept of Aboriginalism. This is a term adopted by Hodge and Mishra in their application of postcolonial theory to the Australian context. They argue that within Australian culture there is a phenomenon similar to Said’s Orientalism which they label Aboriginalism. According to Hodge and Mishra, Orientalism (or Aboriginalism):

has a double movement, a fascination with the culture of the colonised along with a suppression of their capacity to speak or truly know it. One of its great themes … is that since they (the Other) cannot represent themselves, ‘they must therefore be represented by others’ who know more about them than they know about themselves.64

This representation is one which serves the interests of the colonisers, one which reinforces their power and legitimacy. In relation to Australia, Hodge and Mishra

64 Above n.51 at 27.
argue that Aborigines are important in according legitimacy to the white settlers who invaded their country and dispossessed them. Their voice is needed to legitimate Australia’s settlement:

So they cannot be silenced: or more precisely, a voice that is labelled as theirs must have a place, legitimated as theirs yet not disrupting the fine balance of contradictions in the foundation myth.65

The voice they are given is often one of the ‘noble savage’, a ‘primitive’ yet mystical or wise, creature. The effects of this:

is to deny Aborigines the ability (as Aborigines) to establish an alternative account of the foundation event and its aftermath, an account which might refuse to contain the violence and illegalities within the moment of innocence.66

Aboriginalism, that is, has a discursive, ideological and political function. It reduces the plurality of Aboriginal voices into one discourse of Aboriginality. It denies Aborigines the right to represent, or speak for, themselves and so silences and excludes them, but without denying their presence. The adoption of Aboriginalism in literature is one of the techniques by which the silencing and representation of Aborigines as ‘other’ is reinforced, and, as stated by Rodan, “it is the representations by the dominant group that legitimate particular conceptions of minority groups which in turn contribute to injustices.”67 In my analysis of the literary texts I discuss in this thesis I draw on the work of Hodge and Mishra, and the concept of Aboriginalism.

65 Ibid at 27.
66 Ibid at 28.
67 Above n.63 at 8.
Conclusion

In this chapter, I have discussed postmodernism and postcolonialism, and suggested that each provides a useful theoretical framework within which to analyse specific literary texts. Both are large fields and I have only presented aspects of each which are relevant to this thesis. There are many theorists and issues that I have not discussed here, such as the works of Spivak, Bhabha and Fanon, or the dangers of neo-colonialism resulting from attempts to identify an ‘authentic’ Aboriginal voice, for example. My objective in this chapter has been to highlight that postmodernism and postcolonialism can assist us in reading literary texts in a number of important ways. They allow us to critique existing structures and systems as they are represented through literature. They allow us to bear witness to the silences and exclusions created by these structures and systems. And, perhaps most importantly, they create a space for the voice of the local to be heard. As explained in Chapter Three, the way that literature represents and critiques institutions and structures such as the law and its impact is important. Postmodernist and postcolonialist understandings are important in assisting us in the interpretation of these literary texts. As will be shown in Parts Two and Three, postcolonialist readings of literature allow for the recognition and acknowledgement of that which the law has refused to recognise.

In this part of this thesis I have presented a number of issues that I will examine, and that influence my reading, throughout the rest of this work. I have argued that the law is a modernist and colonial institution. As such, it represents itself as an objective institution that seeks to order and regulate the behaviour and actions of its subjects. As explained in Chapter One, this has consequences beyond the purely
legal. Law’s force extends into the social. The force of this law is also felt, as explained in Chapter Two, in its inclusions and exclusions. In its designation, that is, of ‘other’. In the remainder of this thesis I examine literary representations and critiques of these issues of inclusion and exclusion and of law’s supposed objectivity. As explained in this chapter, in so doing I adopt a postmodern / postcolonial framework of analysis and interpretation.
PART TWO

TERRA NULLIUS

PREFACE

The impact of terra nullius surrounds us: violations of our law, ecological destruction of our lands and waters, dispossession from our territories and the colonisation of our being. Terra nullius has not stopped; the violations of our law continue, the ecological destruction of the earth our mother continues with a vengeance, we are still struggling to return to the land, and the assimilator-integrator model is still being forced upon us. This is terra nullius in its continuing and practical application. There is no death of terra nullius. Its life is my struggle against extinguishment: the end of struggle against extinguishment would be the death of terra nullius. The celebration of the death of terra nullius is a farce: a collective act of schizophrenia, a false-hood, a conspiratorial lie, which has lulled the Australian psyche into a fantasy myth that there had been in the Native Title decision an act of recognition of indigenous peoples rights.¹

In Part One of this thesis, I argued that law is a grand narrative that regulates many aspects of our social existences beyond the purely legal. It creates boundaries of inclusion and exclusion that protect its position of dominance and silences and marginalises those ‘other’ who question or challenge it, or fall outside it. In this part, I examine the way in which law’s discourse of terra nullius has constructed, silenced and marginalised the Aboriginal ‘other’.

I have chosen terra nullius as a specific site of analysis in this part for a number of reasons. Firstly, terra nullius provides the foundation of Australia’s modern legal system. As explained in Chapter Five, if Australia had not been deemed ‘empty land’ our legal system would have evolved differently. This could have had enormous consequences for Indigenous peoples, in a number of areas, from

recognition of their legal systems and laws, to acknowledgement of their rights to
land within their law. Secondly, the subject matter of terra nullius and its
continuing consequences poignantly exposes the gap between law and society and
demonstrates the (often negative) social impact of the law in the way that it has
eroded traditional cultures and displaced Aboriginal peoples. Finally, and perhaps
most importantly, as Irene Watson points out, terra nullius is not merely of
historical interest. It continues to influence the way in which the law (and society)
perceive and relate to Aboriginal people in Australia.

Using the theories explicated in Part One of this thesis, I argue that law’s discourse
of terra nullius enabled the law to construct Aboriginal people as ‘other’, deny
them full access to its benefits and protections and deny them a voice, within the
dominant discourse, with which to challenge the injustices perpetrated against
them. I further argue that literature is one way in which these stories of injustice
can be represented, and that it is in the telling of these stories that the law can be
critiqued and challenged. Importantly, these stories also allow for the reader to
engage with the critique as part of their knowledge and understanding of the law.

The texts I discuss here are Eleanor Dark’s *The Timeless Land*, Mudrooroo’s *Doctor
Woreddy’s Prescription for Enduring the Ending of the World*, Thomas Keneally’s
*The Chant of Jimmie Blacksmith*, Kate Grenville’s *The Secret River*, Andrew
McGahan’s *The White Earth* and Alex Miller’s *Journey to the Stone Country*.
These texts tell us about the settlement of Australia, its designation as terra nullius,
the way Aboriginal people were (and are) treated by the law and the continuing
impacts of terra nullius. They provide important critical insights about the law, the
ways in which it creates boundaries of inclusion and exclusion, its lack of equality and objectivity and, importantly, the way in which it creates a *différend* in its denial of a voice to Aboriginal people within the dominant discourse.

In Chapter Five, I provide a discussion of the principle of terra nullius and the settlement of Australia. I explain what is meant by terra nullius, the way in which it was used to enable the occupation of Australia, the justification it accorded for the dispossession of Aboriginal people and challenges to its application. In Chapter Six, I examine accounts of Aboriginal dispossession written prior to the 1992 *Mabo* decision. I argue that these stories, when read from a postcolonial perspective, highlight the way in which the law constructed Aboriginality in a way that legitimated Australia’s settlement and justified Aboriginal dispossession. In Chapter Seven, I examine texts written after *Mabo*. I argue that these texts engage with the change in the law heralded by this decision. They revisit constructions of Aboriginality and allow for alternative accounts of Australia’s history to be told.
CHAPTER FIVE

AN EMPTY LAND?

Introduction

There were no signs that the blacks felt the place belonged to them. They had no fences that said this is mine. No house that said, this is our home. There were no fields or flocks that said, we have put the labour of our hands into this place.1

Until the 1990’s many Australians were unaware of what the term terra nullius meant. It was not (and in most cases still isn’t) something which impacted greatly on the lives of a majority of this country’s citizens. Yet it was the principle of terra nullius that provided the basis upon which the nation of Australia was founded.

The question of rights of ownership of Australian soil has been (and continues to be) a contentious and contested domain. It is a dispute that began on the 22nd of August 1770 when Captain James Cook, on behalf of the British Crown, formally took possession of the east coast of Australia.2 Eighteen years later on the 26th of January 1788 the British occupation of this previously unclaimed, and apparently unowned, territory officially commenced with a ceremonial unfurling of the Union Jack and firing of canons.3 As we now know, this foundational presumption of the land being unclaimed and unowned did not mirror reality. Aboriginal peoples had lived on this land, utilised it and cared for it for thousands of years. Their presence was,

2 Castles, A. An Australian Legal History (Sydney: Law Book Company) 1982 at 22. It should be noted, however, that disputes amongst European nations for the land were occurring for some time before the arrival of the English. The first recorded landing was by Willem Jansz in 1606 on the west coast of Cape York Peninsula. Clancy, R. The Mapping of Terra Australia (NSW: Universal Press) 1995 at 73. This is not to say, however, that there were not any other earlier unrecorded landings.
3 Castles, ibid at 24.
in fact, acknowledged in Governor Phillip’s second commission, issued in 1787, which instructed him to:

endeavour by every possible means to open an intercourse with the natives, and to conciliate their affections, enjoining all our subjects to live in amity and kindness with them.4

Despite such concern, however, the existing occupants of the new colony were not treated with respect.5 In apparent opposition to these expressed sentiments, Aborigines were treated as a problem or a nuisance, or even as invisible, non-existent.6 It was certainly clear that, despite their presence, they were considered in no way to own the land upon which they had lived for centuries.

In this chapter, I examine the basis of England’s settlement of Australia. In the first section, I explain the concept of terra nullius. In the second section, I show how this principle was used to justify the acquisition of Australia, and in the third section, I examine challenges to the application of the doctrine. I also explain how Australia’s designation as terra nullius continues to impact on the lives of Aboriginal people today. My argument throughout is that the discourse of terra nullius enabled the introduction of a colonialist and discriminatory law into Australia that has publicly excluded and silenced Aboriginal people. In this chapter, therefore, I provide the legal background against which the literary texts analysed in Chapters Six and Seven can be read.

4 Quoted in ibid at 23.
5 Phillip initially tried to adhere to this instruction. He first sent a retaliatory party out when his gamekeeper was killed. He captured Arabaroo, and tried to befriend him. He later took Bennelong and Colbebe. See Elder, B. Blood on the Wattle: Massacres and Maltreatment of Australian Aborigines since 1788 2nd ed. (NSW: National Book Distributors) 1992.
6 It should be noted that this was more pronounced after the initial years of settlement.
Terra Nullius

The basis upon which ownership of Australia was asserted by the English was relatively straightforward. It was an established principle of seventeenth century international law that colonising powers could acquire new territory through conquest, whether by the exertion of military power or by treaty. By the eighteenth century it was further accepted that foreign lands could also be acquired through occupation. This was an available option where the territory was considered uninhabited and, as such, terra nullius, that is, empty land belonging to no-one. In the case of land that was terra nullius, colonising countries were permitted to simply move in and claim the land through occupancy. Fundamental to the understanding of this principle of terra nullius was the idea of cultivation. As explained by influential international jurist, Emerich Vattel, in his 1758 Law of Nations, there was a duty at international law on a country’s inhabitants to cultivate the land. Lack of cultivation was a decisive factor in determining if the land was empty and, as such, available for occupation. Referring to inhabited yet ‘uncultivated’ lands, Vattel stated:

in speaking of the obligation of cultivating the earth … these tribes cannot take to themselves more land than they have need of or can inhabit or cultivate. Their uncertain occupancy of these vast regions cannot be held as a real and lawful taking of possession; and when the Nations of Europe, which are too confined at home, come upon lands which the savages have no special need of and are making no present and continuous use of, they may lawfully take possession of them and establish colonies in them.

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8 Castles, above n.2 at 16 – 17.
9 Quoted in Davies, M. Asking the Law Question 2nd ed. (Sydney: Lawbook Co.) 2002 at 275.
In the context of English law, jurist William Blackstone, in examining methods of territorial acquisition, agreed that if land was “desert and uncultivated” it was available for occupation.\textsuperscript{10} In the seminal case of \textit{Cooper v Stuart} this was interpreted as meaning land “\textit{practically} unoccupied without settled inhabitants or settled law.”\textsuperscript{11} The doctrine of occupation and its justifying foundation of terra nullius was expanding. Lack of cultivation, ‘settled’ inhabitants or ‘settled’ law meant that land was available for occupation by a colonising country. As stated by Justice Gibbs in 1979 in \textit{Coe v Commonwealth}, “settlement could occur ‘in a territory which, by \textit{European standards}, had no civilised inhabitants or settled law.’”\textsuperscript{12}

It is perhaps no surprise that this theory of, and justification for, occupation of so-called ‘empty land’ strengthened during the eighteenth, nineteenth and even into the twentieth centuries. This was, as explained in Chapter Four, the age of modernism and colonialism. With the expansion of colonialism and rights of occupation the fate of the future Australian colonies was sealed:

\begin{quote}
[T]he lack of recognition of Aboriginal land rights, and the expanded doctrine of \textit{terra nullius}, were driven by … racist and ethnocentric “truths”: the moral superiority of Western civilization and the wasteful, primitive, lawless, backwardness of indigenous peoples. It was the operation of the same discourses of power which allowed Australia to be classified as \textit{terra nullius} at international law, and which represented the Aboriginal people of Australia as inherently vagabond under the common law.\textsuperscript{13}
\end{quote}

The colonisers determined that Aboriginal people did not cultivate the land and that they therefore did not possess it. Nor were they considered to abide by ‘settled’

\textsuperscript{10} Simpson, above n.7 at 199; Castles, above n.2 at 11.
\textsuperscript{11} (1889) 14 App. Cas. 286 at 291. Emphasis added.
\textsuperscript{12} (1979) 24 ALR 118 at 129. Quoted in Simpson, above n.7 at 201. Simpson’s emphasis.
law. The land, therefore, could be judged to be terra nullius.\textsuperscript{14} As poignantly captured by Dodson:

by representing Indigenous peoples as peoples without a social order, without a law, with no system of ownership, the doctrine of terra nullius became a logical conclusion. A people incapable of ownership cannot be party to a contractual transfer or negotiation; to take possession of the country was not theft, but acquisition of available goods.\textsuperscript{15}

\textbf{The Settlement of Australia}

That Australia was considered, by the occupiers, to be a settled colony is unquestionable. Judicial confirmation of this came as early as 1847 in Attorney-General (NSW) \textit{v} Brown, in which the New South Wales Supreme Court unanimously determined that the colony was settled and that consequently title to all land therein was vested in the Crown.\textsuperscript{16} This approach was later confirmed by the Privy Council in the case of Cooper \textit{v} Stuart, in which Lord Watson notoriously stated that:

There is a great difference between the case of a Colony acquired by conquest or cession, in which there is an established system of law, and that of a Colony which consisted of a tract of territory practically unoccupied, without settled inhabitants or settled law, at the time when it was peaceably annexed to the British dominions. The Colony of New South Wales belongs to the latter class.\textsuperscript{17}

\begin{thebibliography}{9}
\bibitem{dark} In Dark, E. \textit{The Timeless Land} (Sydney: Harper Collins) 2002, for example, Aborigines are portrayed as ‘primitive’. This novel is discussed in Chapter Six. Grenville, above n.1 highlights the way in which lack of cultivation was equated, by the law and by the settlers, with lack of ownership of the land and so used as justification for ‘taking up’ Aboriginal land. This novel is discussed in Chapter Seven.
\bibitem{dodson} Dodson, M. “The Wentworth Lecture: The end in the beginning: re(de)fining Aboriginality” (1994) 1 \textit{Australian Aboriginal Studies} 2 at 7.
\bibitem{mcneil} (1847) 1 Legge 312. See McNeil, K. "A Question of Title: Has the Common Law been Misapplied to Dispossess the Aboriginals?" (1990) 16 \textit{Monash University Law Review} 91 at 96.
\bibitem{mcneil2} (1889) 14 App. Cas. 286 at 291. Quoted in McNeil, ibid at 91.
\end{thebibliography}
In 1913, the newly constituted High Court of Australia reaffirmed that the English Crown acquired rights over Australia through possession or occupancy. If there was any doubt remaining that Australia was, and should continue to be, treated as a settled colony this was authoritatively answered by the High Court in 1979 in *Coe v Commonwealth*, in which Justice Gibbs asserted that “[i]t is fundamental to our legal system that the Australian colonies became British possessions by settlement and not by conquest.”

Declaring land to be terra nullius did not only mean that no one lived on or cultivated the land. It meant that the land was empty in every sense, including legally. That is, no system of law was considered to exist. Consequently, the legal system and laws of a colonising nation were simply received into the empty infant space as the parent nation assumed absolute sovereignty over its new possession. In the case of Australia, those laws in operation in England at the time of settlement that were applicable to the conditions of the new colony were duly received into it. These laws regulated everything from crime and the establishment and operation of judicial bodies, to rights of property ownership. One thing was, however, made very clear. Namely, that the ‘Common Law of England’ was something which should not be denied to Englishmen settling new lands. For, such is “the birth-right of every subject”.

One area where the introduction of English law had immense, immediate and continuing long-term impact in the new colony was that of property. On the

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18 Williams v Attorney-General (NSW) (1913) 16 CLR 404.
19 (1979) 24 ALR 118 at 129. Quoted in Simpson, above n.7 at 198.
20 Blackstone, W. *Commentaries* 18th ed. quoted in Castles, above n.2 at 11.
reception of English law into the colony all land was vested in the Crown of England. As confirmed by Justice Blackburn in *Milirrpum v Nabalco*.

the principle, fundamental to the English law of real property, [is] that the Crown is the source of title to all land; that no subject can own land alodially, but only an estate or interest in it which he holds mediately or immediately of the Crown. On the foundation of New South Wales, therefore, and of South Australia, *every square inch of territory in the colony became the property of the Crown*. All titles, rights, and interests whatever in land which existed thereafter in subjects of the Crown were the direct consequence of some grant from the Crown.21

This was a simple application of the doctrine of tenure, one of the foundational building blocks of English property law. Upon the settlement of Australia this doctrine of tenure was received into the new colony. It determined simply that King George III became the absolute owner of all land in the colony and that no other person, including the Aborigines, had any rights to, or interests in, that land unless by virtue of a Crown grant of that interest.22 They had, after all, failed to cultivate the land and had already been deemed not to possess it. Thus, in 1835 when John Batman asserted ownership of roughly five hundred thousand acres of land around Port Philip Bay and another one hundred thousand acres around what is now Geelong, claiming to have purchased this land from local Aborigines, he fell foul of English property law. He had entered into two ‘treaties’ with the Aborigines, in which they purported to convey the land to him. He had the deeds of conveyance properly executed by a local lawyer, and duly agreed to ‘pay’ for the land with goods including blankets, knives and flour, plus a yearly rent. The British government, not surprisingly, refused to recognise the purchase, and, declaring the agreement between Batman and the Aborigines invalid, stated that the Aborigines

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22 Bradbrook, A., MacCallum, S. and Moore, A. *Australian Real Property Law* 3rd ed. (Sydney: Lawbook Co.) 2002 at 35 – 38. This is also commented on in Grenville, above n.1 at 121: “King George owned this whole place of New South Wales.”
had no rights in the land and therefore had no right to sell that which was not theirs. The land belonged to the Crown of England.\(^{23}\) In a consequent declaration issued by the Governor of New South Wales it was announced that “any bargain or contract made with the Aboriginal natives of New Holland … will be held to be null and void as against the rights of the Crown.”\(^{24}\) It further asserted “the right of the Crown of England to the Territory in question and the absolute nullity of any grant … made by any other party.”\(^{25}\) The common law principle of tenure had, in granting title over the land to the Crown, resulted in the absolute dispossession of the Aborigines.

**A Challenge to Terra Nullius: From Milirrpum to Mabo**

The first major attempt to challenge this dispossession, and so question the status of the Australian colonies, was not mounted until 1971 in the case of Milirrpum v Nabalco Pty. Ltd., in which Justice Blackburn rejected a claim by Yolgnu people at Yirrkala on the Gove Peninsula in the Northern Territory that they had a recognisable title to the land.\(^{26}\) They argued that as they had used and occupied the area from time immemorial they had a common law right to the land under what Blackburn J. labelled the doctrine of “communal native title”. Blackburn J. acknowledged that the Yolgnu people had indeed lived in the area prior to its occupation and that there was some form of recognised law in place at the time of settlement.\(^{27}\) Despite this finding, however, he concluded that, as a question of fact,

\(^{23}\) Castles, above n.2 at 28 – 29.  
\(^{24}\) Quoted in ibid at 29.  
\(^{25}\) Quoted in ibid at 29.  
\(^{26}\) Above, n.21.  
\(^{27}\) “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 or influence. If ever a system could be called “a government of laws, and not of men”, it is that shown in the evidence before me.” Ibid at 267.
any links to the land asserted by the plaintiffs were not the same as those enjoyed by their ancestors at the time of settlement. This finding of fact was immediately and conclusively fatal to the land claim.28

Nevertheless, and perhaps more importantly, Blackburn J. examined in depth the legal ramifications of the claim. He confirmed that, as a matter of law, Australia was a settled colony and, accordingly, concluded that “the doctrine [of communal native title] does not form, and never has formed, part of the law of any part of Australia.”29 To have found otherwise would have been inconsistent with the colony’s status as settled and the system of tenure introduced with settlement.30 Furthermore, he found that Aboriginal people did not have any rights or interests that could, despite his earlier finding of a recognised system of law and society, be deemed to be recognisable proprietary interests in the land. English property law, according to Blackburn J., has three characteristics: the right to use and enjoy, the right to exclude and the right to alienate.31 The nature of the plaintiffs’ interest in the land claimed bore, according to Blackburn J.:

so little resemblance [to] property, as our law, or what I know of any other law, understands the term, … that I must hold that these claims are not in the nature of proprietary interests.32

29 Above n.21 at 245.
30 “On the foundation of New South Wales, therefore, and of South Australia, every square inch of territory in the colony became the property of the Crown. All titles, rights and interests whatever in land which existed thereafter in subjects of the Crown were the direct consequence of some grant from the Crown” Ibid at 245.
31 Ibid at 272. And, of course, Blackburn J. was concerned only with English property law. The “proper procedure to bear in mind is the concept of “property” in our law.” Ibid at 270. He “was unwilling to embrace concepts of property other than those traditional to the English common law itself.” Hocking, above n.28 at 174 – 175.
32 Ibid at 273.
The spiritual connection that Aboriginal people had with the land, although acknowledged by Blackburn J., was quite simply not a sufficient basis upon which to challenge the niceties of the newly implanted English property law.\textsuperscript{33} For Blackburn J. there was absolutely no common law basis upon which Aboriginal rights to land could be founded. The political imperative of maintaining the status quo of Australia as a settled colony was paramount.\textsuperscript{34}

Over the next twenty years community attitudes towards the treatment of Aboriginal people began to change. There was an increasing awareness of the fact of dispossession, and the denial of rights and lack of equality consequently accorded to Aborigines. The 1960’s saw constitutional change with the 1967 referendum granting the Commonwealth the power to legislate for Aboriginal people and allowing them to be counted in the census.\textsuperscript{35} Legislative reform during this period also saw the repeal of some (but certainly not all) restrictive legislation prescribing the rights and activities of Aborigines.\textsuperscript{36} By the 1970’s, Aboriginal activism was growing and Aboriginal people began to push for land rights, compensation, self-

\textsuperscript{33} Blackburn J. acknowledges the relationship Aboriginal people had with the land on a number of occasions. For example, “The spiritual relationship is well proved.” Ibid at 270; “The evidence seems to me to show that the aboriginals have a more cogent feeling of obligation to the land than of ownership of it. It is dangerous to express a matter as subtle and difficult by a mere aphorism, but it is easier, on the evidence, to say that the clans belong to the land than that the land belongs to the clan.” Ibid at 270 – 271.

\textsuperscript{34} The case was undoubtedly important and has been subjected to much criticism. See, for example, Hookey, J. “The Gove Land Rights Case: A Judicial Dispensation for the Taking of Aboriginal Lands in Australia?” (1972) 5 Federal Law Review 85; Hocking, above n.28; Hocking, above n.7; Bartlett, R. Native Title in Australia 2\textsuperscript{nd} ed. (Chatswood NSW: Butterworths) 2004 at 11 – 13. See Ritter, above n.13 for a discussion of Milihipilum as a product of the discourse of terra nullius, despite the changing perceptions about the ‘truths’ of Aboriginal people.


\textsuperscript{36} For example, restrictions on drinking were relaxed. There were many other restrictions on the rights of Aborigines, such as the removal of children that will be discussed in more detail in Chapter Nine.
determination and the like. To this end, in 1972 the Tent Embassy was established outside Parliament House in Canberra. Aboriginal affairs had been irreversibly thrust into political prominence and the Whitlam government of 1972 announced an intention to legislate for land rights and social change.\textsuperscript{37} In 1975 it enacted the \textit{Racial Discrimination Act} in order to give effect to the \textit{International Convention on the Elimination of All Forms of Racial Discrimination}. As stated by Webber, such developments and consequent changes in attitude towards Aboriginal people allowed for:

increasing understanding in the non-indigenous community of the social organisation of Aborigines, the complexity and sophistication of their cultural life, and their deep ties to the land. This, combined with greater humility about the merits of non-indigenous society, has made it easier to think of indigenous and non-indigenous as alternative modes of social organisation, each with their own integrity.\textsuperscript{38}

1988 marked the bicentenary of Australia’s founding. Aboriginal Australians used this event to assert the injustices that they had suffered two hundred years earlier when their land was occupied, and have continued to suffer through to the present day. Slogans of “we have survived” were chanted and Aboriginal activist Burnum Burnum, highlighting the nature of Australia’s occupation, raised the Aboriginal flag in Dover and claimed possession of Great Britain.\textsuperscript{39} The non-indigenous community was being made more aware of the way that Aborigines had been treated for the past two hundred years.

Such changes provided the context for the High Court’s hearing of the \textit{Mabo} case. In 1982, Eddie Mabo challenged the lack of recognition of the rights and interests of

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\item[37] Johnston, above n.35 at 20.3.34.
\item[39] Johnston, above n.35 at 10.3.11.
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Aboriginal people to their land. He claimed that his people had lived on the Murray Islands located in Torres Strait for generations before white settlers arrived, that they had cultivated the land, lived in small communities and that they had handed down the land from generation to generation and that therefore their title to the land should be recognised. Ten years later, in 1992, the High Court of Australia finally handed down its decision in *Mabo v Queensland (No.2)*, one of the most important cases in this country’s legal history. The High Court agreed with Eddie Mabo and concluded that the Meriam people “were entitled as against the whole world to possession, occupation, use and enjoyment of the lands of the Murray Islands.” It declared that native title was part of the common law of Australia, that the source of such title was a continuing connection with the land and that its content derived from the nature of that connection and traditional customs.

In providing for the recognition of native title, the Court questioned the appropriateness of the application of the principle of terra nullius to this country. After all, it was now clear that Australia was not uninhabited, ‘practically’ or otherwise, at the time of settlement. Justice Brennan, in particular, posited that “[t]he common law of this country would perpetuate an injustice if it were to continue to embrace the enlarged notion of terra nullius.” It is important to note, however, that this case does not declare that terra nullius, as a principle of international law justifying the territorial acquisition of Australia, is inapplicable to

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41 Ibid at 76. Note also that this was not a unanimous decision but 6:7 with Dawson J. in dissent.
42 Ibid per Brennan J. at 59 – 60; Deane and Gaudron JJ. at 110; Toohey J. at 118.
43 Ibid at 58. These sentiments were reiterated by Deane and Gaudron JJ. at 108 – 109.
Australia, or that Australia is not a settled colony.\footnote{Ibid at 58, 79 and 182. It simply states that the basis of its application, namely that the land was empty, was incorrect. This is nevertheless important. As stated by Detmold, “It was precisely the point of terra nullius to deny this otherness: the land was not fixed with another’s set of perceptions and desires (including, as a subset, their law). And this the High Court (happily) has rejected.” Detmold, M. “Law and Difference: Reflections on Mabo’s Case” in Essays on the Mabo Decision (Sydney: Law Book Company) 1993 at 41.} It does not challenge England’s sovereignty over Australia. Brennan J. makes this abundantly clear, stating that:

\[\text{[t]he acquisition of territory by a sovereign state for the first time is an act of State which cannot be challenged, controlled or interfered with by the courts of that State.}\footnote{Mabo, above n.40 at 69, quoting Gibbs J. in NSW v Commonwealth (1975) 135 CLR 337. See also at 78 – 79 where the Court states that sovereignty cannot be challenged in a domestic court. This is a matter of international law.}

Nor does the \textit{Mabo} decision challenge the basis of the legal system that was introduced into this country at the time of settlement. Again, as stated by Brennan J.:

recognition by our common law of the rights and interests in land of the indigenous inhabitants of a settled colony would be precluded if the recognition were to fracture a skeletal principle of our legal system.\footnote{Ibid at 43.}

As such, the case determines only that the common law should no longer continue to perpetuate the fiction that Australia was uninhabited at the time of settlement, and that the rights of Aboriginal people to their land must be recognised. It does not challenge the fundamental rubric of property law in this country, but declares that, within the English common law system, common law native title rights can exist. It allows, that is, for the recognition of native title within the common law system of tenure. The application of this principle of tenure was not something questioned by the High Court.\footnote{Brennan J. stated that tenure “is a basic doctrine of land law … which could not be overturned without fracturing the skeleton which gives our land law its shape and consistency.” Ibid at 45. So while there was a willingness to accept that there was some form of native title right there was not a willingness to accept alternative forms of law. As stated by Detmold, above n.44 at 41 – 42: “The
native title could exist, through the use of the concept of radical title. Radical title means simply ultimate title but not full beneficial title. Radical, or ultimate, title entitles the Crown to full beneficial ownership of the land only if it is truly empty and unclaimed. Beneficial ownership gives it the right to do with it whatever it desires. Common law native title is a burden on the Crown’s radical title. As such, *Mabo* does not recognise Aboriginal ‘ownership’ of the land, but simply allows for the recognition of limited rights within the English legal system. It does not provide for the ‘return’ of land that has otherwise been alienated, nor does it provide for compensation for the mass dispossession of Aboriginal peoples.

other had a different law. From the recognition of the existence of the indigenous inhabitants there followed the recognition of the possibility that their law was a different law. There is also in the various High Court judgments a recognition and acceptance of the fact that the indigenous property conceptions were different and that the common law needed to be modified accordingly. But that (unhappily) is as far as it goes.”

48 Brennan J. explains it as follows: “The notion of radical title enabled the Crown to become paramount Lord of all who hold a tenure granted by the Crown and to become absolute beneficial owner of unalienated land required for the Crown’s purposes. But it is not a corollary of the Crown’s acquisition of title to land in an occupied territory that the Crown acquired absolute beneficial ownership of that land to the exclusion of the indigenous inhabitants. If the land were desert and uninhabited, truly a terra nullius, the Crown would take absolute beneficial title … But if the land were occupied by the indigenous inhabitants and their rights and interests are recognised by the common law, the radical title which is acquired with the acquisition of sovereignty cannot itself be taken to confer an absolute beneficial title to the occupied land. Nor is it necessary to the structure of our legal system to refuse recognition to the rights and interests in land of the indigenous inhabitants. The doctrine of tenure applies to every Crown grant of an interest in land, but not to rights and interests which do not owe their existence to a Crown grant.” *Mabo*, above n.40 at 48 – 49.

49 That is, native title does not recognise complete Aboriginal ‘ownership’ of land but is still trying to fit it into the English common law. One of the consequences of this conception of native title is that it forces difference (indigenous relationships with land) into sameness (western conceptions of land ownership). See Detmold, above n.44. The issue of forcing, or reducing, difference into sameness is explored further in Chapters Nine and Ten in relation to policies of assimilation pursued by Australian governments.
The case is, however, important, marking, as it does, the beginning of attempts in the legal sphere to address the question of native title rights. Importantly, in so doing, the case begins to break down the incommensurabilities that give rise to a *différend*. That is, the judges in *Mabo* were able to reach their decision based on the fact that the Meriam people had gardens and used stones to delineate particular individual plots of land in a manner similar to systems of land ownership in English property law. They were able to hear the claims of the Meriam people within the framework of the English common law. The two parties were beginning to speak in the same language and in this way the conditions giving rise to the *différend* were being broken down.

The case is also important for two further reasons. Firstly, it illustrates a point that I take up in Part Three of this thesis: namely, that the (positivist, colonialist) law needs to be more flexible in order to accommodate difference and achieve equality. That is, it highlights the weakness of unquestioned legal positivism as a theory for addressing injustice. As stated by Van Krieken:

> The success of the critique of legal positivism has been such that there is in current legal thought a widespread adherence to the idea that normativity – with norms understood as ‘morals’, ‘ethics’ or ‘principles’ – is central to law, and that moral integrity in the legal field is closely tied to a critical attitude towards the past. Legal positivism and the framing of judgments in terms of precedent or ‘good law’ risks being equated, then, with a hide-bound

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50 Since *Mabo* there have been many attempts to explain, elaborate, expand and limit the extent and content of this common law native title. For example, *Wik Peoples v Queensland* (1996) 187 CLR 1; *Western Australia v Ward* (2002) 191 ALR 1; *Yorta Yorta Aboriginal Community v Victoria* (2002) 194 ALR 538; the *Native Title Act* 1993 (Cth).

51 Although, as highlighted above, the Meriam people had to ‘conform’ to the mainstream law in the first place so that this could happen. In other cases such as *Milirrpum v Nabalco*, above n.21 the language used by the parties was different and they were unable to understand each other, clearly highlighting the existence of the *différend*. This is also highlighted in Grenville, above n.1 as discussed in Chapter Seven.

52 Such as was evidenced in *Milirrpum v Nabalco*, above n.21 for example.
inability to adjust to the changed nature of the current moral community. Precedent, wrote Sir Anthony Mason, “brings in its train ... a mode of argumentation which ... is preoccupied with past decisions and dicta, and an inability to respond to the need for change.”53

Secondly, it demonstrates the impact that the law has on the lives of its subjects beyond the legal. It highlights one of the major consequences of the declaration of Australia as terra nullius: namely, the dispossession of Aboriginal peoples.54 It is important to note here that this dispossession did not simply mean loss of land. The application of terra nullius to Australia had very specific cultural implications. Aboriginal people did not only inhabit and care for their land. The land itself was integral to the very identity of Aboriginal people. The mountains, rivers and the landscape itself, as well as the animals which inhabited it, not only provided food, water and shelter, but also formed the cultural and spiritual nucleus of Aboriginal life. Dreaming stories were concerned with what could be seen and felt. Physical locations formed ritual, spiritual and sacred sites. Even the recording of history and culture was in physical locations such as rock art sites. This concept of country as ‘mother’ was (and is) very real and is characterised by Kim Scott’s “First Thing, Welcome.”55 He writes:

it is a beautiful place, this place. Call it our country, our country all ‘round here. We got river, we got sea. Got creek, rock, hill, waterfall. We got bush tucker: apple, potato, sugarbag, bush turkey, kangaroo, barramundi, dugong, turtle ... every kind. Sweet mangoes and coconuts too.56

53 Above n.28 at 63.
56 Ibid at 13. This concept of country as mother is also commented on by Miller, A. Journey to the Stone Country (Crow’s Nest NSW: Allen & Unwin) 2003 at 80 when Bo explains how his grandmother, a Jangga woman, “showed us how to live off the country. And when we was hungry and complaining she told us, This country is your mother. You wouldn’t even be here if it wasn’t
Terra nullius sanctioned separation from country and so not only dispossessed Aboriginal people but effectively isolated them from the very location that provided their cultural and spiritual identity, giving rise to the notion of a ‘cultural genocide’ the likes of which is very hard for a non-indigenous person to comprehend.

This separation from country was not the only deprivation that white occupation wrought upon Aboriginal people. They were also denied equality.\(^{57}\) As introduced in Chapter Four, the consequences of England’s colonial expansion were (and are) far reaching. Aborigines have not been (and are not) accorded the same level of opportunity in this country as non-Aboriginal Australians, legally, educationally, economically and socially. They are forced to obey a law that is not theirs and yet they do not always reap the benefits of its opportunities and protection. As encapsulated by the *Royal Commission into Aboriginal Deaths in Custody*, for example:

> Following the takeover of their land by the British, the personal liberty of the Aboriginal people was jeopardised. They no longer had the freedom to live as they pleased and their life choices were dictated much more by government and government-approved missions than was the case for non-Aboriginal people. Their children were taken away to dormitories or distant towns, as parents and kin were thought to be a degrading influence. The various colonial and later State, Commonwealth and Territory Governments introduced policies which led to intrusions into most aspects of their everyday lives. These included inspections of camp sites and other residences, and limitations upon their mode of living, work, financial and leisure activities. Institutionalisation was to be a dominant theme in Aboriginal lives. The general population discriminated against Aboriginal people in many ways, which affected their education, housing, employment, income and self-esteem.\(^{58}\)

\(^{57}\) Equality before the law is the focus of Part Three.

\(^{58}\) Johnston, above n.35 at 10.1.1.
Aboriginal people lost control of and, perhaps more importantly, the right to control, their right to self-determination and their right to speak.59 And so the stories of the settlement of Australia and its consequences were (and are) the colonisers’ stories. They were (and are) not the stories of Aboriginal people.

**Conclusion**

The disadvantages, abuses and inequalities discussed above are not of purely historical interest. The impact of white colonisation and the relationship between the colonisers and the colonised continues today. As summarised by Webber, the effects of the injustices and inequalities upon which Australia was founded:

continue in the deprivation of Aborigines and their banishment to the margins, so that they lack, on the one hand, full acceptance in the broader society and, on the other, their own land on which to stand.60

It is the related issues of the declaration of Australia as terra nullius, the rights to land and property ownership and the impact and continuing consequences thereof that I examine in Chapters Six and Seven.

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59 Dodson, above n.15 at 5.
60 Above n.38 at 14.
CHAPTER SIX

“THE MISERABLEST RACE ON EARTH”: STORIES OF ‘PRIMITIVES’, DISPOSSESSION AND THE FOUNDING OF A NATION

Introduction

In Chapter Five, I explained how the discourse of terra nullius enabled the English to occupy, and claim ownership of, Australia without negotiating with or compensating the Aboriginal peoples who already lived here. This ‘settlement’ of Australia had devastating long-term consequences for Aboriginal people. As the settlers continued to take more and more land many Aborigines were either killed, died from introduced diseases or were otherwise forcibly removed from the land. And, as detailed in the Royal Commission into Aboriginal Deaths in Custody, this dispossession did not simply mean loss of land. It:

meant the destruction of the Aboriginal economy which everywhere was based upon hunting and foraging. And the land use adopted by settlers drastically reduced the population of animals to be hunted and plants to be foraged. And the loss of the land threatened the Aboriginal culture which all over Australia was based upon land and relationship to the land.

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1 Brady, V. “Reading Aboriginal Writing” (1994) 2 Westerly 41 at 43, paraphrasing William Dampier’s observation that Aborigines on the west coast of Australia were “the miserablest people in the World.”

2 In 1939 W.E.H. Stanner wrote “Year by year since 1788 the tribes have gone downhill. When the colony was founded the aborigines probably numbered at least 300,000, but have now dwindled to about 50,000. Their decline was most rapid in the nineteenth century, in the years when the upward surge of the white Australian population widened the inner frontiers of the settlement at great cost of body and spirit, no less to the invaders than to the dispossessed tribes whose lands they seized. Officially, there are supposed to be 60,000 natives still alive, but this guess (it is little more) is almost certainly wrong. No proper aboriginal census has ever been undertaken. A national headcount would probably show that 50,000 is a generous estimate. In any case it is a fact that about five-sixths of the original black population have been wiped out in 150 years, a rate equivalent to the death every year since 1788 of two large tribes totalling 1,700 souls.” Quoted in Reynolds, H. Dispossession: Black Australians and White Invaders (New South Wales: Allen & Unwin) 1989 at 17-18.

In this chapter, I analyse literary representations of settlement and dispossession. As I argued in Chapter Three, literature is a form of narrative that contributes to the discourse of law.\(^4\) Its representations can both create and perpetuate, or critique and question official narratives and authorised truths. It can contribute to the way that identities are constructed and particular values and perspectives normalised. It can also convey critical insights about the narrative of law and its underlying assumptions.\(^5\) Literary representations of the settlement of Australia and the consequent dispossession and mistreatment of Aboriginal people are, therefore, an integral and significant part of the debate about the foundation of this country and its continuing long-term consequences.

In particular, I argue here that stories about dispossession provide useful insight into the impact of law on the social, and the way in which the law includes, excludes and silences. The texts analysed tell us not simply that Aborigines were removed from the land, but that this removal both legitimated, and was legitimated by, the discourse of law that represented the land as empty, and denied Aborigines the right to many aspects of white (and Aboriginal) society. They offer valuable insight into the structure of our law, the way it operates and the way in which it can create a *différend*. In this way, these stories explicate the arguments which I raised in Chapters One and Two about the power of the law to include and exclude and discriminate against the ‘other’, and the enormous impact that this can have on the lives of its subjects beyond the purely legal.

\(^{4}\) And history.
\(^{5}\) Particularly of equality and objectivity. These standards are explored in more detail in Part Three.
In this chapter, I examine literary texts written prior to the *Mabo* decision.\(^6\) Those written after this case will be discussed in Chapter Seven.\(^7\) The texts that I focus on here are *The Timeless Land*,\(^8\) *Doctor Wooreddy’s Prescription for Enduring the Ending of the World*\(^9\) and *The Chant of Jimmie Blacksmith*.\(^10\) These novels raise the issues of inclusion and exclusion, silencing and the impact of the law through their portrayal of first settlement in New South Wales and Tasmania, and the consequences wrought by dispossession by the time of Australia’s federation in 1901. I argue that a postcolonial reading of these texts reveals much about the narrative of our law. In particular, I argue that they inform the reader about the way that the law constructed Aboriginality by creating a knowledge of Aboriginal people as ‘primitive’ and without a system of law or society, and that this construction of identity was essential in supporting and justifying the application of the principle of terra nullius to Australia. I also argue that these texts reveal that by creating this knowledge and image of Aboriginal people, the law created a *différend* and silenced Aboriginal voices and Aboriginal stories, within the public domain, further reinforcing the fiction of terra nullius and the legitimacy and superiority of the settlers’ law.\(^11\) I begin this chapter by arguing that the three texts discussed here tell colonial stories that we can now read from a postcolonial perspective. In the second section of this chapter, I explain how these novels inform the reader about the reality of Aboriginal dispossession. In the third

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\(^6\) *Mabo v Queensland (No.2)* (1992) 175 CLR 1. This case was discussed in Chapter Five.

\(^7\) It is after this time that we begin to see an increasing number of works that give voice to the Aboriginal experience and tell Aboriginal stories.


\(^11\) It is important to acknowledge, however, that within Aboriginal communities concerns were being voiced.
section, I analyse the way that the law has constructed Aborigines as ‘other’, and in
the final section, I examine the way that the law, as revealed in these texts, has
silenced Aboriginal voices within the public domain.

**Colonial Stories: Postcolonial Perspectives**

There are many accounts of the story of Australia’s settlement. Until recently,
these have been written predominantly by and about the settlers and not
Aborigines.12 This is perhaps unsurprising when one considers that history is
generally not written by the vanquished. It is written by the colonisers, who often
write out the experiences, legitimacy and, sometimes, the very existence of those
who are colonised.13 In the Australian context, this is manifested in the celebration
and glorification of the trials and triumphs of the settler and the pioneer who
tamed the harsh Australian landscape and forged a new nation. They suffered

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12 This has been reflected in historical accounts also. As stated by the Johnston: “Until the 1970's
the history taught in our schools portrayed Aboriginal people if it portrayed them at all as passive
and backward onlookers to the achievements of non-Aboriginal people in developing the land.”
Johnston, E. *National Report of the Royal Commission into Aboriginal Deaths in Custody* volume 2,
Retrieved on 30 June 2008. See also, for example, Murdoch, W. *The Making of Australia*, quoted in
Reynolds, above n.2 at xii – xiii: “When people talk about ‘the history of Australia’ they mean the
history of the white people who have lived in Australia. There is good reason why we should not
stretch that term to make it include the story of the dark-skinned wandering tribes who hurled
boomerangs and ate snakes in their native land for long ages before the arrival of the first intruders
from Europe … He [the historian] is concerned with Australia only as the dwelling place of white
men and women, settlers from overseas. It is his business to tell us how these white folk found the
land, how they settled in it, how they explored it, and how they gradually made it the Australia we
know today.”

13 “The most ‘obvious’ history to write is the one which celebrates the achievements of the
powerful, using the language of the powerful.” Benterrak, K., Muecke, S. and Roe, P. *Reading the
Country* (Fremantle: Fremantle Arts Centre Press) 1996 at 143. See also Arthur, K. “Fiction and the
of Aboriginal culture in Australia has been as much the work of the pen as of physical violence.
Aborigines have been written out of literature, out of the law, out of history.” Note here also my
comments in Chapter Three about literature itself being a western colonial medium. Aboriginal
peoples had an oral tradition. So while the dominant history was ‘written’ by the colonisers, there
were oral accounts of Aboriginal experiences of settlement. These were not, however, part of the
dominant written discourse.
immeasurable hardship, endured fires, floods and starvation, but ultimately subdued “the harshest continent on earth”. This version of history excludes Aboriginal people for whom “this “victory” means dispossession, poverty, illness and humiliation and often death; it means becoming strangers in their own land.”

It is this colonial history that has, until very recently, shaped Australia’s identity. As Veronica Brady comments:

Aboriginal Australians have figured, if at all, as incidental to the on-going history of “civilization”, “development” and “progress”, turned into objects of anthropological study or for the delectation of tourists, Orientalised ... figures at best from a prehistory we believe we have superseded and at worst from an evolutionary cautionary tale, figures of the “degradation” we left behind on our way up the evolutionary ladder: “nearest of all to the money [sic] or orang-outang and therefore incapable of enjoying the same state of intellectual existence as ourselves”, as one settler wrote, “the very zero of civilization”, to quote another.

In literature, as in history, there are many versions of the foundation of Australia. These tell us a number of things about settlement and its legal basis and ramifications. They engender popular understandings about the arrival of the English, the taking of the land and the treatment of, and attitudes towards, Aboriginal people. Many early novels parallel the dominant discourse. They replicate and thereby promote the narrative of colonialism and represent Aboriginal dispossession as something which either did not occur or as something that was a natural and inevitable consequence of the land being claimed by ‘superior’, ‘civilised’ beings. Ideas of extinction, death, legitimacy and the

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14 Curthoys, A. “Expulsion, Exodus and Exile in White Australian Historical Mythology” (1999) 61 Journal of Australian Studies 1 at 6. This representation is apparent in texts such as Dark, above n.8.
15 Brady, above n.1 at 42. It also, as explained in Chapter Five, meant social and cultural dislocation as they were separated from their country.
16 Ibid at 43.
17 See, for example, Dark, above n.8.
superiority of the white settlers were common to colonial print culture. In these stories Aborigines are either absent or represented in the image of the ‘noble savage.’ They are, that is, either invisible, non-existent,\(^{18}\) or portrayed as ‘primitive’ people who, although having previously enjoyed an idyllic life, are now, in accordance with accepted social and anthropological theories central to colonialism and modernism, destined to become extinct.\(^ {19}\) Such works support the principle of terra nullius and the legitimacy of settlement. In other words, the narrative of law is played out and supported in much of this literature.

Eleanor Dark’s *The Timeless Land* is one such novel. It tells the story of the arrival of the first fleet at Sydney Cove in 1788 from the perspective of both the white settlers and the Aboriginal inhabitants. We witness the transformation of the land from an idyllic paradise to a place filled with the death and destruction wrought by the white man. In telling this story, Dark is not critical of law’s narrative. Her portrayal of Aborigines as ‘noble savages’ rather serves to reinforce the narrative of law (and colonialism) that Aborigines were ‘primitive’, that they did not have a recognisable system of law and that they did not cultivate, and so did not own, the

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\(^{18}\) For example, Clarke, M. *For the Term of His Natural Life* (Victoria: Currey O’Neil) 1984, first published in 1901. This novel is set in Tasmania during the early years of settlement. It describes the topography and landscape of Tasmania in some detail and tells of many attempted escapes by convicts through this harsh landscape. Yet, except for one mention of “a black tracker at his heels” at 235 - 236, nowhere in this story is there any mention of the Aboriginal people of Tasmania. The novel is a colonial story of hardship and survival, of the brutality of both the convict system and the harsh Australian land. There is no role for Aborigines in this story. They are not mistreated, they are not dispossessed, they neither aid the white man nor defend their own land. They are completely absent. The land is represented as truly terra nullius.

\(^{19}\) These theories included those of social Darwinism. As explained by Haebich: “the pseudo-scientific theory of Social Darwinism … postulated that Aborigines were the least evolved race in the world and as such they were doomed to pass away. This was seen to be nobody’s fault as such, rather it was an inevitable part of the process of human evolution: in the struggle for survival the ‘fittest’ survived while the less evolved became extinct.” Haebich, A. *For Their Own Good: Aborigines and Government in the Southwest of Western Australia* (Nedlands: University of Western Australia Press) 1988 at 47 – 48.
land. For example, the opening scene of the novel describes the idyllic life enjoyed by Aboriginal people:

Bennilong and his father had come down to the cliffs again, alone. It was quite a long way from the place where the tribe was camped, and they had set out early in the morning when the heat of the midsummer day was only a threat, and the spider-webs across their path were still glimmering with dew. Now it was after noon, and though Bennilong was six, and expected to bear himself like a man, he was tired and sleepy and a little cross, and he sat in the shade of a rock with his copper-coloured legs thrust out in front of him, and his fingers idly making curly marks in the thin, hot sand. His head was bent, his lower lip protruded, his dark, liquid eyes were sulky. And yet, although this sleepiness, this crossness, lay upon his spirit like a weight, he had a sense, too, of a larger contentment which included it, and made it trivial. He was conscious of the world, and conscious of himself as a part of it, fitting into it, belonging to it, drawing strength and joy and existence from it, like a bee in the frothing yellow opulence of the wattle. He was conscious of an order which had never failed him, of an environment which had never startled or betrayed him, of noises such as the chorus of the cicadas, less a sound than a vibration on his eardrums, of scents which he had drawn into his nostrils with his first breath, and of the familiar, scratchy touch against his bare skin of sand and twig, pebble and armoured leaf. So that his sulkiness remained isolated in a mind abandoned to sensation — something which, for the present, would go no farther than the outthrust lip and the liquid darkness of the eye, while he absorbed, in absent-minded voluptuousness, his secure and all-sufficient world.20

The image created here is one of a ‘primitive’, childlike innocence, of a people living a carefree and happy existence in a by-gone world. Dark repeats this theme throughout the work with frequent references to the Aborigines’ ‘deep’ and ‘primitive’ wisdom21 and their childlike nature and animalistic characteristics.22 The image clearly supports the dominant colonialist discourse of a natural racial hierarchy. Importantly, it is also supportive of law’s discourse of the settlers’ right to the land as justified by the principle of terra nullius. It legitimates particular

20 Dark, above n.8 at 3.
21 Ibid at 11.
22 “Bennilong was trembling all over as an animal trembles, not with fear but with excitement and leashed alertness.” Ibid at 44.
ways of thinking and so legitimates the taking of Aboriginal land and the disruption of Aboriginal culture.

Not all novels perpetuate this position as openly as *The Timeless Land*. *Doctor Wooreddy’s Prescription for Enduring the Ending of the World* and *The Chant of Jimmie Blacksmith* are more critical of law’s discourse. *Doctor Wooreddy* tells a similar story to that of *The Timeless Land*, giving an account, from the perspective of the last Aboriginal male of Bruny Island, of the brutality of the white invasion and the taking of Aboriginal land. Mudrooroo draws on the diaries of George Robinson, the Protector of Aborigines in Tasmania, to recount the story of the demise of the Tasmanian Aborigines.\(^{23}\) In contrast to these stories of first settlement, *Jimmie Blacksmith* tells the story of a ‘half-caste’ man, searching for his identity and trying to make a successful life for himself in a white man’s world. Based on the real life events of Jimmy Governor, an Aboriginal man hanged for murder in 1901, the story tells of how Jimmie wanted simply to be treated as an equal in white society. To this end, he marries a white woman, secures employment and builds them a house, but continues to suffer sustained racial slurs and mistreatment. Eventually, pushed too far, Jimmie goes on a violent rampage committing several murders before, ultimately, being caught and hanged.

These novels portray a less idealised image of Aboriginal life, and a less fatalistic account of dispossession than that presented in *The Timeless Land*. Mudrooroo, in particular, “undertakes a conscious rewriting of history and thus pose[s] a direct

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\(^{23}\) Brown, J. “Unlearning Dominant Modes of Representation: Mudrooroo’s *Doctor Wooreddy’s Prescription for Enduring the Ending of the World* and Robert Drewe’s *The Savage Crows*” (1993) 3 *Westerly* 71 at 71. George Augustus Robinson was the Protector of Aborigines in Tasmania from 1829 to 1839, when he became Chief Protector of Aborigines for Port Philip in Victoria.
challenge to traditional historical constructions.” Whereas Dark relates a story of the sad demise of a ‘primitive’ race, Mudrooroo tells of the conscious and brutal genocide of a vibrant people. He tells of how they were either killed or forced to move to Flinders Island, where they were not permitted to abide by their traditional laws and customs, and how this separation from their country eventually led to their demise.

In *Jimmie Blacksmith*, Keneally seeks to imbue white Australia with a sense of responsibility for its complicity in the deliberate dispossession of Aboriginal people and the destruction of their way of life. For example, McCreadie, the (white) teacher kidnapped by the Blacksmiths, expresses his horror at the destruction of an Aboriginal sacred site:

> the state of the secret place disturbed him. Many of the large stones had been toppled, the small glaucous ones uprooted and heaved in every direction by picnickers; by exhibitionizing young men of the Manning valley. …

> There were inanities too written on the slabs. There were bottles broken and rebroken to small pieces. …

> McCreadie felt ashamed. Such a threadbare response to a ritual gate, a stone-age basilica; not like Stonehenge, millennia-abandoned and a prey to tourists and the graffiti of corporals from Aldershot. A *used* place, this.

> There were men in Purfleet who knew what the uses were. …

> It had become easy for him to believe, his mind all cross-eyed for lack of air, that if the Taree footballers had not fallen to celebrating their skill on the consecrated stones of another race, there would have been no killings at the Newbys’. It seemed to him almost a principle of law, viable in a courtroom. He would state it when the Blacksmiths were taken.  

Despite Keneally’s intent, however, the novel does not effectively give voice to Aboriginal experiences. It was written at a time when Australia was still a colonial
country and terra nullius remained intact. Governments were still supporting integration and assimilation policies, the *Racial Discrimination Act* had not yet been enacted, children were still being removed from their families and land rights were still not receiving recognition. Ultimately, *Jimmie Blacksmith* is a colonial story. It tells of what white Australians did to Aboriginal people and it creates a white construction of Aboriginal experiences. Like *The Timeless Land*, it does not challenge the underlying discourse of terra nullius which supported the law’s treatment of Aboriginal people.

Clearly, there are obvious divergences in the stories told in these novels and, importantly, in the way in which they are told. As such, it may appear odd to discuss them together. However, despite their differences, all of these texts recount a colonial story. That is, they all tell of the demise of Aborigines at the hands of white settlers. In all of these works there is no future for Aboriginal people. While sympathetic to Aborigines, Eleanor Dark supports the discourse of colonialism by adopting the language of social Darwinism and portraying them as ‘primitive’ people belonging to the past. Accordingly, the novel ends with Bennilong’s demise. In *Doctor Wooreddy*, Mudrooroo presents the genocide of Tasmanian Aborigines as inevitable:

> The phrase ‘It is the times’ becomes a refrain which underlines the inevitability of the defeat of the Tasmanian Aborigines by the European invaders. From the outset, an atmosphere of predestination is created by the author.

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26 The novel was written in 1972, twenty years before the *Mabo* decision.
27 *Milirrpum v Nabalco* (1971) 17 FLR 141 was decided only one year before the first publication of *Jimmie Blacksmith*. This case is discussed in Chapter Five.
Finally, in *Jimmie Blacksmith* the three main Aboriginal characters are all put to death. Mort is shot as an outlaw and Jackie Smolders and Jimmie are hanged as murderers. In all three novels Aborigines are portrayed as a doomed people. There is no possibility of a future empowerment for them. There is no survival.29

In telling this colonial story, however, all of these texts, when read through the lens of postcolonialism, inform the reader about law in a number of important ways. Regardless of their political or ideological premises, they all make evident the fact of Aboriginal dispossession, and they all make clear that it was the discourse of law (and terra nullius) that legitimated this taking of Aboriginal land. In so doing, these novels illustrate the very real impact that terra nullius had on Aboriginal people and highlight the power of the law to effect the everyday. They also demonstrate the way in which the law constructed an image of Aborigines as ‘other’ and denied them the right or the ability to speak within its discourse, to object to their dispossession and so silenced them. These are all themes I explore more fully below.

**Beyond Terra Nullius: The Reality of Dispossession**

One of the arguments I raised in Chapter One was that the law has considerable impact on the lives of its subjects beyond the purely legal. Terra nullius is one area in which this argument is clearly explicated. While the jurists and judges discussed in Chapter Five concerned themselves with the parameters of terra nullius as a

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29 One of the novels discussed in Chapter Seven, Grenville, K. *The Secret River* (Melbourne: Text Publishing) 2006 also tells this colonial story of settlement. However, her novel is written after the *Mabo* decision and is a more informed telling of this story. Whereas the novels here portray Aborigines as ‘doomed’, Grenville, although describing them as in a similar position, is more respectful of them. This is particularly evident when compared to Dark, above n.8. Grenville revisits the colonial history from the position of an informed narrator.
legal principle, its real everyday effects were being experienced thousands of miles away by Australia’s Aboriginal peoples. As revealed in the texts discussed here, the impact of the application of the principle of terra nullius spread far beyond questions of law. Terra nullius was not just a legal principle about sovereignty or rights of occupation. It was about the dispossession of Aboriginal people and the destruction of their way of life. All of the novels discussed here comment on and portray dispossession as integral to Australia’s settlement.

Even *The Timeless Land*, with its romanticised vision and images of an idyllic paradise, suggests the land is wrongfully taken from the Aborigines. Dark describes the anger felt by Tirrawaul as he watched the “men who came as strangers to a land, and yet trod its soil as if it were their own”,30 and she allows the “black men” to ask:

> And was it not injustice that these Bereewolgal [white men] should, with their great canoes and their great nets, go hauling up and down the harbour so that there were no fish left for the black men to spear, or for the black women to catch on their lines? … was it right that the Bereewolgal should still feast while they, to whom the land belonged came near to starving?31

Yet, as explained above, Dark was not a critic of settlement. She does attribute some of the settlers with some sense of the injustice of dispossession, as when Phillip reflecting upon the impossible orders with which he had been issued, questions:

> Am I to convince these people that it was “necessary” to steal their land from them? That it is “necessary,” having stolen it, to hunt their game, to haul nets in their waters? That it is “necessary” now to send an armed force against them? What is this “necessity”? The necessity for a distant jail in

30 Dark, above n.8 at 39.
31 Ibid at 161.
which to herd our criminals! The necessity for another colonial possession!
The necessity for empire and dominion, for power and glory ...\textsuperscript{32}

However, she accepts that this dispossession was a natural and inevitable
consequence of white civilisation and in this Dark is supportive of colonialist
discourse. When read from a postcolonial perspective, ultimately this novel tells
the story of the death and demise of its main characters, of the loss of their land
and of the destruction of their culture.

In \textit{Doctor Woreddy} the images of dispossession created by Mudrooroo are
devastating and total:

\begin{quote}
They came like thieves when least expected. They took our land; they took
our women, and they take our lives.\textsuperscript{33}
\end{quote}

He powerfully explicates the consequences of the application of the principle of
terra nullius on Aboriginal people. The novel shows how, as the settlers arrive,
Aborigines are pushed further and further off their land to the point that,
eventually, they are rounded up and completely removed from their land. They
are physically herded into other areas, where they are compelled to remain. They
are to be segregated and are forbidden to exercise their traditions and customs.

What is important about this work is that it is made clear to the reader that
dispossession did not only mean the loss of land, but that with this wholesale
dispossession came the devastating disruption of the culture and way of life of the
Tasmanian Aborigines and, in this, it clearly informs the reader of the impact of
law beyond the legal. This is evidenced in Mangana’s lament that:

\begin{quote}
‘\textit{Num} [white men] come; they see what they want; they take it. It is their
way. They do not know Great Ancestor and his laws. I remember when I
\end{quote}

\textsuperscript{32} Ibid at 352 – 353.

\textsuperscript{33} Mudrooroo, above n.9 at 122.
first saw their big catamarans. I did not know what they were, or perhaps I did because they scared me … They killed needlessly. They were quick to anger, and quick to kill with thunder flashing out from a stick they carried. They kill many, and many die by the sickness they bring. Now all I have left is my little daughter. Once nine shared my campfire. Now it is hard to find nine members of my clan. A sickness demon takes those that the ghosts leave alone.’

This is a theme raised a number of times throughout the novel. The totality of dispossession and its impact is reiterated when Wooreddy is discussing with Walyer and Ummarrah whether or not to trust Mr. Robinson’s promise of leading them to a ‘promised land’, that is, Flinders Island:

[Ummarrah] now declared in his strong voice: ‘They have no authority to make us go where they want us to. This is our land and we have always been here. We have numbered the trees and the very blades of grass. Great Ancestor together with his family made everything. Emu Ancestor made my land and if I were there I could take you over it and show you where he walked. They can never take away our land. I will retreat into the mountains. They will never find me there.’

But they had taken the land; they all knew this, …

… The good doctor noticed how many num words they spoke and suddenly realised that more and more num words had also entered his vocabulary. ‘Yes, there does not seem to be much of a choice,’ he spoke into the silence. ‘Things are so different now, right down to the words we speak.’

The totality of the dispossession is complete. The Aborigines have lost their land, their culture, their people and their language. Mudrooroo is echoing here Memmi’s assertion that:

Finally, the colonizer denies the most precious right granted to most men: liberty. Living conditions imposed on the colonized by colonization made no provision for it [the recognition of the colonized as an individual]; they ignore it. The colonized has no way out of his state of woe – neither a legal outlet (naturalization) nor a religious outlet (conversion). The colonized is not free to choose between being colonized or not being colonized. What is left of the colonized at the end of this stubborn effort to dehumanize him? He is surely no longer an alter ego of the colonizer. He is hardly a human being. He tends rapidly towards becoming an object. As an

34 Ibid at 11.
35 Ibid at 117 – 118.
end, in the colonizer’s supreme ambition, he should exist only as a function of the needs of the colonizer, i.e., be transformed into a pure colonized.36

Doctor Wooreddy and the other Aboriginal characters have lost their right and their freedom to choose or control their lives and their fate. They have been reduced to mere objects of the settlers’ colonial ambitions.

In contrast to The Timeless Land and Doctor Wooreddy, Jimmie Blacksmith is set at the time of federation and informs the reader of the continuing, long-term impact of terra nullius and dispossession. Jimmie is forced to work on the outskirts of white society, is unable to own his land, is treated without respect by the white men and women, and suffers discrimination. Despite his efforts, he will, as an Aborigine, never be fully accepted into, or allowed to participate in, white society.

At the beginning of the novel the Nevilles say to him:

If you could ever find a nice girl off a farm to marry, your children would only be quarter-caste then, and your grandchildren one-eighth caste, scarcely black at all.37

Jimmie does as the Nevilles suggest, but this does not enable his acceptance. Jimmie himself reflects:

that although they were church-wed and had been named a family, they still had very little right of reply in a population that sprouted blunt precept.38

Jimmie is prepared to play his own part in his own negation, literally. Terra nullius had not just dispossessed him of his land. It had dispossessed him of acceptance.39

37 Keneally, above n.10 at 7. The Nevilles were the Reverend H.J. Neville and his wife. They took Jimmie in as “some sort of servant or houseboy.” Ibid at 8.
38 Ibid at 58.
39 One of the ways in which Aboriginal people have been dispossessed of acceptance is through the various Aborigines Acts that were in place in Australia until well into the twentieth century, which defined and then restricted the rights and movements of Aboriginal people. Although Jimmie Blacksmith is not about such legislation specifically, it does tell about the effects of this sort of defining legislation. This is discussed more fully in Chapter Nine.
Jimmie Blacksmith is a violent novel, but it is a violence of despair arising from the dispossession of Aboriginal people. It contains scenes of colonialist discourse prophesising the demise of Aboriginal people, thus giving the settlers the legitimacy to take the land, as when Jimmie visits the Department of Agriculture Office and hears an argument over whether the colonies should federate:

The Australian too adverted to Jimmie.
“Jacko?” he called. “He’s an honest poor bastard but he’s nearly extinct.”

“It’s a hard country. Lower ways of life give way to the higher. … So poor bloody black Jacko’s gone. It’s sad, but he had to go …” 40

The ultimate comment on dispossession, however, is the refusal to hang Jimmie “in the Federation’s early days.” 41 Australia had become a nation. The new nation could not be founded on the deliberate putting to death of blacks. Not this time:

Then Australia became a fact.
It was unsuitable, too indicative of what had been suppressed in the country’s making, to hang two black men in the Federation’s early days. … People laughed in their state of grace, the old crimes done, all convict chains a rusted fable in the brazen Arcady and under the roar of buskers in temperate April 1901.
And the other viciousness, the rape of the primitives? – it was done and past report. 42

The new nation’s first thought is not how to help Aboriginal people, to ensure that their mistreatment would be addressed. It was to ‘move on’, to leave the “rape of the primitives” in the past, and to postpone the hanging of Jimmie until a more appropriate and convenient time. Clearly, Keneally here is commenting on the taking of Aboriginal land and the failure of white Australia to accept responsibility for the consequent devastation wrought on Aboriginal people. The new nation of

40 Keneally, above n.10 at 16.
41 Ibid at 177.
42 Ibid at 177.
Australia was not to be founded on bloodshed. Its new Constitution had just been proclaimed.  

What is important here is that in highlighting the way in which white law simply decided to take Aboriginal land under the guise of terra nullius, and so disrupt Aboriginal life and culture, these novels inform, and encourage the reader to think, about the basis upon which Australia was founded. They inform the reader that it was the law that constructed Australia as empty, and that it was law’s discourse of terra nullius that justified the taking of Aboriginal land and enabled the disruption of Aboriginal cultures and ways of life.  

In so doing, these texts exemplify the extent to which law is part of our everyday. It regulates and controls many aspects of our social existence. And it is a totalising discourse that does not accommodate difference and plurality. In both The Timeless Land and Doctor Wooreddy we see this totalising discourse reduce Aboriginal people to pawns in England’s colonial expansion. They were treated by the law as different, as objects whose legal and social existence did not fit, and could not be accommodated, within law’s discourse. Similarly, in Jimmie Blacksmith we see how law’s persistence in upholding the rights of the settlers to Australian soil enabled and allowed for Aboriginal people to be marginalised, scorned by society and denied access to the dominant discourse so that, despite his aspirations, Jimmie was not accepted into white society.

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43 The Commonwealth of Australia Constitution Act 1901 (Cth) excluded any mention of Aboriginal people.

44Even though Phillip was instructed to make friends and not to disrupt the culture. As explained in Chapter Five, his second commission instructed him to “endeavour by every possible means to open an intercourse with the natives, and to conciliate their affections, enjoining all our subjects to live in amity and kindness with them.”

45 As did (and does) Aboriginal law for Aboriginal people.
Constructions of Aboriginality

As argued in Chapter One, one of the ways in which the law is able to extend its reach beyond the legal is through the construction of identity and the creation of knowledge. As explained there, the law imposes standards of behaviour which reflect, and so promote, particular constructed values and norms. In this way, law is complicit in creating knowledge about, and perceptions of, certain groups of people within society, such as Aborigines. From the outset of colonisation, the discourse of law created knowledge about Aboriginal people based on race and culture, constructing an image of Aborigines as ‘primitive’ and ‘uncivilised’, a remnant of the past destined to extinction. It constructed and labelled Aborigines as ‘other’, and, as explained in Chapter Two, the discourse of law, in treating those who fall within constructed categories of non-conformity or difference as ‘other’, reinforces its dominant discourse and dominant power relations. It denies those who are labelled ‘other’ any particular right, legitimacy or authority to be heard, within the dominant discourse.

This characterisation and representation, by the law, of Aborigines as ‘primitive’ without any recognisable legal system and who neither owned nor cultivated the land was central to law’s discourse. It legitimated the application of the principle of terra nullius to Australia and so provided the legal foundation and justification for settlement. As noted by Brady:

in the history of contact between Aboriginals and non-Aboriginals, favourable representations have been rare. Dampier set the tone in the seventeenth century with his picture of them as “the miserablest race on earth”, a picture which supported the conviction that their land existed to be colonised and that they needed to be “civilised” by us.46

46 Brady, above n.1 at 43.
Ultimately, it also enabled (and enables) us to justify ourselves.

Images, of course, are usually forms of alienation from one self and reality, and it is this attempted separation of Aboriginal people from their history and culture on the one hand and on the other the cult of forgetfulness on our part which, writing them out of our history, inserts them into the fantasies by which we justify ourselves.\(^{47}\)

Importantly, the images and stereotypes used to legitimate and justify occupation informed and shaped the perceptions that many Australians had (and continue to have) about Aboriginal people and Aboriginality. In this way, the construction of the Aboriginal ‘other’ has impacted (and impacts) on all forms of legal, social, political and cultural interactions.\(^{48}\)

All of the texts discussed here inform the reader about how the law constructs the ‘other’. Importantly, they show the reader that the law represents this colonised ‘other’ to be inferior. As Brady notes:

Colonization produces the colonized, and produces them as inferior, subordinate to the colonizers’ purposes. Notions of “white” superiority thus provided the justification for the destruction of Aboriginal resistance and the attempted destruction of their culture.\(^{49}\)

Both *The Timeless Land* and *Doctor Wooreddy* make apparent the way in which the law labelled Aborigines as ‘other’ from the very beginning of colonisation. In *The Timeless Land* this dominant discourse is mirrored in Dark’s many descriptions of the Aborigines as ‘primitive’ or ‘childlike’.\(^{50}\)

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\(^{47}\) Ibid at 43.

\(^{48}\) And this, as explained by Foucault, gives law its power: “… there is no power relation without the correlative constitution of a field of knowledge … .” Foucault, M. *Discipline and Punish: The Birth of the Prison* trans. Alan Sheridan (New York: Pantheon) 1977 at 27 – 28.

\(^{49}\) Above n.1 at 46.

\(^{50}\) Dark imbues Aborigines with a “primitive wisdom”, above n.8 at 135; and a wisdom “primitive enough” ibid at 11; and describes Aborigines as “primitive creatures” ibid at 34; and “not civilised enough” ibid at 164.
They were the children of the human family, having the gaiety, the monkey-like inquisitiveness, the monkey-like lack of application of the very young. They had, as children have, a deeply rooted sense of justice; like children they were generous, devoid of rancour or suspicion, driven by the impulse of the moment, vain, inveterate actors and mimics.51

Dark draws heavily on Aboriginalism in telling this story. As explained in Chapter Four, Aboriginalism is a way of representing Aborigines as noble savages, as mystical, primitive, and wise. It gives the colonisers the power and the right to represent Aboriginal people within the dominant discourse and thereby serves to publicly silence Aboriginal voices and stories. It denies Aboriginal people the right to tell their account of Australia’s settlement and its consequences. By adopting this technique, Dark constructs an identity of Aborigines that allows the reader to ignore the dispossession and violence shown towards them or, more accurately, discard it as sad, tragic even, but of no particular consequence, for they were a people of the past. She is content to view the plight of the Aborigines with some nostalgia and sympathy and presents a romanticised image of their way of life. However, as noted by Hodge and Mishra, she:

in effect removes [the Aborigines] from history. However positive she is about the value and validity of Aboriginal beliefs, she has situated them in a kind of ‘dreamtime’ which exists outside the material world and physical space and time.52

The image presented remains the romanticised one of a ‘primitive’ people living in an idyllic past.

This construction of Aboriginality begins to be challenged in Doctor Wooreddy and Jimmie Blacksmith. In Doctor Wooreddy Mudrooroo “calls into question the validity of white Australia’s cultural and historical constructions of aboriginality

51 Ibid at 135.
and suggests a far less palatable version of history.” As a postcolonial writer, he comments on and critiques the Aboriginalist premise used to support colonialist discourse. He tells an Aboriginal story from the perspective of Aboriginal characters, and comments on the constructed white knowledge of Aborigines by turning it on its head. He presents the white men as primitive, describing them as ‘ghosts’ and hideously ugly, and unable to survive on the Aborigines’ land. They are not the “brave and daring pioneers” of earlier tales, such as *The Timeless Land.* Rather, virtually “all white characters are physically deformed, have some kind of speech impediment and are renowned for their cannibalistic tendencies.” For example:

They explained that although they had volunteered to meet the *num*, they had not realised just how ugly he would be. Wooreddy tried to put their minds at rest by saying that the ghost looked hideous because he had a skin disease and that under the ointment he had smeared on his skin, he was quite handsome. They were not entirely convinced. ‘But apart from his ugliness and bad smell, he even acts like a demon. He ran out of the jungle as if he meant to devour us all! And don’t tell us that the *num* doesn’t eat humans, they eat each other and who knows what they would do if they caught one of us.’

Aborigines, in contrast, are described as ‘humans’ and as having a highly complex society and law. Gone are Dark’s romanticised images of the ‘noble savage’ living in a forgotten paradise. Mudrooroo constructs a positive image of Aborigines. He:

... rehumanises [them] by celebrating their culture and their dignity, so legitimises an Aboriginal history. ... By using an Aboriginal history which has been neglected and excluded from most Australian history books, Doctor Wooreddy attempts to reshape white Australia’s historical

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53 Brown, above n.23 at 73.
54 It is important to emphasise that Mudrooroo, in contrast to Keneally, is giving an Aboriginal voice to Aboriginal experiences of settlement.
55 Brown, above n.23 at 73.
56 Ibid at 74.
57 Mudrooroo, above n.9 at 91.
consciousness by offering a revised and positive reading of Aboriginal history and culture.\textsuperscript{58}

In rehumanising the Aboriginal ‘other’, Mudrooroo clearly exposes the way in which the discourse of law and its constructions of Aboriginality, which underpin the foundation of this country, legitimate, and are legitimated by, racism and prejudice.

Thomas Keneally is also critical of the way in which constructions of Aboriginality have informed public perceptions of Aboriginal people:

‘We Europeans are so poor in spirit that the best we can do is laugh at primitive people who, in my experience, always have something. God knows what it is, but something.’

The girl sniffed at the word something. Wayward girl that she was, she still thought that she had a heritage and that she surpassed Jimmie.\textsuperscript{59}

\textit{Jimmie Blacksmith} is set a hundred years after settlement and it is not only these images of the ‘primitive’ that Keneally addresses here, but also those of Aborigines as unable to look after themselves and their families, and as ‘lazy’ and ‘alcoholic’. Jimmie is described as having “drunk a lot of bad sherry early in the afternoon”,\textsuperscript{60} and Wongee Tom is portrayed as a ‘bad influence’, discouraging Jimmie from looking for work:

\begin{quote}
Don’t git a job in the open-cut. Come round to the Caledonian Sat’dee night. Is all a poor black bastard got left.\textsuperscript{61}
\end{quote}

What is of concern to Keneally here is the way in which these images of a mystical, ‘primitive’, ‘other’ and the ‘degenerate’, ‘lazy’, ‘alcoholic’, legitimise and perpetuate racism. As exemplified throughout his work, it is this perception of Aborigines

\begin{itemize}
\item \textsuperscript{58} Brown, above n.23 at 73.
\item \textsuperscript{59} Keneally, above n.10 at 47.
\item \textsuperscript{60} Ibid at 25.
\item \textsuperscript{61} Ibid at 12. There are many other such descriptions such as the “[l]azy members of [Jimmie’s] totem” ibid at 24.
\end{itemize}
that justifies and renders acceptable the discrimination and lack of respect with which Aborigines are treated. If they were indeed as the law, and popular imagery, represented them there was nothing that the white population could do for them anyway. They were a people who were (justifiably) destined to extinction, in accordance with principles of social Darwinism.

Mudrooroo and Keneally’s novels are, however, also problematic in some ways. Hodge and Mishra, in particular, contend that Jimmie Blacksmith draws heavily on Aboriginalism, arguing that, in this novel, “the Aboriginal perspective comes not from any Aboriginal voice, but from Aboriginalism and its myths”. They cite as an example of this the scene describing Jimmie’s birth:

Half-breed Jimmie had resulted from a visit some white man had made to Brentwood blacks’ camp in 1878. The missionaries – who had never been told the higher things of Wibbera – had made it clear that if you had pale children it was because you’d been rolled by white men. They had not been told that it was Emu-Wren, the tribal totem, who quickened the womb.

Mrs. Dulcie Blacksmith believed the missionaries more or less. They took such a low view of lying in other people that they were unlikely to lie themselves. And certainly, Mrs. Blacksmith had been rolled by white men. For warmth in winter, she once said. For warmth in winter and for comfort in summer. But the deep truth was that Emu-Wren had quickened Jimmie Blacksmith (pale or not) in the womb and that Mungara owed him a woman.

For Hodge and Mishra there are two important points raised in this passage. Firstly, it portrays biological facts as beyond the comprehension of Aborigines. They require the white missionaries to give them this knowledge. As Hodge and Mishra comment:

This ‘knowledge’ … turns out to be a hoary myth straight out of Aboriginalism, that Aboriginals did not understand the basic facts of human

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62 Hodge and Mishra, above n.52 at 60.
63 Keneally, above n.10 at 1 - 2.
biology before the coming of White science, that they had only a childlike grasp of human sexuality and the role of the father.\textsuperscript{64}

Secondly, it shows that, conversely, the missionaries have no understanding of Aboriginal beliefs, “which are, however, so well-known to Keneally’s narrator, who it seems has been ‘told’ them.”\textsuperscript{65} They go on to argue:

Keneally’s Aboriginalism is … structural. His label for Jimmie, ‘half-breed’, neither one thing nor the other comes not out of anthropological or scientific nor even missionary discourse, but out of the popular racism which delegitimated any departure from an abstract form of pure Aboriginality.

Keneally’s narrative endorses the Aboriginalist premise: in his account Jimmie is excluded in important ways from Aboriginality, to which only his fully Aboriginal half-brother, Mort, and his uncle Jackie Smolders have access.\textsuperscript{66}

For them, \textit{Jimmie Blacksmith} is another example of white constructions of Aboriginality “that still leaves Aborigines as the dispossessed, in a White-dominated status quo.”\textsuperscript{67} Hodge and Mishra are right in their criticisms of this work.\textsuperscript{68} As stated above, \textit{Jimmie Blacksmith} is still a colonial story that creates a white construction of Aboriginal experiences. In contrast, \textit{Doctor Wooreddy} does allow for the Aboriginal story to be told from the perspective of Aboriginal characters. As such, although his work has been subject to some criticism, it cannot be criticised for being Aboriginalist.\textsuperscript{69}

\textsuperscript{64} Hodge and Mishra, above n.52 at 60.
\textsuperscript{65} Ibid at 60.
\textsuperscript{66} Ibid at 61.
\textsuperscript{67} Ibid at 62.
\textsuperscript{68} Keneally himself recognised this when he stated that if he were to write the novel again he would do it differently, that he would be more sensitive to a white appropriation of a black story. Keneally, T. “The borrowers” \textit{The Age} August 30, 2003 <http://www.theage.com.au/articles/2003/08/29/1062050656844.html> Retrieved on 30 June 2008. It is also worthy of note that Aboriginalist thoughts continue in many forms today. Consider former Prime Minister, John Howard’s Coalition Party launch on November 12, 2007 where he talks of Aborigines “preserving their special place in the affections and history of our nation” and wanting them “to share its bounty by becoming part of the mainstream of the Australian community”. Howard, J. “Coalition Campaign Address” Liberal Party of Australia <http://www.liberal.org.au/info/news/detail/20071112_CoalitionCampaignAddress.php> Retrieved on 1 July 2008.
\textsuperscript{69} For a critique of \textit{Doctor Wooreddy} see Arthur, above n.13.
No Right to Speak: Silencing Aboriginal Voices

One of the consequences of creating this image and knowledge of Aborigines as ‘primitive’ and ‘uncivilised’ was that the law silenced Aboriginal voices and excluded Aboriginal stories from the dominant discursive domain.\(^70\) That is, the law’s inability or unwillingness to recognise Aboriginal points of view created a différend. As explained in Part One, the différend refers to an inability to speak, or more specifically, to be heard within the dominant discourse.\(^71\) It arises because of the incommensurabilities that occur when one of the parties does not, or cannot, speak in the idiom of the other, and its existence is manifested in a silencing of the marginalised. Until very recently, the dominant culture and discourse in this country did not hear the voices of Aboriginal people.

The consequences of this silencing were (and are) considerable. Firstly, as Shoemaker notes:

> the near-invisibility of blacks in Australian historiography masked for so long the fact that Aborigines and Europeans held radically different views of what actually happened in black / white interracial history.\(^72\)

Their side of the story was simply not heard. By constructing Aborigines as ‘other’ the law already judged them and denied them the right and ability to tell their side of the story. Secondly, silencing Aboriginal voices allowed white Australia to maintain control over constructions of, and knowledge about, Aboriginal people. Denying them the right and ability to represent themselves meant that they could be represented by others, “who know more about them than they know about

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\(^70\) This is seen in the way that legislation defined, restricted and silenced Aboriginal people. This is touched on in Keneally, above n.10. It is also discussed in Chapter Nine.

\(^71\) “As Gayatri Spivak says, the crucial question is not whether the subaltern … can speak – obviously they can – but whether people of the dominant culture can hear them.” Brady, above n.1 at 49.

\(^72\) Above n.28 at 131.
themselves.”73 As discussed above, they were often represented as the noble savage, as ‘primitive’ and ‘childlike’. This representation:

justified our speaking for them, excluding them from power and subordinating them to our purposes and values. In this way … Aboriginal people have been held as hostages to images of our creation.74

It allowed for the perpetuation and legitimation of authorised (white) ‘truths’ about Australia’s settlement, and about the place of Aboriginal people within Australian society.

All of the novels discussed in this chapter inform the reader that the law denied Aborigines a right and ability to argue against the injustices which they suffered. They all inform about how the discourse of law gave rise to a différend and about how Aborigines were silenced within this discourse. None of the texts allow for the possibility of the empowerment of Aboriginal people, or for Aboriginal people to be given a voice.75 There is no opportunity for the différend to be overcome. In The Timeless Land the reader is presented with the romanticised image of a ‘primitive’ race that belongs to the past. In Doctor Wooreddy the image is one of genocide, and in Jimmie Blacksmith it is one of a violent, drunken reprobate who is (deservedly) put to death. These novels show how the law would not allow Aborigines to remain on their land and continue with their ways. It would not allow them to object to the way they were treated. It could not, and would not, hear Aboriginal voices.

73 Hodge and Mishra, above n.52 at 27.
74 Brady, above n.1 at 43. And, as noted by Larissa Behrendt, focusing on the imagined makes the real invisible, and this “invisibility of the real because of a focus on the imagined creates a kind of psychological terra nullius where, even though Aboriginal people are physically present, they are not seen.” Behrendt, L. “What Lies Beneath” (2006) 65(1) Meanjin 4 at 6.
75 Although Jimmie did have some power with his gun. The fact that Jimmie killed people was his way of saying that he wanted a voice. In this way, he fought against the marginalisation that he experienced.
In *The Timeless Land*, for example, the reader sees how the English were unable to conceive of any way of being other than their own, and that they could only see Bennilong as the exotic ‘other’. Governor Phillip takes him to England and attempts to ‘civilise’ him, however, he is unable to fit within, and engage with the niceties of, English society. The two parties were not speaking in the same idiom. Consequently, it is the marginalised, that is, Bennilong’s voice that is silenced. He was silenced by being removed from his own people and he was silenced when he was not able to be heard by the English. Ultimately, the novel ends with his demise once these attempts to ‘civilise’ him have failed.

In *Doctor Wooreddy*, Aborigines are silenced by being killed, and taken away from their land and herded onto Flinders Island. The white law forcibly removed Aborigines from their land and denied them the right, under that law, to challenge white ownership of the land. They have no-one to appeal to, no-one who will listen to their voice. They are unable to object, within the white discourse, to the destruction of their way of life:

‘When first we came we had hopes and there were still youths to be made men. We made a ground and then the commandant told us not to dance at night. We agreed in our way and tried to continue, but he stopped our food until we really gave up our ceremonies. If he caught anyone even talking about them, he was put in gaol. Our ground used to be where that field is. He made us dig it up. He said that we were Christians and that if we wanted to sing we had to sing in that chapel shelter there. We sing there every evening, and that is now our ceremony.’\(^{76}\)

Two of the main characters in the text comment on the way in which the law’s constructions of Aboriginality resulted in a *différend*. Wooreddy remarks that,

\(^{76}\) Mudrooroo, above n.9 at 158.
“they don’t even believe that we can speak like this or choose our own destiny”\(^\text{77}\), and Trugernanna explains to Robinson:

‘We did nothing wrong; we were only trying to get back home! That man that was killed. Long ago he raped me. Black women can be raped too! We can feel pain and we do not kill without reason. We are not savages. This is only your excuse for not listening to us.’\(^\text{78}\)

Eventually, in *Doctor Wooreddy* most of the Aboriginal characters die, until there is only one Aboriginal woman left and no-one is listening to her.

Finally, in *The Chant of Jimmie Blacksmith*, Jimmie is silenced because he wants to be accepted, and successful, in white society but the white men won’t let him. He is, for example, unable to acquire any land. All the landowners in the novel are white and it is these white characters who retain the power to determine when and where Aborigines may enter upon the land. This eventually results in Jimmie expressing his frustration by killing these “obelisks to white virtue.”\(^\text{79}\) When Jimmie goes to court he is, therefore, tried as a murderer. The law would not listen to Jimmie’s voice. It would not listen to why it was that Jimmie felt compelled to take the action that he had. His real story of dispossession is silenced. And, of course, his ultimate silencing is in being hanged.

This public silencing of Aboriginal voices served to reinforce the legitimacy of the dominant discourse. If Aborigines were unable to tell their story and be heard, within this discourse, then white legitimacy was assured. It also brought about the exclusion of Aboriginal people from many aspects of white law and white society. While Aborigines were included within the law for many purposes, they were

\(^{77}\) Ibid at 204.
\(^{78}\) Ibid at 202.
\(^{79}\) Keneally, above n.10 at 96.
excluded for many others. Formally, Aborigines were deemed to be British subjects, and, as such, were required to comply with the prescriptions of the white law. As will be discussed further in Chapter Nine, their lives were also the subject of considerable restrictive legislation with which they were required to comply. Yet, despite these apparent inclusions, the law excluded Aboriginal people from many of its benefits and protections, and it denied them the right, ability or legitimacy to speak within its discourse. These anomalies are detailed in the *Royal Commission into Aboriginal Deaths in Custody*:

> While theoretically Aboriginal people were to be treated as British subjects, they ‘suffered severe disabilities in the courts’. They were not given equality of legal status, yet were perceived as law-breakers. Because they were not Christians, they often could not testify in court … Many legal impediments existed to Aboriginal people giving evidence and exercising their rights as individuals. In some colonies they could not press charges, were held corporately guilty for the crimes of others, and were not permitted to give evidence because they were pagans. … The justice system was especially alienating for people who were not familiar with this facet of Western culture.80

One area where Aborigines were excluded was in the ‘ownership’ of land. The introduced English common law would not recognise Aboriginal rights to land. It could not conceive of any way of owning land other than as defined by its law of property.81 The way in which the law constructed the Aboriginal ‘other’ meant that Aborigines had no right to the land. Their way of viewing ownership of land and the relationship which they had with the land was excluded from the colonialist, positivist law that arrived with the first settlers. This is something clearly exemplified in the texts discussed here. In *The Timeless Land* and *Doctor Wooreddy* it is apparent in the settlers’ assumption of the lack of need to negotiate

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80 Above, n.12 at 10.6.2 – 10.6.3.
81 This was made clear as late as 1971 in *Milirrpum v Nabalco*, above n.27.
with or compensate Aborigines for the loss of their land. It is also apparent, particularly in *Doctor Wooreddy*, in the way in which the settlers physically and forcibly removed Aborigines from their land and herded them into areas of land, ‘generously’ set aside by its new owners, where they were compelled to remain. In *Jimmie Blacksmith*, the exclusion is perhaps more stark. Jimmie is not simply dispossessed of his land here. He is unable, because of his Aboriginality, to acquire and own any land. All of the landowners in this novel are white.

As stated above, Aborigines were also, despite being subject to law’s prescriptions, excluded from its protections. And so, in the texts discussed here, the reader is shown how Aboriginal people were, on the one hand, subjected to physical attacks, for which they had no recourse, and, on the other, severely punished if deemed to be the perpetrator of any illegal act. In *Doctor Wooreddy*, for example, Robinson rebukes a shepherd for killing some Aborigines. The shepherd’s response is telling:

‘Yes, sir,’ the shepherd replied without conviction or care. What did it matter to him! They were just a bloody pack of crows, better off dead. He decided to agree with what the governor said no matter how silly it was. That was the best way of handling this. And no one had been hanged for killing a crow yet.82

There is no such leniency when it is white men who are killed. The novel ends with Ummarrah’s standing trial in a white court for the murder of white men. It is determined that he “should feel the full weight of the law”83 and he is condemned to death, even though he felt he was only acting in self-defence. As he states:

‘Just about all my people have been killed or murdered. We only killed in self-defence or for the injuries inflicted on us. Lalla Rookh killed that man

82 Mudrooroo, above n.9 at 99.
83 Ibid at 202.
for raping her when she was a young girl. He was an ugly brute. The other was killed when he came to his assistance. This is all that I have to say.84

Aborigines were excluded from the protection of the white law yet subject to its punishment. Aboriginal stories were excluded from the courtroom and from the white law.

Perhaps the most poignant example of the power of law’s discourse to exclude is in The Chant of Jimmie Blacksmith. As detailed above, this story is set at the time of federation. Yet the document which would enable this federation, the Constitution of Australia, did not include Aborigines within its ambit. In this, the novel exemplifies the extent of the law’s power to define, exclude and silence that which it deemed unworthy of inclusion. Aborigines were considered to be a ‘dying race’. There was no need to include them as citizens of the new nation of Australia.85 They were defined as an obsolete ‘other’ and silenced and excluded.

The white law determined that there was no Aboriginal law which it had to recognise or to negotiate with.

**Conclusion**

In this chapter, I have argued that the three novels discussed here inform the reader about law in a number of ways. They show the impact that the law can have on the lives of it subjects, by explicating that the discourse of terra nullius did not simply enable the English to claim sovereignty over Australia, but that the application of this principle dispossessed Aboriginal people and destroyed their way of life. Beyond this, they inform the reader about the way in which the law

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84 Ibid at 204.
85 Not until 1967 was the Constitution amended so that the Commonwealth had power to legislate about Aboriginal people, and so that Aborigines could be counted in the census.
produces knowledge and constructed an image of Aborigines as ‘primitive’ and ‘uncivilised’. That is, I have argued that these novels illustrate that our law is unable and unwilling to accommodate difference, and that, in failing to recognise Aboriginal points of view, and constructing Aborigines as ‘other’, it has created a différend. Consequently, Aboriginal voices have been silenced and Aboriginal stories excluded from the dominant discursive domain.

In the next chapter, I argue that novels written after the 1992 Mabo decision begin to address these issues of silencing and exclusion. They re-tell stories of dispossession, re-examine constructions of Aboriginality and, most importantly, allow for Aboriginal voices to be heard. They allow for alternative histories to be constructed, retrieving “an Aboriginal past from white histories”,86 and allow for alternative stories to be told.

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86 Brown, above n.23 at 72.
CHAPTER SEVEN

MABO AND THE FICTION OF TERRA NULLIUS: RETELLING STORIES OF DISPOSSESSION

Introduction

‘... then the High Court led the way with the Mabo judgment. It recognised finally that terra nullius was always a lie, ... This country was Aboriginal land and it was stolen from them without compensation. That was unfair.’¹

In Chapter Six, I argued that stories of dispossession written prior to the Mabo decision clearly inform the reader about the role of the law in the deliberate dispossession and mistreatment of Aboriginal people. They highlight the complicity of the law in the construction of Aborigines as ‘primitive’ and ‘uncivilised’, which was essential in justifying the application of terra nullius to Australia, and expose how the law created a différend in its failure (and unwillingness) to recognise Aboriginal perspectives. This law silenced Aboriginal people and denied them the ability to challenge the settlers’ taking of their land and disruption of their culture. That is, the texts discussed there reveal that the English law introduced into this country at the time of settlement was colonialist, discriminatory and inflexible and could not and would not listen to the people who already inhabited this land.

As explained in Chapter Five, it was not until 1992, when the High Court handed down its Mabo decision, that the common law began to address Aboriginal dispossession. In this case, the High Court declared that “[t]he common law of this country would perpetuate an injustice if it were to continue to embrace the

enlarged notion of terra nullius." It recognised that Aboriginal people had been dispossessed because of the inappropriate application of a principle of law and, importantly, that native title did form part of the common law of Australia. And so, for the first time since settlement, the colonial law was beginning to listen to Aboriginal people. It heard that the Meriam people marked out plots of land which they cultivated and that these plots were passed down through the generations. In other words, the Meriam people were able to present their case in a way which could be understood by the western law. In this, Mabo marks the beginning of the dismantling of the conditions that gave rise to the différend. The two parties were finally beginning to speak in the same idiom and the dominant culture was beginning to hear the voice of the marginalised.

Following the Mabo decision we begin to see an increased awareness of Aboriginal stories in many areas, including literature, as evidenced by the numerous literary prizes awarded to those telling these stories. In this chapter, I analyse texts written after Mabo which retell stories of dispossession. Like the texts discussed in Chapter Six, they inform the reader about the impact of the law on the everyday and highlight the way in which the law includes, excludes and silences. However, the texts I analyse here tell alternative stories and expose alternative histories to those in Chapter Six. They tell the reader about a changing law, one which

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2 Mabo v Queensland (No.2) (1992) 175 CLR 1 per Brennan J. at 58.
3 This is not to say that there are no problems with Mabo. See discussion in Chapter Five.
recognises the erroneousness and the inappropriateness of terra nullius.\(^5\) They show that the law is not immutable, and that it can be flexible to accommodate changing community standards.

The texts I discuss in this chapter are *The Secret River*, *The White Earth* and *Journey to the Stone Country*.\(^6\) I argue that these are all postcolonial novels in that, even if not written from an Aboriginal perspective, they present alternative accounts of Australian history and society, which accord a space for Aboriginal peoples’ experiences. In particular, I argue that these texts inform the reader about the role of the law in changing constructions of Aboriginality and in addressing the *différend*. In doing this, these novels imagine a more just future, one borne out of the law beginning to dismantle the conditions that foster the *différend*. These texts engage with the change in the law introduced in *Mabo* and show that Aboriginal people have become more empowered. That is, I argue that the texts discussed in this chapter reveal how there is now a way for Aboriginal people to speak and be heard within the public domain.

I begin with a discussion of Kate Grenville’s *The Secret River*. This novel retells the story of settlement told in *The Timeless Land* and *Doctor Wooreddy*.\(^7\) However, Grenville tells the story differently, using an informed narrator to tell the reader that Aboriginal people were not ‘primitive’, that terra nullius was not an appropriate legal principle to apply to Australia, and that at the time of settlement

\(^5\) Note, however, that *Mabo* did not overturn the application of terra nullius to Australia. It simply questioned it. See Chapter Five.

\(^6\) Grenville, above n.4; McGahan, above n.1; Miller, above n.4.

white settlers and Aborigines were not speaking in the same idiom. In the remainder of this chapter, I discuss *The White Earth* and *Journey to the Stone Country*. In the second section, I show how these novels inform the reader about changing constructions of Aboriginality, and in the final section I examine the way in which these texts reveal how the law has started to break down the incommensurabilities that give rise to the *différend* and hear what Aboriginal people have to say.

**Re-writing the Past: Kate Grenville’s *The Secret River***

Kate Grenville’s *The Secret River* has caused considerable controversy since its 2005 publication. It began life as an exercise into Grenville’s family history and eventually evolved into the fictional story of emancipist William Thornhill. It follows the fortunes of Thornhill from his conviction and transportation to New South Wales in 1806 to wealthy landowner after ‘taking up’ land on the Hawkesbury River. It is a story of colonisation and dispossession that tells of the struggle for land between white settlers and Aboriginal people. It is, however, a white story that is told from Thornhill’s perspective. It is not a story of the Aboriginal response to, or experience of, settlement. As Grenville puts it:

> the subject of this book is actually the white settlers, it’s the white settler response to the fact that the Aboriginal people were on the land they wanted to settle on. It’s not actually about the Aboriginal response to the white settlers.8

Ultimately the story Grenville tells is that the white settlers’ response to the Aboriginal presence was simply to take the land that they wanted.

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Although fictional, Grenville has claimed that the novel is “solidly based on history” and that “[m]ost of the events in the book “really happened” and much of the dialogue is what people really said or wrote.” She has also stated that: “I wanted the book to be based at every point on whatever historical veracity I could find. I haven’t made it up” and “that this book is probably as close as we are going to get to what it was actually like.” Unsurprisingly, such claims have sparked considerable debate over the accuracy of the work and, more widely, the role of the novelist as historian. Mark McKenna, in particular, is opposed to “the new authority of fictive history” and argues that we must “remember the distinction between history and fiction.” He objects to *The Secret River* being presented as history and to the claims made by Grenville about its veracity, pointing out that the accuracy of the novel is questionable, with events and dialogue being shuffled around from different periods and places. Others, notably Inga Clendinnen, further object to Grenville’s assertions that she is able to place herself in the position of a settler two hundred years ago and understand the events which surrounded them, and then present her results as history.

I agree with McKenna and Clendinnen’s point that there is a danger in assuming the historical accuracy of what remains essentially a work of fiction. As

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10 Sullivan, J. “Skeletons are out” The Age, July 2, 2005.
12 Ibid at 9.
13 Ibid at 5. For example, the massacre that Grenville describes as occurring on the Hawkesbury in 1814 actually occurred in 1838 at Waterloo Creek.
14 Clendinnen, I. “The History Question: Who Owns the Past” (2006) 23 Quarterly Essay 1 at 16 – 28. See also Murray, R. “Hollywood on the Hawkesbury” (2007) 51(4) Quadrant 67 at 67. In answering the question, “How far should an historical novel stick to the ascertainable truth?” he says, “Presumably there must be some simplification and heightening for effect and a degree of guesstimation to fill in the gaps. But a best selling novel like Kate Grenville’s *The Secret River* is all most people will ever know about a particular situation, and illustrates many a point.”
Clendinnen states, “[t]housands of people will read *The Secret River* and get some knowledge of their past. That’s great – as long as it’s kept in the fiction section.” I would add to these criticisms a further rider that the novel should not be read as a “salve [to] the conscience”. Grenville dedicates the work “to the Aboriginal people of Australia: past, present and future.” This would seem to suggest that by writing and reading the novel we are able to acknowledge the past and, importantly, move on. However, there are dangers in adopting such a simple stance. As Mark McKenna notes:

> the cliche that we'll move on when we acknowledge the way this land was won is so hollow and such a forlorn hope. Moving on may only be a journey to a new kind of forgetting.

This is not to say, however, that writers of fiction cannot inform their readers of historical events, or that they cannot draw on history in the telling of their stories. Despite the above criticisms, *The Secret River* is a useful work, especially in the context of my argument about how novels written after the *Mabo* decision inform the reader about the law. In the context of the legal, it is an important work. It is a self-consciously postcolonial novel which reflects on the colonial process and the acquisition of land by challenging primitivist representations of Aboriginal people in colonial texts such as *The Timeless Land* and the heterogeneity of ‘settler’

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17 This is supported by her statement in Koval, above n.8 that “my feeling is that until we are prepared to look at all those slightly hidden, slightly secret places in our history, we can’t actually make much progress into the future.” See also Sullivan, above n.10 where Grenville says, “I now feel a great sense of relief that I’ve taken the skeleton out of the cupboard. The kind of paralysis we’ve been in over what we should do about our Aboriginal heritage can be opened up, and we can move on.” These kinds of comments are somewhat self congratulatory given that the novel was written in 2005. Grenville is not the first to draw our attention to the issues that she raises.
18 McKenna, above n.11 at 7.
responses to Aboriginal people. It brings to the attention of the reader the way the
law permitted and legitimated the dispossession of Aboriginal people and, in so
doing, it gives the reader access to the history of the law that was challenged in
Mabo.

As well as writing from the perspective of Thornhill, Grenville also writes in the
third person. This enables her to provide the reader with information about
Australia’s settlement. As she puts it, “what I had to try to do was to let the reader
know what was happening, even though Thornhill sometimes didn’t.”19 By
adopting this technique of the informed narrator, Grenville is able to revisit the
legal basis of the settlement of Australia, informing the reader about the law, and
tell a narrative of dispossession in which the “lie of terra nullius conveniently
enables the clearing of land and setting up of borders and boundaries that signal
European ownership.”20 Even Thornhill has the occasional insight to know that
this terra nullius is a lie:

    It came to him that this might look like an empty place, but … [it] was no
more empty than a parlour in London, from which the master of the house
had just stepped into the bedroom. He might not be seen, but he was
there.21

Nevertheless, as Grenville explains, upon settlement, in accordance with the
principle of terra nullius, “King George owned this whole place of New South
Wales”.22 She goes on to explain the consequences of this:

19 Koval, above n.8.
20 Kossew, S. “Voicing the “Great Australian Silence”: Kate Grenville’s Narrative of Settlement in
21 Grenville, above n.4 at 155.
22 Ibid at 121.
what was the point of King George owning it, if it was still wild, trodden only by black men? The more civilised folk set themselves up on their pieces of land, the more those other ones could be squeezed out.23

Accordingly Will ‘takes up’ his land on the Hawkesbury and squeezes the Aborigines out. Instructing the Aborigines to “bugger off”24 he:

bent down and with a twig drew marks on the dust; a curving line that was the river, and a tidy square representing his own hundred acres. This mine now. Thornhill’s Place.25

It is with this ‘taking up’ of land that Grenville takes exception. She understands, “unlike her fictional family, … [that] the land that has brought it such riches was … acquired through an act of stealing.”26 She tells us about the privilege of the colonisers, which makes what they do possible. She shows that this is the case regardless of whether the coloniser was initially a free settler or not. When the novel begins the reader has hope that because Thornhill has experienced injustice himself he will be a more just man. However, when he is in the colony and then when he has his freedom, he takes up the part of the coloniser and dispossesses. He does this knowingly, for his own benefit. Grenville does not excuse Thornhill by keeping this from the reader. Thornhill’s action, in this way, is consistent with Memmi’s point that regardless of whether the European living in a colony wishes it or not (and Thornhill does):

he is received as a privileged person by the institutions, customs and people. From the time he lands or is born, he finds himself in a factual position which is common to all Europeans living in a colony, a position which turns him into a colonizer. … He could not, of course, have sought a colonial experience, but as soon as the venture is begun, it is not open to him to refute its conditions.27

23 Ibid at 121.
24 Ibid at 194.
25 Ibid at 196.
27 Memmi, A. The Colonizer and the Colonized (London: Earthscan Publications) 1990 at 83.
Thornhill adopts the position of the coloniser and he takes up land as justified by terra nullius. He is able, that is, to dispossess Aboriginal people in the same way that the other settlers have. Memmi goes on:

The fundamental questions are directed to the colonizer at another level. Once he has discovered the import of colonization and is conscious of his own position (and that of the colonized and their necessary relationship), is he going to accept them? Will he agree to be a privileged man, and to underscore the distress of the colonized? Will he be a usurper and affirm the oppression and injustice to the true inhabitants of the colony? Will he accept being a colonizer under the constant gaze of the usurped? Will he adjust to this position and his inevitable self censure?28

In Thornhill’s case he builds his mansion over an Aboriginal rock carving, he has a portrait of himself painted so that he can be reminded “of the person he had become”,29 and he builds a wall around it all to protect himself and his family. He accepts, and benefits from, the privilege of being a coloniser.

As discussed in Chapter Six, one of the ways in which the law justified the application of terra nullius to Australia and legitimated the taking of Aboriginal land was through its representations of Aboriginal people as ‘primitive’, ‘uncivilised’ and ‘savage’. This is something commented on extensively by Grenville in The Secret River. As Will reflects, for example:

everyone knew the blacks did not plant things. They wandered about, taking food as it came under their hand. They might grub things out of the dirt if they happened on them, or pick something off a bush as they passed. But, like children, they did not plant today so that they could eat tomorrow. It was why they were called savages.30

This lack of cultivation that equated with savagery absolved Thornhill of the need to recognise the Aborigines’ prior claim to the land, or to negotiate with them.

28 Ibid at 84.
29 Grenville, above n.4 at 320.
30 Ibid at 141.
Grenville, however, tells us that Aborigines were not ‘primitive’. From the beginning, she depicts them as sophisticated, with their own area of country and systems of law and society, and shows that they did ‘cultivate’ or ‘manage’ the land. We see, for example, how they deliberately burn the land, and wait for the rain to transform the blackened earth with new growth. This, in turn attracts kangaroos on which the Aborigines feed. Here, the narrator tells the reader that the justification for the dispossession of Aboriginal people was wrong, that they did manage the land on which they lived. They simply did so in a manner different to that understood by the English law and the white settlers.

In this way, Grenville’s novel highlights the existence of the *différend* and the way that the settlers’ law silenced and excluded Aboriginal people, rendering them unable, within this discourse, to defend their interest in their land. Grenville explains how this *différend* occurred. She informs the reader that Aboriginal people and the settlers were not able to understand each other because they did not speak in the same idiom. This, as she points out, is not just about language:

> but a complete inability to communicate. It wasn’t just language that the settlers and the Aboriginal people didn’t share. … it was … a world view. The Aborigines, for example, had a culture in which individual competition, individual striving, individual ownership were not part of their world view, and they were unable to understand the way settlers marked out a bit of land for themselves individually, put a fence around it and called it theirs. The settlers, likewise, just couldn’t understand that the Aborigines had just as great a sense of territory as they themselves did but they didn’t need to build a fence or a house or a road to have that.

31 This is similar to Mudrooroo, above n.7, however, Grenville’s purpose here is different. Also it is significant that she emphasises that they cultivate the land as cultivation was central to the judges reasoning in Mabo, above n.2. See also the discussion in Chapter Five.
32 Grenville, above n.4 at 220 – 223.
33 Koval, above n.8.
Thornhill is only ever working from the western legal perspective that does not accommodate difference or pluralism. Grenville’s narrator explains to the reader Thornhill’s (and the law’s) inability (and unwillingness) to hear the voice of the Aborigines, thus giving rise to the différend.³⁴ At the end of the novel, for example, we hear Will talking to Long Jack, the only survivor of the massacre of his people. Thornhill tries to render assistance, by offering Long Jack charity; a blanket and food, but it is rejected. Thornhill doesn’t understand that Jack wants to be left alone, in his place. He does not understand the impact or enormity of what has occurred. The reader here is clearly shown a clash of idioms; white paternalism on the one hand, and Aboriginal self determination on the other.³⁵ It is Thornhill, as part of the dominant western discourse, who prevails.³⁶ He retreats to his house and his “piece of paper to prove it was all his,”³⁷ and turns his back on Long Jack.

The Secret River, like the texts discussed in Chapter Six, doesn’t go beyond settlement and does not offer much hope for its Aboriginal characters. The importance of the work and its point of difference from those discussed in Chapter Six, however, is that the narrator stands post- Mabo and revisits the story to show us what happened legally. Thus, while the Aboriginal characters in the novel still have no voice that is heard within the dominant colonial / settler discourse, the novel does enable current day readers to understand the history of dispossession and how it was legitimated in the minds of the people who took the land. It tells us

³⁴ As Collins puts it “there is no common language or cultural literacy, and there is no empathy.” Collins, E. “Poison in the flour: historical novel or tragic love story?” (2006) 65(1) Meanjin 38 at 45.
³⁵ Grenville, above n.4 at 328 – 330.
³⁶ In a way, however, Long Jack also prevails, but not within the dominant discourse. He does, however, retain his dignity and has the knowledge that the land is really his.
³⁷ Grenville, above n.4 at 329.
why Aboriginal people should be recognised and so, unlike the novels in Chapter Six, leaves open the possibility of change for the future.\(^3\)\(^8\) It is because Grenville is presenting this post-\textit{Mabo} perspective that she is able to revisit this story of settlement and dispossession and show that there was always another story that the law was not acknowledging. And so, when she writes:

\begin{quote}
There were no signs that the blacks felt the place belonged to them. They had no fences that said \textit{this is mine}. No house that said, \textit{this is our home}. There were no fields or flocks that said, \textit{we have put the labour of our hands into this place},\(^3\)\(^9\)
\end{quote}

she is reflecting on, and conveying to the reader, the rigidity and inappropriateness of the principle of terra nullius. Her post-\textit{Mabo} perspective allows her to show that Aborigines had boundaries of land but that this was simply not recognised by the settlers or their law.

Mark McKenna says of fiction, “it tries constantly to break [the] distance [of history] down, to create the illusion that the reader is there and therefore knows what the past is like.”\(^4\)\(^0\) This goes some way to explaining why I find \textit{The Secret River} a useful novel. In taking the reader into the life of Thornhill, Grenville allows us to revisit the legal issues surrounding the claiming of land and the dispossession of Aboriginal people. For me, doing this provides a summary of the key legal assumptions of terra nullius and provides a key to understanding \textit{Mabo}. Once we recognise the way that the law operated at the time of settlement we can have a greater appreciation of later stories which are set in a more contemporary

\(^3\)\(^8\) Her character Blackwood, for example, represents the possibility of an alternative. He respects and acknowledges Aboriginal peoples’ perspectives and experiences.
\(^3\)\(^9\) Grenville, above n.4 at 93.
\(^4\)\(^0\) McKenna, above n.11 at 8.
context and, in particular, the way that these later stories reconstruct Aboriginality and begin to address the *différend*.

**Re-examining Aboriginality**

Andrew McGahan and Alex Miller write in a more contemporary context. Like Kate Grenville, they stand post-*Mabo* and challenge the appropriateness of terra nullius. Both of these writers embrace the changing law to inform readers about how this law is responding to, and assisting in, changing constructions of Aboriginality. In their novels, terra nullius is depicted as a lie, dispossession as unjust, and, importantly, the legitimating myth of Aborigines being ‘primitive’, ‘savage’ and ‘uncivilised’ is dispelled.

Andrew McGahan’s *The White Earth* is set in the post-*Mabo* ferment of the early 1990’s and centres on the introduction of the *Native Title Act*.\(^1\) It is a story about the reaction of Queensland landowners to *Mabo* and the proposed legislation, and the fear that Aborigines will take their land. It is not a novel written from an Aboriginal perspective. However, underlying the story is the presence of Aborigines, their dispossession and the violence with which the white settlers treated them. Ultimately, it is a story of dispossession that tells of William’s discovery of genocide and theft of land,\(^2\) and in telling the story of John McIvor and his nephew William, who John has selected to inherit Kuran Station, McGahan tells us much about dispossession and constructions of Aboriginality.

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\(^1\) *Native Title Act* 1993 (Cth).

\(^2\) Ashcroft, B. “The Horizontal Sublime” (2005) 19(2) *Antipodes* 141 at 150.
In relation to dispossession, John McIvor tells William, for example, that “[t]he Kuran people are long gone – shot, or killed by disease, or carted away”, and that “[t]his is my land now, … Whoever might have lived here once, they’re gone.”

There is imbued in these statements a sense of John’s right to the land. As Potter notes, McGahan here “depicts a history of white occupation and indigenous dispossession as ideologically justified.” It is this sense of an absolute entitlement to the land which also underlies John’s response to William’s questions about native title:

‘Well, one of the things it means is that someone like me won’t have a say any more about what happens on my own property. … But that’s not all. The worst of it is that I might not even own the land any more. Not outright. Other people would come along and say they owned it as well. People who haven’t had anything to do with the place for centuries. And I wouldn’t be able to do a thing without their say-so.’ He leant forward again. ‘There are lots of aspects to it and you’ll hear all sorts of rubbish about this and that, but don’t fall for it. Deep down, it’s purely a question of property rights.’

The irony here is clear. It makes apparent (if not always to some of the main characters) the dispossession upon which these ‘property rights’ are based; that white property rights are themselves founded on an act of theft. The ultimate depiction of the dispossession of the Kuran people, however, is their massacre by John’s father. Despite having been forcibly removed from their land, every two

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43 McGahan, above n.1 at 163.
44 Ibid at 180. See also McIvor’s address to the anti native title rally at 209: “‘The Aborigines are gone. And that’s the point. This is my property now. This is all your properties, your farms, your houses, your yards – this hill represents them all. We must be prepared to defend what we own.’ … ‘Australia – every square inch of it – is our sacred site.’”
46 McGahan, above n.1 at 135.
47 This is also made evident in the opening quote of this chapter: “… then the High Court led the way with the Mabo judgment. It recognised finally that terra nullius was always a lie, and now the government is responding to historical reality with the Native Title legislation. This country was Aboriginal land and it was stolen from them without compensation. That was unfair.” Ibid at 174.
years all the remaining men and boys of the tribe returned for a specific, yet unknown purpose. 48 Each time they returned they were removed and told that this was not their land and that they were trespassing. They continued to return, however, until, finally, John’s father shot them all. 49

In *Journey to the Stone Country* dispossession is, once again, a central theme. In this novel, Alex Miller tells the story of Annabelle Beck and Bo Rennie. Annabelle leaves her husband and Melbourne, to return to her family home in Northern Queensland, where she assists a friend conducting cultural surveys. It is here that she meets Bo, one of the Jangga people. Together, Bo and Annabelle are to report on the cultural significance of an area of land that will become a reservoir if the proposed damming of the Ranna Creek proceeds. The area to be flooded includes Ranna Station, once owned by the wealthy (white) Bigges family. The station is now deserted, but intact, and Annabelle wants it preserved as a place of cultural significance, as “a unique record of early colonial life.” 50 Bo disagrees. To him the Bigges homestead is not important. It is against this backdrop that Miller weaves his compelling commentary on terra nullius, dispossession and the “co-existence of conflicting histories.” 51

Throughout his novel Miller comments extensively on the fiction of terra nullius. From the outset the reader is informed that terra nullius was a lie, and that this

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48 Under section 9 of the *Aboriginal Protection and Restriction of the Sale of Opium Act 1897* (Qld) all Aboriginal people under the Act were to be removed from their land and to be “removed to, and kept within the limits of, any reserve.”

49 McGahan, above n.1 at 347 – 351. From a postcolonial perspective, readers can appreciate that Aboriginal people would necessarily return to a place for law and other ceremonies.


51 Ibid at 100.
land was not empty. We are told, for example, that, “[b]efore the conquest by the white man, all of Australia was owned under Aboriginal terms by Aboriginal people.”52 We are also told of the violence with which this supposedly empty land was claimed and Aboriginal people dispossessed:

She could see her fierce grandfather’s bronze stirrup catch the cold glint of moonlight as he swung it over the head of the terrified boy running for the shelter of the scrub, the triumphant yell of the hunter on horseback. The child’s thin bleached cry of terror cut short. The flash and smack of the hit. Dispute settled! My land now!53

This sense of loss is further represented in Annabelle’s discovery of a cyclon, a “stone artefact of unknown purpose.”54 She removes it from where she finds it so that it won’t get lost. Later, she questions Dougald, an Aboriginal elder about it, stating, “Susan thought we’d better take it, in case it got damaged … Or maybe got lost.”55 To this Dougald sardonically responds, “‘Lost?’ … ‘Well I think it’s been lost.’”56 As in The White Earth, it is clear what is being depicted here. The law, through the fiction of terra nullius, enabled white settlers to take Aboriginal land and destroy Aboriginal culture without negotiation or compensation. The injustice of this dispossession is expressed in Bo’s feelings about the Bigges family and their loss of the land:

‘The Bigges didn’t do too bad when you think what the old people who had it before them got shifted to.’ He fell silent, his feelings of injustice aroused, …

‘If you and I knew the truth about them people, John, I don’t reckon they could ever have been easy in themselves about holding that country.’ …

52 Miller, above n.4 at 16. Likewise in The White Earth, above n.1 at 276 Ruth says to William: “‘You know, no one really found Kuran. And it wasn’t empty. Other people were already here.’”
53 Ibid at 347. He also describes Annabelle and Bo looking at the river Isaac: “… the riverbed a level stretch of golden sand cutting through the sunlit timber like an abandoned highway from some unnamed metropolis of antiquity whose population had been dispersed and murdered long ago, the scattered survivors dreaming their time would come again …” Ibid at 46.
54 Ibid at 57.
55 Ibid at 71.
56 Ibid at 71.
'Dying out on themselves,' Bo said then, … ‘That might have been their way of dealing with not being easy about holding the country.’

Miller is telling the reader, in these passages, that Australia was not empty land and that the white settlers deliberately and brutally dispossessed Aboriginal people.

As explained in Chapter Six, one of the justifications promulgated by the law for labelling Australia terra nullius was that its existing inhabitants were ‘primitive’ and ‘uncivilised’, and that they did not cultivate the land. In informing the reader about terra nullius and dispossession, both McGahan and Miller tell us that this construction of Aboriginality was wrong and that, importantly, the law post-*Mabo* is beginning to recognise and acknowledge this. Andrew McGahan, for example, directly tells the reader that the justification underlying terra nullius is questionable:

‘sie let me tell you about terra nullius. Part of the theory is that the Aborigines didn’t work the land, that they just left it as they found it, and so therefore they had no rights of ownership. But that isn’t quite true.’

This passage conveys two important points. Firstly, that terra nullius is a lie and, secondly, that Aborigines did manage and care for the land. Although there are no specific Aboriginal characters in the novel, the image that is presented of the Kuran people by McGahan is of a people who lived in ordered communities, who had a strong sense of place and who looked after and managed the land. We hear Ruth, John’s daughter, telling William about the Kuran people. She tells him, for example, of the tools and implements constructed by them that now lay discarded

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57 Ibid at 232 – 233.
58 Ibid at 348 – 349: “For in truth there were no other means than murder by which they might have acquired their land.”
59 McGahan, above n.1 at 174.
on the plains, and about the way that they managed the land to ensure a sustainable food source:

‘Every summer apparently they burned the plains clean through. That way they had fresh green grass every year, and so more animals would come down from the hills for them to hunt. The Aborigines never let any trees grow. The last thing they wanted was for the plains to be covered in scrub. The problem was, they did too good a job. A hundred and fifty years ago, the squatters came along and saw all that beautiful grass. And they thought, wow, won’t this be perfect for cattle and sheep. And aren’t we lucky that all this pasture is just sitting here, with no one using it. So they marched on in.’

Similarly, Alex Miller conveys an image of the Murris as a sophisticated people who lived in ordered societies and who had their own area of country and knew how to manage and look after it. Like McGahan, he directly critiques the way that Aboriginal people were constructed in order to legitimate the taking of their land. He is particularly contemptuous of the conception of them as a ‘dying race’. This is seen, for example, when Bo, discussing the fate of the Bigges family states, “[t]he Bigges turned out to be a vanishing race” and, later, “[t]he Bigges of Ranna Station. A vanished race, Bo had said, slipping the irony in … .” The irony is clear. Miller is informing the reader here that Aborigines did not lose their land because they were ‘primitive’, or because they were a ‘vanishing race’, but because of an unfair and ill-founded application of terra nullius. He describes, for example,

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60 Ibid at 282 – 283.
61 Ibid at 277.
62 Miller, above n.4 at 141.
63 Ibid at 171.
64 There are many other examples in relation to the Bigges. For example: “Them Bigges never knew they was gonna die out so quickly. They thought they was founding a whole new civilization.” Ibid at 174; “The Ranna won’t fail you, Tom. Them old folk had it the springs held good right through the biggest droughts.’ .. ‘When you say the old folk, Bo, you mean … ?’ ‘I mean the Bigges! Them Bigges! They seen the nineteen-twenty-three drought. The thirty-five drought. These springs held good then. She’s not gonna fail you Tom.’” Ibid at 213 – 214.
how Grandma Rennie, “a traditional Jangga woman”,\textsuperscript{65} looked after her country and taught Bo and the other children to do the same:

‘They’re still there,’ he said, ‘them highways of the old people. Grandma walked us over them when we was kids. ... Up into that wild country, till we come out at them stone playgrounds of the old people. Way up there below Bulgonunna mountain. We was out in the scrubs a week but we didn’t take no supplies or swags. We took nothing. She showed us how to live off the country. And when we was hungry and complaining she told us, This country is your mother. You wouldn’t even be here if it wasn’t for her. You treat her with respect. If she got a reason to starve you, you just starve and don’t think nothing about it.’\textsuperscript{66}

In telling their stories, both McGahan and Miller represent Aboriginal people as sophisticated people who were unfairly treated by the white law.

This construction of Aboriginality that is presented by McGahan, Miller (and Grenville) is important for a number of reasons. Firstly, these authors are clearly informing the reader that in determining that Australia was ‘empty land’, the law as it operated at the time of settlement was ill-founded. Secondly, they tell us that the construction of Aborigines as ‘primitive’ that justified the application of terra nullius to Australia was wrong. This is important, because it was this justification that conferred legitimacy on white Australia. As Potter states:

In order to justify their presence in the land, non-indigenous Australians had to imagine their arrival as a “Year Zero” upon which, materially and metaphysically, the nation was to be built.\textsuperscript{67}

The writers discussed here expose the myths that underlie this supposed legitimacy. The representation of Aboriginal people presented in Chapter Six show how the law supported terra nullius. In contrast, what we see here is a construction of Aboriginality that does not support terra nullius. That is, these novels inform the

\textsuperscript{65} Ibid at 25.
\textsuperscript{66} Ibid at 80.
\textsuperscript{67} Potter, above n.45 at 177.
reader about a changing law, one which is beginning to acknowledge that the basis for Aboriginal dispossession was unjust and inaccurate.

**Hearing Aboriginal Voices**

As explained in Chapter Six, one of the consequences of the law’s construction of Aboriginal people as ‘primitive’ was that, from the outset of settlement, the law was able to marginalise and silence them within the dominant discourse. As explained in Chapter One, this silence is a key indicator of the existence of a différend. It signifies the incommensurabilities that occur when one of the parties does not, or cannot, speak in the language of the other. In the context of stories about dispossession, it was the law’s inability or unwillingness to recognise Aboriginal perspectives that gave rise to a différend. The western law was unable to conceive of any way of being other than itself. And so, it could not hear the Aboriginal voices that were saying this is our land and this is our culture. As a positivist, totalising institution, it could not accommodate or understand pluralism or difference. This resulted in the silencing of Aboriginal accounts of settlement and its consequences, and the legitimation of authorised versions of the founding of Australia.

As discussed above, Kate Grenville comments extensively on the history of this différend, highlighting that at the time of settlement Aborigines and settlers were not speaking in the same idiom, so that they were unable to understand each other. Andrew McGahan and Alex Miller also critique the existence of the différend. In *The White Earth*, for example, it is represented by William looking at an old painting in his uncle’s study. He is able to discern that it is of Kuran House. But:
off in one corner of the painting, so faded as to be almost invisible, was a
collection of shapes recognisable as people only because of their white eyes
and teeth. Black men, looking on from the shadows, their expressions
impossible to read. Hostile? Fearful?
Phantoms.\(^{68}\)

Black men, unable to speak and unable to be heard by the white men, whose
“[h]orses grazed on long grass nearby, their riders leaning easily upon their
backs.”\(^{69}\) The message that McGahan is conveying here is clearly that Aborigines
are (to the settlers and their law) mere ‘phantoms’; invisible and impossible to
understand. Kuran House itself can also be seen as an illustration of the \(\text{différend}\). Although dilapidated, it is representative of authorised histories that legitimate
white settlement, and narratives that marginalise and silence difference. It remains
a solid structure, a clear, material reminder (in the eyes of the settlers) of a white
right to the land. In contrast to the house, there is no material Aboriginal presence
on the land, just remnants of stone axes, “lying all over the plains, as if they were
just thrown away like Coke cans.”\(^{70}\) To the settlers they are disposable and
insignificant, their uses and origins a mystery.

In \textit{Journey to the Stone Country}, Alex Miller exposes the \(\text{différend}\) when
Annabelle and Bo argue about the importance of preserving Ranna Station.
Annabelle tells Bo it is “enormously significant”,\(^{71}\) and that “the Burra Charter rates
early European remains as just as significant as Indigenous remains.”\(^{72}\) Bo disagrees.
He doesn’t think that the Station is worth preserving. Annabelle explains that it is
no different from Bo wanting to preserve “the stone labyrinths at the head of

\(^{68}\) McGahan, above n.1 at 46 – 47.
\(^{69}\) Ibid at 46.
\(^{70}\) Ibid at 282. Also see Potter, above n.45 at 179.
\(^{71}\) Miller, above n.4 at 174.
\(^{72}\) Ibid at 175.
Verbena Creek … The playgrounds of the old people”,73 to which Bo replies, “It’s different and you know it’s different.”74 They are unable to understand each other at this point.75 As Annabelle reflects:

Such scraps of knowledge would be utterly foreign to Bo’s mind. He would see no value in them. If she were pressed, she would not be able to explain their value to him for herself. But the value was there all the same. She was sure of it. … What might there be, she wondered, in Bo’s mind that would be just as foreign to her … 76

The scene tells the reader of the conflicting histories of black and white Australia and that still we are not fully able to understand each other, that there remain things that cannot be explained, and those that should not be explained. Colonial practice such as anthropology, for example, would record aspects of Aboriginal life that were not meant to be public. From a postcolonial perspective we can now respect that we are excluded from some Aboriginal knowledge.77 Importantly, Miller highlights that this history has led not just to a lack of understanding, but also to a silencing of Aboriginal people. He tells us, through Panya, that “[t]he white man never wanna hear nothin about what’s different from him.”78 He also describes Annabelle’s visits to:

country town museums … where there was never any mention of the Murris. And whenever she asked the attendant why this was so he would tell her with a fatuous sincerity, Why, Miss, didn’t you know? there were no Murris in this part of the country.79

73 Ibid at 176.
74 Ibid at 277.
75 Annabelle reflects: “Were their pasts too similar and yet too different for them to understand each other?” Ibid at 178.
76 Ibid at 179 – 180.
77 This is reflected, for example, in the restrictions on the evidence in the hearing of native title claims.
78 Miller, above n.4 at 345.
79 Ibid at 348.
These works do more, however, than simply highlight the existence of the *différend*. They inform the reader that it is beginning to be addressed. This is a point of important difference from the works discussed in Chapter Six, in which there was no possibility of empowerment, or of a future, for any of the Aboriginal characters. In contrast, in the novels discussed in this chapter there is a possibility of a future, in which Aboriginal peoples’ voices, experiences and stories can be heard. In *The White Earth*, for example, the reader hears these Aboriginal stories through Ruth, as she informs us of the way that the Kuran people were dispossessed and forcibly removed from their land and taken to Cherbourg.\(^80\) We are also told through William of an alternative history to the white settler triumph told by his uncle.\(^81\) While journeying to the water hole he hears voices, telling him “*Old things still wait. In special places.*”\(^82\) He senses blood and death and sees “deranged things, wrong things” that hail from an Aboriginal past.\(^83\) And he discovers Aboriginal bones in the dry bed of the water hole. McGahan is allowing here for an Aboriginal account of the brutality of dispossession to be told.

In *Journey to the Stone Country* we are told of the brutal treatment of Aboriginal people by Panya. She tells how Annabelle’s family murdered the Murris:

> ‘They gotta have everything before they’re satisfied. They leave you with nothin. I know them. … That grandfather of hers hunted us in the moonlight. Louis Beck and his mate George Bigges.’\(^84\)

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\(^{80}\) “It used to be an Aboriginal mission. … It’s where the last people from Kuran Station were sent to in 1911.” McGahan, above n.1 at 333

\(^{81}\) Ibid at 327: “They were from a different history altogether.”

\(^{82}\) Ibid at 316.

\(^{83}\) Ibid at 327.

\(^{84}\) Miller, above n.4 at 338.
Beyond the violence, however, she also tells of how Aboriginal people have been silenced and treated unjustly, and of how, even now, they are expected to forget their past:

‘All they wanna do is forget. They want us to believe the bad times is over and we all gotta be friends now. Only they got everything for themselves and they not giving it back. That’s what the white man want now. Peace for himself. …

… Do they forget their own dead? Well they don’t do they? Look at that Gallipoli stuff they go on about. They don’t forget. So what makes them think we’re gonna forget?’\(^85\)

Like McGahan, Miller is allowing for an Aboriginal voice to be heard, and is reflecting on the way that white discourses of history and law have silenced Aboriginal people.

By allowing Aboriginal perspectives to be heard, both of these novels inform the reader that the law post-*Mabo* is beginning to break down the conditions that gave rise to the *différend*. While change is slow, and the past cannot be recovered, there is the possibility of a different future. In *The White Earth* the Aboriginal women at Cherbourg who have been hidden and silenced for so long can now place a land claim over Kuran Station.\(^86\) In *Journey to the Stone Country* Bo is able to contemplate reclaiming Verbena Station, once owned by his grandmother.\(^87\) Both Bo and the women at Cherbourg know that there is now a possibility for them to be heard and that they can now embrace a future in which they have legal access to their land. This possibility of a future is seen particularly in *The White Earth* with the property ultimately being left in limbo once, after John McIvor’s death, it

\(^85\) Ibid at 344 – 345.

\(^86\) McGahan, above n.1 at 333.

\(^87\) Miller, above n.4 at 79 – 80: “‘We lost Verbena. Grandma never sold it.’ … ‘I mean to get it back. The journey of them old people’s not over yet.’”
passes to William who is unsure what to do with it. As Ashcroft explains, “William leaves the land, the absence of title on the property suggesting that it will revert to Aboriginal ownership.”

The telling of these stories is important. In allowing Aboriginal perspectives to be heard within the dominant discourse there is the possibility for “the wrong to find an expression and for the plaintiff to cease being a victim.” That is, it is possible for the différend to be put into words. As Trees puts it, it allows “Aboriginal people to testify to the wrongs perpetrated against them while they were divested of the means to argue.” And, in allowing for this testimony to be heard, the “grand narratives, which have the goal of legitimating social and political institutions and practices, laws, ethics, ways of thinking” are challenged. These novels show that western law can now acknowledge that Aboriginal people had their own legal system, and that, in previously excluding this possibility, Aborigines were, from the outset of settlement, treated unfairly by this law. In this way, these writers are showing how the law can potentially accommodate difference and pluralism. The possibility of pluralism is a big step forward for a law which, as explained in Chapter Two, accommodates and promotes only one unified single law.

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88 Ashcroft, above n.42 at 150.
89 Lyotard quoted in Trees, above n.16 at 166.
90 Ibid at 166.
91 Lyotard quoted in ibid at 165.
92 This difference and pluralism is also accommodated by individuals listening to each other. For example, in 1999 a native title claim was lodged by the Goongarri people in Queensland over land owned by pastoralist Camilla Cowley. Mrs. Cowley sat down and talked about the claim with Ethel Munn, one of the Goongarri people. The two women became friends and came to a mutually satisfactory agreement which granted the Goongarri access to the land. This incident shows how dialogue between parties can lead to real change. As Mrs. Cowley stated: “People are running scared rather than seeing the future benefits to both our communities.” <http://www.faira.org.au/lrq/archives/199904/stories/reconciliation-in-story.html> Retrieved on 15 July 2008.
93 The possibility of pluralism is explored further in Chapter Ten.
Importantly, however, these novels also highlight that listening to Aboriginal people is not going to eliminate disagreements and divergences in modern Australia. While the Native Title Act is a mechanism by which Aboriginal people can place a land claim, it does not mean that they will always succeed in reclaiming land, as shown in *Yorta Yorta*, for example, where Olney J. declared native title was extinguished.\(^94\) This reflects the fact that it still requires Aboriginal claims for land to be couched within the language and rules of the western legal system. Aboriginal people need to speak the language of the Native Title Tribunal in order to have their claims heard. Furthermore, as Miller makes clear in *Journey to the Stone Country*, it does not mean that people will be united in what they want, and it does not translate into immediate positive changes. Disagreement remains, both between black and white, and within Aboriginal communities, as evidenced in the disagreement between Bo and Les Marra over the damming of the Ranna,\(^95\) and social marginalisation continues. Just because the dominant discourse can hear the voice of the marginalised does not mean that they cease to be marginalised. As Panya expresses it:

‘Let’s all be friends, [the white man] says, as if nothing never happened. And if some of us don’t wanna be friends we’re in trouble to him and in the wrong again.’ She was silent a moment. ‘There’s gonna be no peace for him. I’m used to being in the wrong so it don’t matter to me. I give him the slip a long time ago and he’s not catchin me now. We’re different from them, boy, and we always gonna be different from them, and you know that, Bo Rennie.’\(^96\)

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\(^94\) *Yorta Yorta Aboriginal Community v Victoria* (2002) 194 ALR 538.

\(^95\) Les supports it in the interests of the economic well being of the younger generation, while Bo wants the land left alone.

\(^96\) Miller, above n.4 at 344 – 345.
Conclusion

In Chapters Six and Seven I have focused on stories of dispossession to demonstrate how literature can inform the reader about the law. In particular, the novels examined in these chapters show a transition from a pre-\textit{Mabo} law, that was introduced at the time of settlement, which constructed an image of Aborigines as ‘primitive’ and ‘uncivilised’ in order to legitimate the white taking of Aboriginal land, to a post-\textit{Mabo} law, which recognises that the application of terra nullius to Australia was ill-founded. Whereas the law pre-\textit{Mabo} could not acknowledge or accommodate difference or pluralism, and so created a \textit{différend} and silenced those who did not conform to its standards, the post-\textit{Mabo} law has begun to hear these voices. I have argued, in this chapter, that novels written after the \textit{Mabo} decision engage with this change in the law to inform the reader about the way that it has acknowledged that Aborigines are not ‘primitive’ or ‘uncivilised’, and that their dispossession, without negotiation or compensation, was unjustified. They further demonstrate how the \textit{différend} is beginning to be addressed, and the injustices suffered by Aboriginal people expressed. And, importantly, they show that western law, when challenged, can change. It is not immutable.

In Part Three I move away from stories of dispossession and focus on some of the wider consequences of the application of terra nullius. In particular, I examine how literary texts inform the reader about the discriminatory and restrictive legislative regimes to which Aboriginal people were subjected in the nineteenth and twentieth centuries, and how these regimes show that the law does not treat everyone equally.
PART THREE

THE RULE OF LAW

PREFACE

Let our laws and policies treat equally all who live in this land, accepting
difference and fostering tolerance. Let there be respect for the rule of law
and the jurisdiction of our courts to administer it. Those are guarantees of
Australian values.¹

One of the foundations of the modern Australian legal system is the rule of law.
When England occupied Australia in 1788 the principle of terra nullius mandated
the introduction of the English legal system and English laws into the fledgling
colony, to the exclusion of any other pre-existing (Aboriginal) legal systems and
any other pre-existing (Aboriginal) laws. One of the pillars of England’s common
law system was (and is) the rule of law. And so, with the introduction of the
English legal system into Australia, the rule of law also became the basis upon
which this country’s legal system was built. As a guiding principle, the rule of law
has many meanings and manifestations, from E.P. Thompson’s “unqualified human
good”² to A.V. Dicey’s condemnation of the exercise of discretionary powers.³
Essentially, however, the rule of law embodies the ideal that the law is an impartial
and objective arbiter and that everyone is equal before the law. In this part, I focus
on this ideal of equality for all before the law.

‘Equality before the law’ is a commonly used phrase. It represents that no-one is
above the law, that everyone is subject to the same law and that the law does not

² Thompson, E.P. Whigs and Hunters – The Origins of the Black Act (New York: Pantheon) 1975 at
266.
1960. First published in 1885. Dicey’s theory of the rule of law is discussed in Chapter Eight.
discriminate between those who come before it. Many critical theorists, however, would argue that this is not the case. They contend that issues of gender, race or culture, for example, mean that not all people are treated equally by the law, that the law is neither impartial nor objective, and that it is this unequal operation of the law that leads to the marginalisation of particular groups, such as Aborigines, refugees and other cultural minorities, by the law and by society generally. That is, those who are perceived as different, or constructed as ‘other’, do not always benefit from this ideal of equality. As Sir Gerard Brennan has noted, for example, the White Australia policy, which operated in this country until the late 1960’s, prevented:

people of Asian or African ethnicity [from becoming] the beneficiaries of Australian egalitarianism. And the original Australians were not even counted in reckoning the numbers of people of the Commonwealth before the 1967 referendum. … These exclusions were symptomatic of a negative Australian value: fear of the other, the different, the unfamiliar.

I argue in this part that the law is neither objective nor impartial, and that it does not treat everyone equally. Rather, by representing itself as such, the law reinforces its boundaries of inclusion and exclusion and, in so doing, it continues to silence, within the dominant domain, the voices of those who are not treated equally by it. I have chosen the law’s treatment of Australia’s Indigenous peoples as the specific site for analysing what literature tells us about the rule of law and the ideals of objectivity and equality. In particular, I argue that the texts discussed here show how the law has constructed and defined Aborigines in ways that deny them equality. On the settlement of Australia, Aborigines were accorded the status

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4 Some of these critical approaches are discussed in Chapter Eight.
5 Above n.1 at 7 – 8.
of British subjects. Despite this, the law constructed them as ‘other’, and excluded them from full and equal access to its benefits and protections, yet included them within its controls and restrictions. It effectively denied them a voice, within the dominant discourse, with which to challenge the injustices, discrimination and inequalities to which they were subjected. In Part Two of this work, these issues were examined in relation to terra nullius and the dispossession of Aboriginal people. In Part Three, I focus on the deliberate discrimination of Aboriginal people as contained in successive government policies and legislation. As highlighted in the texts discussed, the law’s failure to treat Aboriginal Australians equally with non-Aboriginal Australians and the law’s systematic discrimination of Aboriginal people has contributed to their continued marginalisation, exclusion and discrimination at the level of both the legal and the social.

The texts on which I focus in this part are Kim Scott’s *Benang*, Sally Morgan’s *My Place*, Alex Miller’s *Landscape of Farewell* and Gail Jones’s *Sorry*. These texts provide crucial insight into the operation of the rule of law. They reveal not only the way that successive governments enacted discriminatory laws that had (and continue to have) considerable (negative) impact on the lives of Aboriginal people, but that the law constructed Aboriginality in a way which enabled it to treat Aborigines differently to non-indigenous Australians. They expose how it excluded Aborigines from many of its rights and protections, and, importantly, that it created a différend in denying those treated unequally by it the ability or the right to challenge it within the dominant discourse. Importantly, however, these

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texts also hold out a hope for the future and for a law that does treat Aboriginal people equally with non-indigenous Australians.

In Chapter Eight, I provide a discussion of the rule of law. I explain what the rule of law means, how it is incorporated into Australian law and how it is perceived as fundamental to the Australian legal system. I also analyse in more depth the ideal of equality before the law. In Chapter Nine, I examine the legislative restrictions that have been imposed on the lives of Aboriginal people since settlement. In particular, I critique the operation of the Aborigines Act 1905 (WA) and the impact that this legislation and its underlying policies has had (and continues to have) on the lives of Aboriginal people living in Western Australia. In Chapter Ten, I focus on the importance of apologising to Aboriginal people for the way that our law has (mis)treated them, and on reconciliation and the acceptance of difference, or ‘otherness’, as a precursor to the realisation of equality for Aboriginal people.
CHAPTER EIGHT

“ALL ANIMALS ARE EQUAL BUT SOME ANIMALS ARE MORE EQUAL THAN OTHERS”¹: EQUALITY UNDER THE RULE OF LAW

Introduction

There is currently a lot of discussion in Australia about Australian values. A new citizenship test requires those wishing to become Australian to subscribe to the ‘core values’ of our society,² and to demonstrate knowledge of these values before being granted citizenship.³ Naturally, this has led to considerable debate about what these values are and what they encompass. They seem to refer variously to such vague notions as ‘fair go’ and ‘mateship’, through to more specific concepts such as the rule of law. Members of both the High Court and the Federal Court of Australia have emphasised the latter, commenting that it is the rule of law that is the core value in a liberal democracy.⁴ The implication is a sense of egalitarianism, equality for all. Whether or not those such as Dr. Haneef or Robert Jovicic would believe this rhetoric is perhaps questionable. They did not seem to be treated impartially by the law, nor did they appear to be accorded the benefit of being given a ‘fair go’. For Jovicic, at least, this was despite having lived in Australia his

³ One of the practice citizenship test multiple choice questions, for example, is “Which one of these values is important to modern Australia?” The answer is “Everyone has equality of opportunity.” <http://www.citizenship.gov.au/test/preparing/index.htm#d> Retrieved on 2 July 2008.
⁴ “It may be said that the core value in the citizenship pledge is acceptance of the Rule of Law in a liberal democracy.” Mansfield, J. “How Balanced are the Scales of Justice? The Rule of Law in Australia” (2007) 10 Flinders Journal of Law Reform 1 at 2; “The core value … is the rule of law in a liberal democracy.” Gleeson, above n.2 at 2.
entire life. Similarly, Aboriginal Australians have not always enjoyed the benefits of these ‘core values’. They have been castigated as ‘inferior’ by the law, subjected to policies of deliberate discrimination and assimilation and denied opportunities available to many non-Aboriginal Australians. As Prime Minister, Kevin Rudd, has recently stated, for many Aboriginal people “there was no fair go at all.”

Yet, it is the ideal of equality, as embedded in the rule of law, which underpins our society. It is reiterated in everyday statements such as ‘no-one is above the law’ and ‘everyone is subject to the same law’. Law in practice, however, does not always function ideally. It does not operate in a social vacuum. Rather, the law is peopled. It is peopled by judges, lawyers, defendants, plaintiffs, the police and so on. And all of these people come to the law from varying socio-political, economic, ethnic and gendered backgrounds, bringing with them differing perspectives, attitudes, experiences and skills. Some will have greater access to lawyers and the

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5 Dr. Haneef is an Indian man who was living in Australia on a work visa when he was linked (tenuously) to the London bomb attacks on July 7, 2005. He was detained and deported and had his visa revoked by Kevin Andrews, the then Minister for Immigration. The charges against Dr. Haneef were, however, held to be unfounded. Kevin Andrews nevertheless refused to reinstate Dr. Haneef’s visa, a decision which Dr. Haneef successfully challenged in the Federal Court in Minister for Immigration and Citizenship v Haneef [2007] FCAFC 203. Earlier this year Senator Chris Evans, the current Minister for Immigration announced that he would not be appealing this decision. Robert Jovicic has lived in Australia since the age of two. However, in June 2004 he was deported to Serbia on character grounds after being jailed for burglary. He had never lived in Serbia, could not speak the language and ended up living on the streets. He has now been granted a permanent visa to live in Australia. Neither Haneef nor Jovicic were given the opportunity to present their case before being deported.

6 Commonwealth, Parliamentary Debates, House of Representatives, 13 February 2008 at 170 (Kevin Rudd, Prime Minister).

7 It is this rhetoric that is used as justification for such activities as invading those countries that are deemed not to live by the rule of law, notably Iraq. As Iain Stewart states: “One thinks: ‘When my side wins, the rule of law has prevailed’; this ‘move’ has the same form as an appeal to ‘God’. Appeal to the ‘rule of law’ then becomes a menace in both domestic and foreign (or imperialist) affairs. The very suggestion that there could be an alternative is already defined as irrational. And whoever proposes an alternative is not a friend but an enemy of society.” Stewart, I. “Men of Class: Aristotle, Montesquieu and Dicey on ‘Separation of Powers’ and ‘The Rule of Law’.” (2004) 4 Macquarie Law Journal 187 at 223.
courts, including the language of the law, than others, whose lack of education, skills, language and other resources, may restrict such access. This effects how they approach the law, negotiate with the law and, importantly, are treated by the law. Despite this, the law nevertheless maintains that it acts without favour. It maintains that it treats everyone equally.\(^8\)

In this chapter, I examine the ideal of equality that is enshrined in the rule of law. In the first section of this chapter, I explain what is meant by the rule of law, focusing specifically on A.V. Dicey’s formulation of it, as it is his vision that has been the most influential in shaping the (Anglo) Australian legal system, and which most clearly embodies the ideal of equality before the law. In the second section, I explore this concept of equality in more depth, focusing particularly on the way that the law, while endorsing principles of formal equality, does not always treat everyone with substantive equality.

**Dicey and the Rule of Law**

The problem with the idea of the rule of law is that it seems to be a juristic chocolate factory, a category with no definite content apart from law itself and hence open to almost any content.\(^9\)

The rule of law is a somewhat elusive concept. It has been variously described as “the bedrock of civilised society”,\(^10\) an “assumption that underlies the political

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\(^8\) Although, as noted below at n.42, it was recommended in the *Royal Commission into Aboriginal Deaths in Custody* that the judiciary undertake cross cultural training as a way of being fairer to Aboriginal people in the court system. This is some acknowledgement that the law, despite its insistence that it is impartial and that everyone is treated equally by it, does not always act fairly. Johnston, E. *National Report of the Royal Commission into Aboriginal Deaths in Custody*, volume 5, 1991 <http://www.austlii.edu.au/au/special/rsiproject/rslibrary/rdiacic/national/vol5/1.html> at 1.4.2. Retrieved on 30 June 2008.

\(^9\) Stewart, above n.7 at 189.

\(^10\) Justice Keith Mason quoted in Mansfield, above n.4 at 2.
process that makes our system of government work in practice”,11 “a universal legal principle”,12 and the basis of “our freedom to think, to express, to be and to do: … [It] is the underlying and underpinning value of our society.”13 While all of these statements convey a clear sense that the rule of law is somehow fundamental to the operation of our society, none of them actually make clear what is meant by the concept. It means different things to different people and, as noted by Creyke and McMillan, its definition will be “influenced by changing political and social values.”14 For some, for example, it may literally mean rule of law, as opposed to rule of men. That is, it ensures that our government does not exercise power arbitrarily. In this context, the rule of law has a certain minimum content, one which dictates that “all authority is subject to and constrained by law.”15 For others, it may emphasise the need to protect individual rights from bureaucratic injustice.16 And, for others, it is an assurance that the law will treat all of its subjects with objectivity and equality. Whichever definition is preferred, however, it is clear that the rule of law does embody certain revered core values, and that it holds universal appeal as the basis of our western legal system. As Justice French expresses it, “[t]he Australian legal system operates on the assumed application of the rather numinous concept of the rule of law.”17

11 Chief Justice Murray Gleeson quoted in ibid at 2.
14 Creyke and McMillan, above n.12 at 237.
The rule of law underlies not only the Australian legal system but also that of England, the United States and Canada. Dicey, referring to England, where the constitution is unwritten, stated that the rule of law is “a characteristic of the English constitution.”\(^{18}\) Bryden, writing in the Canadian context, states:

Dicey’s conception of the rule of law ... contained enough of a germ of truth to sustain its powerful popular appeal. There is, after all, something rather stirring about the idea that even Prime Minister Mulroney stands on no higher legal footing than any of the rest of us. ... We didn’t go so far as to put Dicey’s name into our Constitution in 1982, but we did state in the preamble to the Charter that Canada was founded upon principles that recognise the rule of law, right after the part where we recognised the supremacy of God.\(^{19}\)

In Australia, the rule of law is not written into our Constitution. It is, however, deemed to underlie its operation. In *Australian Communist Party v Commonwealth* Sir Owen Dixon CJ. famously stated that the Australian system of government:

is government under the Constitution and that is an instrument framed in accordance with many traditional conceptions, to some of which it gives effect, ... others of which are simply assumed. Among these I think that it may fairly be said that the rule of law forms an assumption.\(^{20}\)

Approval of this sentiment has been voiced in a number of judicial decisions; most recently in *Plaintiff S157* where the High Court stated that “the Australian Constitution is framed upon the assumption of the rule of law.”\(^{21}\)

One of the best known formulations of the rule of law, and that which has had the most influence on the foundation of the Australian state and its constitution, is that

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\(^{18}\) Dicey, above n.16 at 187.


\(^{20}\) (1951) 83 CLR 1 at 193.

\(^{21}\) *Plaintiff S157/2002 v Commonwealth* (2003) 201 CLR 323 at 492 per Gleeson CJ. See also at 513 per Gaudron, McHugh, Gummow, Kirby and Hayne JJ.
of A.V. Dicey.22 Demanding governmental compliance with general, objective rules designed to limit the scope for discrimination and to safeguard an individual’s rights against the arbitrariness of those who govern, Dicey’s rule of law provides a reference point or standard against which to assess and measure the legitimacy of government decision making and rule making.23 Stipulating that all power has legal limits within which it must be exercised, it further provides the basis for reviewing discretionary decision making and containing its misuse, by mandating the courts to ensure that all decisions comply with these limits. As such, Dicey’s rule of law is an expression of the need to protect individuals from bureaucratic injustice, and to uphold democratic legitimacy by ensuring administrative compliance with the will of the democratically elected and representative parliament.

The principles of Dicey’s rule of law are simple and straightforward. Its essence is that ‘regular law’ as administered by the ‘regular courts’ is supreme and that no individual can be subject to the arbitrary exercise of power. In particular, Dicey stipulated three discrete propositions. Firstly:

no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land.24

Secondly, Dicey stated that the rule of law means:

not only … that no man is above the law, but (what is a different thing) that … every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals.25

22 Above n.16.
24 Dicey, above n.16 at 188.
25 Ibid at 193.
That is, administrative officials are equally as amenable to this regular law as are private individuals. They cannot be exempt from the supervision of the ordinary law. As Dicey explains it:

In England the idea of legal equality, or of the universal subjection of all classes to one law administered by the ordinary courts, has been pushed to its utmost limit. With us every official, from the Prime Minister down to a constable or a collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen.26

The final principle of Dicey’s rule of law is not so much concerned with content as process. He expresses it as:

the constitution is pervaded by the rule of law on the ground that the general principles of the constitution (as for example the right to personal liberty, or the right of public meeting) are with us the result of judicial decisions determining the rights of private persons, in particular cases brought before the courts.27

That is, it is the courts that are entrusted with maintaining adherence to the principles of the rule of law.28

These three principles of Dicey’s rule of law combine to underpin our constitutional system in a number of important ways. Firstly, they encompass the theory of the separation of powers. The separation of powers simply stipulates that there are three branches of government, each with its own distinct function, and that one institution cannot encroach upon the tasks of another. It is a system of checks and balances designed to ensure that one branch of government does not acquire too much power. Thus, the legislature enacts the law, the executive implements these laws and the judiciary interprets or declares the law.29

26 Ibid at 193.
27 Ibid at 195.
28 See Stewart, above n.7 for a discussion of Dicey’s principles.
29 For a discussion of the separation of powers see Creyke and McMillan, above n.12 at 237 – 239.
importance of the separation of powers in the context of Dicey’s rule of law is that it provides the basis for judicial review of governmental decision making.\textsuperscript{30} That is, it endorses the role of the judiciary in ensuring that administrative or executive decision makers, from government ministers to local councils, do not exceed the power which they have been granted and do not make decisions that illegally impact on the rights of those individuals subject to their decisions. In this way, Dicey’s rule of law has provided the foundation upon which much administrative law theory has been built.\textsuperscript{31}

More important in the present context, however, than the contribution that Dicey has made to administrative law jurisprudence, is the influence that he has exerted in shaping general conceptions of the law as objective and impartial, and that everyone is equal before the law. That is, the principles of Dicey’s rule of law combine to ensure “equality before the law, so that all members of the community … are subject to the same laws and the same judicial tribunals as other citizens.”\textsuperscript{32} More specifically, it is the second of Dicey’s principles with its emphasis on all classes being equally subject to the same ‘ordinary’ or ‘regular’ law that gives rise to conceptions of equality before the law. As Stewart reiterates:

\textsuperscript{30} Dicey condemned, for example, the French system of separate courts by which administrative decision makers were judged. The importance of the concept of the supremacy of ordinary law as administered by the ordinary courts was, for him, paramount. He was very distrustful of bureaucracy and discretionary decision making. He viewed the rule of law as a necessary “bridle for Leviathan”. See Arthurs, H. “Rethinking Administrative Law: A Slightly Dicey Business” (1979) 17 Osgoode Hall Law Journal 1.

\textsuperscript{31} This discussion of Dicey draws on research undertaken for Sidebotham, N. Jurisdictional Review: An Error of Jurisdiction or Jurisprudence? (Master of Laws Thesis: University of British Columbia) 1994.

\textsuperscript{32} Mansfield, above n.4 at 2.
The second meaning or appearance is ‘equality before the law, or the equal subjection of all classes to the ordinary law of the land, administered by the ordinary law courts’.33

It is this understanding, or spirit, of the rule of law that is of most concern to me here.

**Equality Before the Law?**

Two important questions emerge from this discussion of Dicey’s rule of law. Firstly, what is meant by this ideal of equality before the law? Is it merely rhetoric, or is it a standard that is generally achieved in practice? That is, is equality merely something to which the law pays lip service by stating that all people are treated equally, or is it a protection that is actively pursued and enforced? Secondly, and perhaps more importantly, does equality really exist for all people? Does someone who is less educated, has fewer resources and is, for example, Aboriginal or from a non-English speaking background, enjoy the same level of ‘equality’ as someone who is white, well educated and well resourced? The policies of assimilation and discrimination pursued by the law against Aboriginal people in Australia and the continuing consequences of these measures would suggest not. As explained earlier,34 the rule of law became part of Australian law at the time of settlement. As such, it was something which all British subjects enjoyed the benefits of. This should have included Aboriginal people who, on settlement, were deemed to be British subjects. They were not, however, treated equally by or before the law. Rather, they were singled out for deliberately discriminatory treatment. They were subjected to policies of protection, assimilation and absorption, which sought to ensure that all traces of Aboriginality (both physical and cultural) would

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33 Stewart, above n.7 at 205.
34 See Preface to Part Three.
ultimately be removed from the population. They were denied, for example, equal rights of employment, freedom of movement, and access to education.\textsuperscript{35} Law (and society) treated them as undeserving of equality with non-Aboriginal Australians.

Equality, like the rule of law itself, is an elusive concept that can prove difficult to define. It can be interpreted in a variety of ways and measured against a variety of standards. \textit{Formally}, at least, Australia is a country in which everyone is deemed to be equal. Anti-discrimination legislation at state and federal levels, aimed at protecting individuals from discrimination and unequal treatment, mandates that no-one can be discriminated against on the basis of race, gender, culture, age, disability and so on.\textsuperscript{36} These measures combine to provide formal guarantees of an individual’s rights. If I am denied employment because I am a woman I can seek redress via the relevant provisions of the \textit{Sex Discrimination Act}. If someone is denied opportunities because they have a disability they can appeal to the Disability Discrimination Commissioner.

Standards of formal equality do not, however, always ensure that people are, in substance, treated equally. They create a legal level playing field and place

\textsuperscript{35} These issues are highlighted in Morgan, S. \textit{My Place} (Fremantle: Fremantle Arts Centre Press) 1988 and Scott, K. \textit{Benang} (Fremantle: Fremantle Arts Centre Press) 2000. These novels are discussed in Chapter Nine.

\textsuperscript{36} These protections are contained in, for example, the \textit{Racial Discrimination Act 1975} (Cth); the \textit{Sex Discrimination Act 1984} (Cth); the \textit{Disability Discrimination Act 1992} (Cth). The \textit{Human Rights and Equal Opportunity Commission Act 1986} (Cth) sets up the Human Rights and Equal Opportunity Commission which protects equality by acting against discrimination, which is defined in s3(1) as “any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin that has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation.” There are similar enactments at state level. For example, the \textit{Discrimination Act 1991} (ACT); the \textit{Anti-Discrimination Act 1977} (NSW); the \textit{Anti-Discrimination Act 1991} (Qld); the \textit{Equal Opportunity Act 1984} (SA); the \textit{Equal Opportunity Act 1985} (Vic); the \textit{Human Rights Act 2004} (ACT); the \textit{Charter of Human Rights and Responsibilities Act 2006} (Vic).
everyone at the same starting position making everyone “formally equal by
definition and standardisation.” Yet, people are not the same, and in insisting
“that people are essentially the same, [formal equality] does not give sufficient
recognition to actually existing differences.” There are two points of importance here. Firstly, equality, in this sense, fails to recognise that we do not all start from the same position. Indigenous Australians, for example, living in remote areas of Australia are not in the same position as wealthy, non-indigenous Australians living in affluent areas of the city. They begin from a different position economically, culturally, educationally, and so on. As Davies explains:

many [indigenous people] suffer social, political and economic disadvantage. The attempt to see all people as ideally equal masks the fact that people are not equal in their material conditions.

These are differences that the law neither recognises nor accommodates, and notions of formal equality will not resolve these differences, or ensure that equality is achieved in a substantive sense. As Davies states:

Merely enshrining a principle of equality in the law will not solve the much more profound inequalities entrenched in cultural perceptions, economic status, and biological difference.

Sandra Berns makes a similar point:

If we are to guarantee to individuals the equal protection of the law we must ensure that individuals are equally placed before it, not simply in a formal sense, but in the context of their lives as a whole.

37 Stewart, above n.7 at 221.
38 Davies, M. Asking the Law Question 2nd ed. (Sydney: Lawbook Co.) 2002 at 287.
39 Neither are they equal, of course, to wealthy or well resourced Indigenous people or those who are well educated such as lawyers, academics and other professionals.
40 Above n.38 at 287.
41 Ibid at 219.
42 Berns, S. Concise Jurisprudence (New South Wales: Federation Press) 1993 at 16. Some attempt to address this in relation to the treatment of Aboriginal people is evidenced in recommendations 96, 97, 104 and 107 of Johnston, above n.8. These recommendations suggest that magistrates and judges need to do cross cultural training so that they are more aware of the position of Aboriginal people and so can treat them more fairly in the courts.
Secondly, in defining and identifying everyone to be the same, the law denies ‘otherness’. That is, it neither recognises, nor accommodates, difference, not in the sense of material conditions that may prevent the realisation of equality, but in terms of differing ways of understanding and relating to the law and to society. As explained in Chapter Two, Australia is a plural society. There exist, in this country, (at least) two different conceptions of law, understandings of law, and legal systems. Yet only one of these, that of the colonisers, is accorded full recognition and priority, and this law, as explained in Chapter Two, does not accommodate difference. Rather, it promotes singularity and unity. It has, accordingly, sought to make everyone the same, and so has denied people’s differences. It is this emphasis on uniformity and sameness that has led to such brutal and inhumane practices as the forced removal of Aboriginal children from their families. In this way, the denial of ‘otherness’ causes the lack of equality some Aboriginal people experience.43

The difficulties in defining, understanding and measuring equality are particularly highlighted by a number of critical theorists. Feminist theorists, for example, have argued that our legal system is a masculine system, so that equality, as a standard defined and interpreted within this masculine system, will not necessarily achieve equality for women. As Davies explains:

if women are expected to be like men in order to be treated equally, if women will only be treated equally insofar as we are like men, equality itself can be seen to be a repressive ideal. An “equality” defined according to male standards will only benefit women who can or do conform to that standard.44

43 This is discussed more fully in Chapters Nine and Ten.
44 Above n.38 at 219. See, for example, Graycar, R and Morgan, J. The Hidden Gender of Law (Sydney: Federation Press) 1990.
Similarly, our legal system is a western (colonial) system. Within this system equality is linked to the notions of racial superiority that underpinned colonial expansion. That is, the principles of social Darwinism which postulated that “stronger races would inevitably exterminate weaker races”, meant that colonised people were, by definition, unequal. Equality was (and is) defined, and interpreted, according to the standards of the dominant (colonial) culture, and so does not always benefit the colonised who do not conform to these standards.

In the context of this work, these deficiencies and shortcomings are clearly exposed. In Part Two, one of the issues that I discussed was the recognition of native title rights in *Mabo*. While this case does recognise Aboriginal rights to land, and so appears to accord equality to Aboriginal peoples’ interests, it is not about equality. It does not recognise *Aboriginal* ownership of land. It simply allows for some (limited) rights to exist *within* the common law system, and these limited rights are not accorded the same status, or level of protection, as non-native title rights. They are susceptible to extinguishment and are subject to a raft of regulations and restrictions contained in the *Native Title Act*, which are not imposed on non-native title interests. As stated by Davies:

> Under current law in Australia property in land derived from white law is legally recognised and protected far more extensively than “native title”. There is no equal property where one type is valued far above another.

In this part, I argue that the discourse of equality has legitimated and justified the law’s mistreatment and discrimination of Aboriginal people. This discourse has

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45 Racial superiority as a justification for colonial expansion was discussed in Chapter Four.
46 Davies, above n.38 at 263.
47 *Mabo v Queensland (No.2)* (1992) 175 CLR 1.
48 Above n.38 at 286.
been used by the law to construct Aborigines as ‘other’ and ‘inferior’, and, under the guise of making them the same as non-Aboriginal Australians and ensuring that they ultimately received the same opportunities and privileges, it has sought to assimilate them into dominant, mainstream Australia. The reality of this supposed equality was that Aboriginal people were subject to numerous restrictions on their rights and freedoms, and suffered the forced removal of their children in ways that “would have rarely, if ever, happened to Anglo-Australian children.” As McRae et al. summarise:

In the assimilation / integration period … the pursuit of equality was understood to mean identical treatment for all. This approach … perpetuated devastating inequalities and suffering … It led, for example, to the removal of Aboriginal children.

This lack of equality experienced by Aboriginal people has been further exacerbated by their inability to challenge these injustices. That is, the lack of equality was an incommensurability within the law that gave rise to a différend. Aboriginal people were not heard within the dominant discourse. They were denied the opportunity to challenge their mistreatment. They were silenced. As Rodan explains:

the notion that everyone is equal in the eyes of the law … is legitimated by the fact that every citizen has access to the law through private law firms or

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49 Some of these restrictions are discussed in Chapter Nine.


51 McRae, H., Nettheim, G., Beacroft, L. and McNamara, L. Indigenous Legal Issues: Commentary and Materials 3rd ed. (New South Wales: Lawbook Co.) 2003 at 437. Duncan Ivison makes a similar point. “the Aboriginal peoples of … Australia have been treated as less than equal citizens, however equal citizenship is defined. But they have also often experienced injustice at the hands of apparently well-intentioned policies and programs justified in the name of equal treatment and non-discrimination. Ideas of equal citizenship, for example, have been used to justify forms of coercive assimilation.” Ivison, D. Postcolonial Liberalism, (Cambridge: Cambridge University Press) 2002 at 117.
legal aid. Yet, if citizens do not speak the language that is party to legal discourse within the courts, they cannot be heard.52

Equality in this sense operates to exclude. And, as explained in Chapter One, these exclusions carry through to the social, impacting on the everyday and reinforcing the very positioning that led to the exclusions in the first place. I argue in this part that the law needs to focus on substantive rather than formal equality. That is, it needs to acknowledge and accommodate people’s differences, and so focus on achieving actual equality. As stated by Cameron Stewart:

the rule of law has … been said to encompass a wider notion of equality, such as equality of concern and respect. Viewed in this fashion legal equality requires not only that like cases should be treated alike but that different cases should be treated differently.53

These issues are discussed in more detail in Chapters Nine and Ten.

**Conclusion**

In this chapter, I have argued that one of the fundamental ‘values’ of Australian law is equality under the rule of law. This is not a purely theoretical or academic concern. Whether or not someone enjoys such equality has considerable impact on them at many levels, not just the legal. It can determine their educational, employment and other such opportunities, and impact on their health, life expectancy and so on. Yet despite this, and despite the apparent importance of equality as a principle in our system of law, equality is not something which has been experienced by Aboriginal Australians. Rather, the law has singled them out for discriminatory treatment, and denied them many rights, opportunities and privileges, enjoyed by non-Aboriginal people. In the following chapters, I focus

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52 Above n.50 at 89.
specifically on the ways in which the law has denied Aboriginal people equality, and on how this can potentially be addressed, and equality realised.
CHAPTER NINE

“THESE STORIES CRY OUT TO BE HEARD”¹: MY PLACE, BENANG AND THE 1905 ABORIGINES ACT

Introduction

‘It made such a difference,’ he said, ‘that legislation.’ … ‘You could be moved anywhere, told who to marry, where to live, had to get a permit to work, not allowed to drink or vote …’ Uncle Will was on a roll. ‘It separated us all.’²

When the English occupied Australia in 1788, bringing with them their own legal system and their own laws, to the exclusion of all others, they conferred upon themselves the right to legislate about every aspect of life in the new colony. Subsequent legislation did not only regulate the lives of the settlers, however. Much of it related to Aborigines. A variety of policies from segregation and protection, to integration and assimilation, motivated the enactment of a raft of legislative measures aimed at controlling the movement and activities of Aboriginal people. Arguably Aborigines, as British subjects, if not yet Australian citizens,³ became the most legislated about people in the country.⁴ And much of this legislation was discriminatory, denying them the rights and protections enjoyed by non-indigenous Australians.

In this chapter, I analyse stories about the legislative regulation of the lives of Aboriginal people. In particular, I examine how these stories expose the way that

¹ Commonwealth, Parliamentary Debates, House of Representatives, 13 February 2008 at 169 (Kevin Rudd, Prime Minister).
³ Aboriginal people were not included within the Australian Constitution until 1967.
the law does not treat everyone equally. As explained in Chapter Eight, one of the principles of English law introduced into Australia at the time of settlement was the rule of law, and its assertion that everyone is equal before the law. I argue that from the beginning of colonisation Aboriginal people did not benefit from this equality. Rather, the discourse of equality was used by the law to justify the deliberate discrimination of Aboriginal people.

The texts I focus on in this chapter are Kim Scott’s *Benang* and Sally Morgan’s *My Place*. These are both postcolonial works that allow for Aboriginal stories and perspectives to be told, and inform about the continuing long-term consequences of the law’s discriminatory treatment of Aboriginal people. Both novels critique the way in which the law defined and constructed Aboriginality, denied Aboriginal people equality and silenced Aboriginal voices within the public domain.

I begin this chapter by providing an overview of the legislation governing the lives of Aboriginal people in Western Australia. While legislation regulating Aboriginal life was introduced into all states in Australia, my focus in this chapter is on Western Australia, and the 1905 *Aborigines Act*. This Act restricted and controlled the lives of Aboriginal people in Western Australia until 1963, when all Aboriginal and Native Welfare Acts were finally repealed. This discussion is not intended as a comprehensive analysis of the legislation, but as providing sufficient

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6 Other legislation includes the *Aboriginal Protection and Restriction of the Sale of Opium Act 1897* (Qld); *Aborigines Protection Act 1909* (NSW); *Northern Territory Aboriginals Act 1910* (SA); *Aborigines Act 1911* (SA); *Cape Barron Island Reserve Act 1912* (Tas); *Aborigines Protection Act 1886* (Vic); *Aborigines Act 1890* (Vic).

7 They were repealed by the *Native Welfare Act 1963* (WA).
background against which the two novels discussed here can be read. In the second section of this chapter, I examine how Benang and My Place expose the way in which this legislation constructed Aboriginality, and in the third section, I discuss the way in which it denied Aboriginal people equality. I examine the way in which Aboriginal people were silenced and denied the right or the ability to object, within the dominant discourse, to the injustices imposed upon them by the legislation, and the impact that this has had (and continues to have) on Aboriginal people in Western Australia.

The 1905 Aborigines Act (WA): An Overview

Legislative control of the lives of Aboriginal people in Western Australia began in the 1840’s with the introduction of laws concerned primarily with restricting the presence of Aborigines in townships and limiting their access to alcohol. More far reaching regulation began to be introduced in the latter part of the century with the enactment of the 1886 Aborigines Protection Act and the 1897 Aborigines Act. It was, however, the 1905 Aborigines Act which initiated the repressive and discriminatory regime which continues to impact on Aboriginal people in Western Australia today. The ambit of this Act was extensive. It regulated virtually every

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8 For a comprehensive discussion of the legislation see Haebich, A. For Their Own Good: Aborigines and Government in the Southwest of Western Australia (Nedlands: University of Western Australia Press) 1988.
9 Ibid at 47. Aborigines were first mentioned in 1841 legislation establishing a prison for Aboriginal people on Rottnest Island. Trees, above n.4 at 178.
10 The 1886 Act imposed restrictions on, for example, the employment of Aborigines, and stipulated that the Aborigines Protection Board, established under the Act, ensure the protection and welfare of all Aboriginal people. The 1897 Act granted the Western Australian government the power to regulate Aboriginal affairs. The Act established the Aborigines Department and instructed it to “distribute relief (rations, blankets and clothing) and medical care to needy Aborigines; manage Aboriginal reserves; provide for the education and maintenance of Aboriginal children; protect Aborigines from injustice and fraud; and exercise a general supervision over all matters affecting Aborigines in the state.” Ibid at 53.
11 This Act was to some extent modelled on the Aboriginal Protection and Restriction of the Sale of Opium Act 1897 (Qld). This Act is referred to McGahan, A. The White Earth (Crow’s Nest NSW:
aspect of the lives of Aboriginal people, and conferred sweeping powers on government officials to secure its implementation. It authorised the removal of Aboriginal people from their land to reserves, and restricted their right of movement from these reserves. It made the Chief Protector of Aborigines the legal guardian of all Aboriginal and ‘half-caste’ children to the age of sixteen, and authorised the removal of Aboriginal children from their families to missions or Aboriginal institutions where they were to be trained as ‘useful citizens’. It further provided for the Chief Protector to manage the finances or property of Aborigines, either with or without their permission, controlled the employment of Aborigines, their access to firearms, who they could marry, and allowed for their arrest without a warrant. It defined who was, and was not, Aboriginal and controlled all contact that Aboriginal people had with the wider community. As summarised by Haebich, it:

laid the basis for the development of repressive and coercive state control over the state’s Aboriginal population. It lumped a broad range of disparate persons together in a special legal category based on vague notions of Aboriginal ancestry and lifestyle. It set up the necessary bureaucratic and legal mechanisms to control all their contacts with the wider community, to enforce the assimilation of their children and to determine the most personal aspects of their lives.

Unless exempt from the provisions of the Act, an exemption which was subject to revocation by the Minister, Aboriginal people required permission to do virtually anything.

Allen & Unwin) 2005 and Miller, A. Journey to the Stone Country (Crow’s Nest NSW: Allen & Unwin) 2003. These works are discussed in Chapter Seven.

12 Although initially the Act did not permit for the removal of children without the permission of their parents. This was to come later with amendments in the Aborigines Act Amendment Act 1911 (WA), section 3.

13 Haebich, above n.8 at 83 – 89.

14 Ibid at 83.
The enactment of these measures was motivated by paternalistic and colonialist policies of protection, assimilation and absorption. Protection policies were, as explained by Haebich:

predicated on the pseudo-scientific theory of Social Darwinism which dominated settler attitudes to Aborigines from the 1870's and well into [the twentieth] century. Social Darwinism postulated that Aborigines were the least evolved race in the world and as such they were doomed to pass away. … Such beliefs absolved the colonists from taking firm action to halt the decline in the Aboriginal population; instead, Aborigines were simply given enough to make their ‘passing’ as ‘comfortable’ as possible.\(^\text{15}\)

Protection simply meant easing “the plight of the dwindling Aboriginal population in settled areas.”\(^\text{16}\) They were to be segregated from the rest of the population and protected and cared for until their inexorable demise. It soon became apparent, however, that the theories of social Darwinism that justified protection policies were unfounded. Aboriginal people were not ‘dying out’ and the number of ‘half-castes’ was increasing. And so a new concern emerged. That of how to manage the threat to the white population posed by this increasing number of people of mixed origin. The response was a policy shift from protection to assimilation. Assimilation meant the integration of Aboriginal people into white society. Or, more accurately, it sought to make everyone the same, denying Aboriginal people their identity and their difference. It was both social and biological. Social integration would ensure that white culture would predominate, eliminating that of the Indigenous population, while biological absorption would secure the disappearance of all physical traces of Aboriginality.

\(^{15}\) Ibid at 47 – 48. The influence of theories of social Darwinism on colonialism is discussed in Chapter Four.

\(^{16}\) Ibid at 47.
The 1905 Act reflected both of these policies. It advocated segregation, satisfying those who disliked the visible presence of Aborigines and allowing for their ‘care’ and ‘protection’ while they ‘died out’. At the same time, it promoted the assimilation and integration of those Aborigines with sufficient non-Aboriginal (white) blood into mainstream society, through the removal of Aboriginal children from their families, ensuring that ultimately the Aboriginal ‘race’ would be absorbed into the white population and disappear. It was this policy of assimilation that gained precedence throughout the first half of the twentieth century.

Amendments to the 1905 Act conferred on the Chief Protector the right to remove illegitimate and ‘half-caste’ children from their families “to the exclusion of the rights of the mother”. Further amendments enacted in 1936 widened the definition of persons falling under the Act, extended the guardianship powers of the Commissioner, who replaced the Chief Protector, to every child to the age of twenty-one, made sexual contact between Aboriginal and non-Aboriginal people unlawful, and empowered the Commissioner to authorise any person to examine a ‘native’, and to stop traditional Aboriginal practices. The focus of these amendments was to ensure that ‘half-caste’ children would be absorbed into mainstream society. As A.O. Neville, the Chief Protector of Aborigines in Western Australia from 1915 to 1940, stated:

The opinion held by Western Australian authorities is that the problem of the native race, including half-castes, should be dealt with in a long range plan. … Western Australia has gone further in the development of such a long range policy than any other State, by accepting the view that

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17 For example, the Preamble to the Act states that it is “An Act to make provision for the better protection and care of the Aboriginal inhabitants of Western Australia.”

18 Aborigines Act Amendment Act 1911 (WA) section 3.

19 Trees, above n.4 at 192. These amendments were contained in the Native Administration Act 1936 (WA) sections 16 and 66.
By 1951 there was consensus between all states that assimilation was the best policy to be pursued. The federal Minister of Territories, Paul Hasluck, stated that this would allow Aboriginal people to:

attain the same manner of living as other Australians and live as members of a single Australian community enjoying the same rights and privileges, accepting the same responsibilities, observing the same customs and influenced by the same beliefs, hopes and loyalties as other Australians.21

Not until 1963 did the legislative regime in Western Australia begin to be dismantled, when the Commissioner ceased to be the guardian of Aboriginal children and their removal without compliance with general child welfare laws was no longer allowed.22

As reflected in Hasluck’s statement, there was, underlying assimilation and integration policies, a conception that all Australians should be treated equally and enjoy the same rights and opportunities. However, assimilation did not achieve equality for Aboriginal people. Rather, it instituted a discriminatory regime that ensured they were not treated equally with non-Aboriginal Australians and, at the hands of those such as A.O. Neville, it became nothing more than a tool of social engineering, a mechanism by which biological absorption could be pursued.23

People were defined by reference to the colour of their skin and the degree of their

20 Quoted in ibid at 193.
21 Quoted in ibid at 196.
22 Ibid at 200. The removal of children then had to comply with the provisions of the Child Welfare Act 1947 (WA), although these child welfare laws were often used more freely in the case of Aboriginal children. Also as Kevin Rudd stated in the apology, “let us remember the fact that the forced removal of Aboriginal children was happening as late as the early 1970’s. The 1970’s is not exactly a point in remote antiquity. There are still serving members of this parliament who were first elected to this place in the early 1970’s. It is well within the adult memory span of many of us.” Above n.1 at 169 – 170.
23 Jacobs, P. Mister Neville, a biography (Fremantle: Fremantle Art Centre Press) 1990 writes of the good that Neville did, such as keeping good records.
Aboriginal ancestry. In this way, the discourses of equality and assimilation enabled and justified the unequal and discriminatory treatment of Aboriginal people under the 1905 Act and resulted in such inhumane practices as the removal of Aboriginal children from their families. The consequences of such measures are devastating. As recounted in *Telling Our Story* and *Bringing Them Home*, the legislative regulation of the lives of Aboriginal people had consequences far beyond the legal, and these consequences continue to be felt by Aboriginal people in Western Australia today.

**“Tell them you’re Indian”**: Defining Aboriginality

In *My Place*, Gladys instructs Sally to tell the children at school that she’s Indian:

‘Come on, Mum, what are we?’
‘What do the kids at school say?’
‘Anything. Italian, Greek, Indian.’
‘Tell them you’re Indian.’
I got really excited, then. ‘Are we really? Indian!’ It sounded so exotic.
‘When did we come here?’ I added.
‘A long time ago,’ Mum replied. ‘Now, no more questions. You just tell them you’re Indian.’

Gladys is scared of being Aboriginal, at least within the public domain, and Sally and her siblings are kept unaware of their Aboriginality. Gladys’s fear and shame at being Aboriginal is reinforced by her mother, Daisy, who also insists that they not tell anyone that they are Aboriginal. Later, Sally’s sister Jill says to her:

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25 Morgan, above n.5 at 45.

26 Ibid at 45.

27 “Mum … told me I must never tell anyone what I was. She made me really frightened. I think that was when I started wishing I was something different.” Ibid at 349.
'You know what we are, don’t you?'
'No, what?'
'Boongs, we’re boongs!' I could see Jill was unhappy with the idea.
It took a few minutes before I summoned up enough courage to say, ‘What’s a boong?’
‘A boong. You know, Aboriginal. God, of all things, we’re Aboriginal!’
‘Oh.’ I suddenly understood. There was a great deal of social stigma attached to being Aboriginal at our school.
‘I can’t believe you’ve never heard the word boong,’ she muttered in disgust.
‘Haven’t you ever listened to the kids at school? If they want to run you down, they say, “Aah, ya just a boong.”’

Daisy and Gladys’s fear and shame, and the stereotyping and denigration of Aborigines as ‘boongs’ recounted by Jill, result from the reality of being Aboriginal under the 1905 Act, and, perhaps more importantly, the knowledge of Aboriginality constructed and promoted by this legislation.

It was explained in Chapter One how narratives are a means of producing knowledge. They may be personal, as in autobiographical texts or reports such as *Bringing Them Home* and *Telling Our Story*, literary, such as the texts discussed in this work, or official, such as the law. Legislation is part of the official narrative of law. It provides an official story, or framework, which structures perspectives of, and creates knowledge about, the subject matter of the legislation. The 1905 Act is part of this official narrative of law. It contributed to the creation of knowledge about Aboriginal people, by constructing them as ‘primitive’, ‘uncivilised’ and ‘a dying race’. This official representation shaped the way in which Aboriginal people were (and are) perceived and portrayed by the wider, non-indigenous, community. As Trees explains:

28 Ibid at 121.
29 This shame is also evident in Scott, above n.2.
While England, the State and then the Commonwealth were regulating the lives of Aboriginal people, to the point of determining who was Aboriginal, public ‘knowledge’ about Aborigines was being constructed. This knowledge paralleled government regulation. Aboriginal people were constructed as ‘primitive’, ‘uneducated’, ‘without law or religion’, ‘promiscuous’, ‘unfit parents’, and ‘needing to be constrained’. Legislation … and public opinion correlated to the objectification, subjugation and construction of Aboriginal identity.31

In this way, the 1905 Act is part of the discourse of Aboriginalism discussed in Chapter Four. Aboriginalism, as explained there, is a way of informing our knowledge about Aboriginal people. In regulating the lives of Aboriginal people, this Act created ‘truths’ about them and constructed an Aboriginal identity, which shaped the community’s knowledge of Aboriginality.

One of the ways in which the legislation created this knowledge and identity was through its various definitions of ‘Aboriginal’ and designation of those who fell within its jurisdiction. The Act applied to all ‘Aboriginal natives’, defined as “all persons of the full descent and those with one Aboriginal parent and who lived with Aborigines”.32 It also applied to “any ‘half-caste’ child or any ‘half-caste’ adult married to an ‘Aboriginal native’.”33 Under this regime people were classified as ‘full blood’, ‘half-caste’, ‘quadroon’ and ‘octoroon’, and, depending on how they were defined and categorised, were denied or granted various rights, freedoms and opportunities.34 Not only did the Act categorise people according to the degree of their Aboriginal ancestry, it also defined Aboriginal people to the exclusion of their tribal names and identities. They were not identified as Yinjibarndi, or Bunjima, or

31 Trees, above n.4 at 177.
32 Haebich, above n.8 at 88.
33 Ibid at 88.
34 They were denied such rights as welfare, invalid and old age pensions and maternity allowance. These had been introduced by the federal government in 1908 and 1912 respectively. Ibid at 98.
Nyoongar, for example. They were labelled simply as ‘Aboriginal natives’. In this way, the official narrative of law denied the identity of specific Aboriginal groups, creating, in their place, a generic, homogenous and homogenising category of ‘Aboriginal’. That is, it appropriated Aboriginal identity and, purporting to “know more about them than they know about themselves”, it constructed and represented them as ‘other’. Through its definitions of ‘full-blood’, ‘half-caste’ and the like, the law told Aboriginal people who, and what, they were. Initially it told them that ‘half-castes’, being half white, were capable of being educated and assimilated. Later, however, as Trees points out, this representation changed. ‘Half-castes’ “became ‘the problem’ – they were re-identified as ‘lazy’, ‘failed to attend school or work’ and were ‘alcoholics’.” These images informed the way that white people perceived Aboriginal people. By contributing to the creation of these images and this knowledge, the legislation thereby promoted prejudice and discrimination towards Aboriginal people at the level of the legal and the social.

*Benang* and *My Place* are both works which inform readers about the knowledge created by the 1905 Act, the inequalities that it imposed on Aboriginal people and the impact that it had (and continues to have) on them. *Benang* tells the story of Harley, “the first white man born”, and his reconnection with his Aboriginal heritage. Harley is the grandson of Ernest Solomon Scat, a Scotsman who emigrates to Australia in the 1920’s and embraces the eugenics project advocated by

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35 Trees, above n.4 at 178.
37 The law also told Aboriginal people in Western Australia who they were by including them within the portfolio of the Minister for Flora and Fauna until as late as 1984.
38 Trees, above n.4 at 173.
39 As discussed below this contributed not just to the definition of Aboriginal but also to the exclusion and silencing of Aboriginal people.
40 Scott, above n.2 at 12.
his cousin Auber Neville. Like Neville, Ern believes absolutely in biological assimilation and that ultimately all traces of Aboriginality can be bred out of the population. Wishing to “make something of himself”, and “leave his mark on history”, Ern embarks on a personal eugenics project. He is determined, through “a controlled breeding program amongst Nyoongar women … to produce a white son.” Harley is the result. Unfortunately for Ern, Harley is, however, determined not to lose his Aboriginality, and sets out (successfully) to rediscover his family history and revive his Aboriginal ancestry. He “traces his Nyoongar family … and rewrites and differentiates the people that Ern attempted to reduce to the generic categories of “half-caste” and “quadroon.”

In recounting this “most local of histories”, Scott compellingly informs about the operation of the 1905 Act. He powerfully exposes the way that Aboriginal people were defined and treated under the Act, the inhumanity of the assimilationist knowledge and policies which underlay it and the way in which the law “systematic[ally] attempt[ed] to breed out a race” as it sought to transform Aboriginality into whiteness. The reader is told, for example, of Neville’s “expert opinions on the need for both social and biological absorption of the Native Race” and of Ern’s belief in the need to “[u]plift a despised race” and “[d]ilute the

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41 This relationship between Neville and Scat is only fictional.
43 Ibid at 52.
44 Ibid at 52.
46 Scott, above n.2 at 12.
48 Scott, above n.2 at 45.
49 Ibid at 29.
This is to be achieved through “careful breeding” so that “after two or three generations the advance should be so great that families should be living like the rest of the community.” To facilitate this program of “careful breeding”, of “animal husbandry”, it was essential that Aborigines be clearly identified as ‘half-caste’, ‘quadroon’, ‘octoroon’ and so on. Harley finds his family so labelled and defined when he discovers some photographs in his grandfather’s study, in which “each individual was designated by a fraction”.

Captions to the photographs; full-blood, half-caste (first cross), quadroon, octoroon. There was a page of various fractions, possible permutations growing more and more convoluted. Of course, in the language of such mathematics it is simple; from the whole to the partial and back again. This much was clear; I was a fraction of what I might have been.

A caption beneath my father’s photograph: Octoroon grandson (mother quarter caste [No. 2], father Scottish). Freckles on the face are the only trace of colour apparent.

And Harley, the “intended product of a long and considered process”, is identified as “the first white man born”.

As “the first white man born”, Harley has a “propensity for elevation”. When he relaxes and lets his “mind go blank” he floats above the ground:

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50 Ibid at 29.
51 Ibid at 28.
52 Ibid at 28.
53 Ibid at 76.
54 Scott quotes Haebich’s discussion of how Aboriginal people were defined under the amendments to the 1905 Act: “The central clause in the 1936 Act was the definition of persons to be deemed ‘natives’ within the meaning of the Act. … Briefly, it included all persons of the full and part descent, regardless of their lifestyle, with the following exceptions: all ‘quadroons’ over the age of twenty-one unless classified as ‘native’ by special magisterial order … and persons of less than ‘quadroon’ descent born before 31 January 1936.” Ibid at 151.
55 Ibid at 28.
56 Ibid at 28. The arbitrariness of these definitions is made apparent when Harley is talking about his father, Tommy and Tommy’s sister, Ellen. Ellen was born on 30 January 1936 and so, legally, was exempt from the definition of ‘native’ under the Act. Tommy, however, born later, although of the same parentage was not exempt. He was defined by the law as a ‘native’. Ibid at 152.
57 Ibid at 30.
58 Ibid at 14.
I know I make people feel uncomfortable, and embarrass even those who come to hear me sing. I regret that, but not how all the talk and nervous laughter fades as I rise from the ground and, hovering in the campfire smoke, slowly turn to consider this small circle of which I am the centre.\(^{60}\)

It is only his anger that brings him back to ground. The irony here is clear. Scott is exposing, and commenting on, the racist ideologies that informed assimilationist and eugenicist practices. Harley is “quite literally ‘uplifted’ and ‘elevated’” as only someone with white blood can be.\(^{61}\) The barbarity of these assimilationist beliefs and practices is conveyed more starkly by Harley’s Uncle Jack:

‘It’s another sort of murdering. What the law was doing. And helping people do. Killing Nyoongars really, making ‘em white, making ‘em hate ‘emselves and pretend they’re something else, keeping ‘em apart.’\(^{62}\)

Scott is similarly critical about the way the knowledge created by these constructions of Aboriginality perpetuated the image of Aborigines as ‘primitive’ and ‘uncivilised’. Sergeant Hall, for example, was “proud that there was no _nigger_ problem in his town”,\(^{63}\) and one of the white school children laments that:

they shouldn’t be going to the same school together. They were like monkeys they were, and filthy. His dad talked of a _White Australia_, about the dangers of contamination and infection. It made him passionate, even in this dull schoolroom.\(^{64}\)

As Sandy One states, however, in response to suggestions that his children should not attend the same school as the white children, “‘They’re not _savages_, they’re my kids. They’re people.’”\(^{65}\) Again the irony is clear.

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59 Ibid at 14. Lisa Slater suggests that Scott likens blankness to whiteness, and that “[t]hroughout _Benang_ he suggests that to desire a limited and prescriptive white nation is to be imaginatively, intellectually and ethically bereft.” Above n.42 at 58.
60 Ibid at 9.
61 Scott, K. “Covered up with Sand” (2007) 66(2) _Meanjin_ 120 at 123.
63 Ibid at 74.
64 Ibid at 295.
65 Ibid at 267.
*Benang* is a local history, a family history that “contests the interpretation of white history and law.” That is, *Benang* presents a counter narrative that tells a different story and a different history to the authorised white colonial history. In Chapter Six, I explained how history has been written by the colonisers, not the colonised, and that this has resulted in a privileging of an official history that has subjugated the history and knowledge of colonised (Aboriginal) peoples. As Trees explains:

Official history has served to marginalise ‘Aboriginal’ knowledges, customs and beliefs and further ensures a privileged place for ‘white’ knowledges, customs and beliefs as the foundation of Australian society.67

*Benang* challenges this official history. It tells of:

Australia’s heroic pioneering history from the perspective of those who suffered at the hands of the colonizers. It tells the stories of different heroes – Harley’s Nyoongar ancestors and family who survived and resisted colonialism.68

In order to reconnect with his Aboriginal past, Harley travels through Nyoongar country with his uncles. They tell him of the history of their people and of the impact that colonisation had on them, so that through “the deafening and deadening roar of colonial contact” Harley is able to hear and tell the story of his ancestors. In so doing, he comes to understand that “his own history and experiences, at the hands of Ern, [are] part of the much larger project of colonialism.” In response, he seeks to redefine himself and rejects the white ‘truth’ of Scat. He presents an alternative story of his identity, one which rejects and defies the law’s description of Aborigines as needing to be ‘uplifted’ or as a

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66 Uhlmann, above n.47 at 50.
68 Slater, above n.42 at 53.
69 Ibid at 53.
70 Ibid at 53.
'despised race'. Harley creates an identity that is neither promoted nor endorsed by the law. As Slater states:

In *Benang*, Scott forces the monologue of eugenicist discourse to answer to, and enter into dialogue with, Indigenous people. *Benang* is a hybrid history that gathers together the quiet voices and littler histories of Nyoongar people to contest and protest against colonial ideology.71

Ultimately, what *Benang* tells the reader is that the racist, colonial ideology that underlay the 1905 Act justified the unequal and discriminatory treatment of Aborigines. Their construction as ‘inferior’, ‘primitive’ or ‘different’ was essential to the colonial project. As Scott’s narrator reflects:

These new people, they were growing a community like they grew their crops. They focused on money and time, on cause and effect, and knew they would have to modify what was around them if they were to grow as they wished. They were not of this country, but, looking outward, believed they understood its potential. It was necessary to believe that the land's people were inferior, and to ensure that there was proof of that.72

Scott challenges this. He disrupts colonial logic and the eugenicist discourse by writing an alternative story, and presenting alternative perspectives that have been suppressed by the discourses of colonialism, paternalism and assimilation.

Like *Benang, My Place* is a journey of discovery and reconnection with an Aboriginal heritage. In this work, Sally Morgan recounts her life growing up in suburban Perth, initially unaware of her Aboriginality, but later uncovering the truth. She embraces her Aboriginal past and begins to research into her family history. Eventually she is able to convince her mother Gladys, her great uncle

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71 Ibid at 52.
72 Scott, above n.2 at 313 – 314.
Arthur and her grandmother Daisy to tell their stories. Like Scott, she weaves a compelling account of the realities of life under the 1905 Act and its assimilationist policies, and of the continuing long-term impact of its measures. The reader is informed of Daisy and Arthur’s removal from their mother as ‘half-castes’ so that they could be assimilated into white society and, particularly for Daisy, of the consequent fear and shame associated with being Aboriginal. We learn of Daisy’s life as a servant to the Drake-Brockman family, the lack of equality and fairness with which she was treated by them, the implication that Howden Drake-Brockman was her father and the removal of her daughter Gladys, also potentially fathered by Howden, to Parkerville children’s home. Such is the difficulty and stigma of being Aboriginal that Daisy denies and suppresses her Aboriginality and encourages Gladys to do the same. Only after Sally’s persistent questioning do mother and daughter begin to acknowledge and embrace their Aboriginality. And, despite Sally’s best efforts, there remain secrets of which Daisy will not speak.

In telling the stories of three generations of Sally’s family, My Place exposes the way in which Aborigines were defined as ‘full-blood’ and ‘half-caste’ and critiques the way that this constructed identity determined how Aboriginal people were treated, and what rights and freedoms they had (or did not have). Arthur Corunna, for example, tells of how he wished he was ‘full-blood’ so that he could stay with

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73 Morgan has been subjected to some criticism for the way that she has constructed her Aboriginality. See, for example, Attwood, B. “Portrait of an Aboriginal as an Artist: Sally Morgan and the Construction of Aboriginality” (1992) 25 Australian Historical Studies 302; Muecke, S. “Aboriginal Literature and the Repressive Hypothesis” (1988) 48(4) Southerly 405. I am not concerned with these arguments here. My concern is with the way that Morgan exposes, critiques and challenges the way hegemonic power structures such as the law define and construct Aboriginality. For a discussion of some of these criticisms see Cooper, A. “Talking About My Place/My Place, Feminism, Criticism and the Other’s Autobiography” (1995) 28 Southern Review 140.
his family, and of the way that ‘half-caste’ children were brutally removed from their Aboriginal mothers so that they could be assimilated:

Aah, I wish I’d never left there. It was my home. Sometimes, I wish I’d been born black as the ace of spades, then they’d never have took me. They only took half-castes. …

When I left, Lily cried and cried. She was only little but she ran away and hid, no one could find her. I was her favourite. She was full blood, real black, so they didn’t want to take her. …

They told my mother and the others we’d be back soon. We wouldn’t be gone for long, they said. … They didn’t realise they wouldn’t be seein’ us no more. I thought they wanted us educated so we could help run the station some day, I was wrong.74

And, once removed from their families the fairer children were further separated from the darker ones, in the belief that they were more capable of being educated and assimilated:

we was all in there together, white ones, black ones. We liked sharing … Governor Bedford didn’t like it one bit. He separated us all out. … they put Freddie Lockyer in with the white kids. He had fair hair and fair skin, but really, he was a white blackfella. He didn’t want to go, he wanted to stay with us blackies, he belonged to us, but they made him go. I said to him, ‘You’re not black enough to stay with us, you have to go.’ I felt sorry for him. He was really one of us.75

But assimilation, as explained by Arthur, was not about education or protection. It was, under Neville, nothing more than a policy of genocide. Aboriginal people were not even permitted to use their own language but were forced to speak that of the colonisers. As Arthur concludes, “Neville … wasn’t protectin’ the Aborigines, he was destroyin’ them!”76

The impact of these measures was considerable, extending far beyond the legal into the social, informing the way that Aborigines were perceived and treated by non-

74 Morgan, above n.5 at 231 – 232.
75 Ibid at 234.
76 Ibid at 266.
indigenous Australians. We see, for example, how white authorities question Aboriginal people’s integrity and honesty, and Gladys tells of one particularly revealing encounter with a woman at a bus stop:

I remember one Sunday waiting at a bus stop for a bus to my girlfriend’s house, when a lady came along. She was catching the same bus as me, so we started to chat.

‘You’re very beautiful, dear,’ she said, ‘what nationality are you, Indian?’

‘No,’ I smiled, ‘I’m Aboriginal.’

She looked at me in shock. ‘You can’t be,’ she said.

‘I am.’

‘Oh, you poor thing,’ she said, putting her arm around me, ‘what on earth are you going to do?’

What is made evident here, and throughout the text, is that Aborigines were defined and identified as being ‘different’. They were not constructed or perceived as equal to non-Aboriginal Australians. They were inferior, to be cared for, in some cases pitied, but ultimately they were to be absorbed. This was the construction adopted by the law, and by society, and, in accordance with Said’s Orientalism and Hodge and Mishra’s Aboriginalism, one which Aboriginal people themselves were forced to believe. As Trees notes, “Daisy, Arthur and Gladys Corunna were coerced into accepting white assessment of themselves as ‘inferior’ and therefore as subordinate.”

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77 For example, Sally is questioned by the Commonwealth Department of Education over an Aboriginal scholarship that she is receiving. It was suggested that she was receiving the scholarship falsely. Sally says to those questioning her, “You’ve obviously already judged me guilty, what else can I say?” Ibid at 177.
78 Ibid at 349.
79 Trees, above n.67 at 72. This is also evident in Benang. As Slater observes: “Despite these discoveries and his desire to reverse his grandfather’s process – and whatever understanding he might have come to of this process – and although he has rejected Ern’s truth, still he remains with only his grandfather’s knowledge of him.” Slater, L. “Kim Scott’s Benang: An Ethics of Uncertainty” (2005) 4 Journal of the Association for the Study of Australian Literature 147 at 152.
Morgan challenges this imagery and, in so doing, like Scott, writes a counter history. She tells an Aboriginal history and documents Aboriginal experiences of the way Aboriginal people were treated under the 1905 Act. That is, she presents an alternative truth and an alternative history, one which challenges and critiques the official histories and “undermines the authority of assimilationist discourses.”

Such critiques and histories are important. As Trees explains, they:

> provide some understanding of the experiences of Aboriginal people post-1788. They act as a counter-memory, as a record of displacement and deculturation, as opposed to official Australian accounts of settlement and civilisation.

Sidonie Smith makes a similar point:

Detecting Aboriginality, confessing Aboriginality, battling for Aboriginality, educating oneself in Aboriginality, all these generic practices are counter normative. Here the confession of Aboriginality is posited as something good; and the act of confessing it publicly becomes a political gesture in resistance to discourses of assimilation.

Or, as Sally puts it in *My Place*:

> I want to write the story of my own family … there’s almost nothing written from a personal point of view about Aboriginal people. All our history is about the white man. No one knows what it’s like for us. A lot of our history has been lost, people have been too frightened to say anything. There’s a lot of our history we can’t even get at, Arthur. There are all sorts of files about Aboriginals that go way back, and the government won’t release them. … our own government had terrible policies for Aboriginal people. Thousands of families in Australia were destroyed by the government policy of taking children away. None of that happened to white people.

*My Place* was one of the first accounts written from an Aboriginal perspective of the brutality of the measures contained in the 1905 Act and of the impact that they

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81 Trees, above n.67 at 74.
82 Above n.80 at 531 – 532.
83 Morgan, above n.5 at 209.
had on Aboriginal people. By highlighting such issues as the paternalism and injustice of government policies and actions, and the denial of family relationships and language rights, for example, Morgan reveals a story that has hitherto largely been suppressed.84

What is made clear in both *Benang* and *My Place* is that the production of knowledge is both important and powerful. The 1905 Act, as part of the official narrative of law, produced a particular knowledge of Aboriginal people. It defined who was, and was not, Aboriginal, and to what extent. This determined not only what rights, freedoms and opportunities those under the Act were permitted or denied, but contributed to the perception that the non-indigenous community had of Aboriginal people and of Aboriginality. It justified the inhumane and discriminatory treatment of Aboriginal people in Western Australia, ensuring that, at the level of both the legal and the social, they were not accorded equality with non-Aboriginal Australians. That is, the law was (and is) complicit in the creation of an Aboriginal identity which then justified their unequal treatment. They were ‘inferior’, ‘primitive’, ‘sub human’, and, as such, they neither needed nor deserved

84 It pre-dates *Telling Our Story* and *Bringing Them Home*, above n.24. It is important, also, to highlight that *My Place* is a biographical work and that it is this that accords it an authority that a purely fictional text might be denied. That is, while it is a story of the lives of Sally, Arthur, Gladys and Daisy, it is also an account of Western Australian history, and the way in which the law defined and treated Aboriginal people in Western Australia. Morgan’s text is the story of one family. There are many other families who have similar stories to tell and these stories perform an important function. See, for example, Nannup, above n.30 and Ward, above n.30. Stories such as these “record a past which has been elided in official white histories of the nation.” Brewster quoted in Trees, above n.4 at 170. They critique the colonialist, positivist narrative of law, as enshrined in the 1905 Act, and allow Aboriginal people to speak of the injustices and wrongs to which they were subjected and about which they were not previously allowed to speak. They allow for Aboriginal voices to be heard, and for Aboriginal stories to be told. And these stories inform about the devastating consequences that the 1905 Act had on the lives of Aboriginal people, many of which continue to be felt by Aboriginal people today.
equal treatment. This lack of equality is examined in more depth in the next section of this chapter.

“Well Jack … you’ve got no rights according to the laws of this country”85: ‘Equality’ Under the 1905 Act

‘The law? The law? How long’s there been this law? That says that I’m a lesser man than any of you?’

… ‘Oh, ages Harry. Nearly ten years now. The 1905 Aboriginal Protection Act. A new amendment, just a few years ago.’

‘Protection Act? I don’t need it, I don’t need that. Just fair treatment same as anyone. That’s what I want from a law, any law, new one or old one just the same.’86

Despite its stated aim of ensuring that all Australians would enjoy the same rights, privileges and opportunities, assimilation did not achieve equality for Aboriginal people. Far from enjoying the benefits of the rule of law, Aboriginal people were actively and deliberately denied equality. Two points need to be emphasised here. Firstly, the law was not merely implicated in this. It was actively complicit in its denial of equality to Aboriginal people. Secondly, the impact of these inequalities persists today in various forms.87 As Scott has noted:

The power relationship characteristic of colonial societies still exists in Australia. The benefits of colonisation haven’t been equally shared with the prior societies. No matter what statistics you choose – life expectancy, employment, education, income, infant mortality – Australia’s indigenous communities remain at a disadvantage compared to the rest of the population.88

86 Scott, above n.2 at 315.
87 Consider, for example, the discriminatory treatment of Aboriginal people under the Northern Territory intervention authorised in the Northern Territory Emergency Response Act 2007 (Cth).
88 Scott, above n.61 at 120 – 121.
In *Benang* this lack of equality is manifest in the many scenes in which the narrator informs us about the treatment of Harley and his ancestors. They are not, for example, permitted to enter pubs or clubs without permission,\(^9\) or to work without special permits.\(^9\) They are not free to live where they wish,\(^9\) or to raise their own children.\(^9\) They are not allowed to own property,\(^9\) or entitled to control their own finances.\(^9\) Uncle Jack, for example, despite being ‘half-caste’ and “work[ing] Hard and Earn[ing] a living the same as a white man would”,\(^9\) is denied an exemption under the Act, and Uncle Will is denied financial assistance because of his Aboriginality.\(^9\) Even the children were ‘discouraged’ from attending the same school as the white children.\(^9\) Such examples indicate the extent of the discrimination to which Aboriginal people were subject. It was a form of apartheid.\(^9\) These were not restrictions to which white people had to adhere. The law denied Aboriginal people a range of rights and privileges and imposed on them numerous burdens, and society followed suit. Aboriginal people were denied equality, scorned and treated as less than human. As Lisa Slater writes:

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\(^9\) “‘We wish to know his caste,’ continued Auber, ‘because it has a bearing upon whether he is entitled to join the ANZAC Club.’” Scott, above n.2 at 42.

\(^9\) “There had been new legislation hinted at which would require that he take out a permit to employ the boy.” Ibid at 195.

\(^9\) “*Despite your officer’s report and the advice of members of the Gebalup community I have serious objections to the woman remaining in the Gebalup district instead of being removed to the Native Settlement. I enclose the necessary warrant for her removal.*” Ibid at 108.

\(^9\) “*Our policy is to send them out into the white community, and if the girl comes back pregnant our rule is to keep her for two years. The child is then taken away from the mother and sometimes never sees her again.*” Ibid at 159.

\(^9\) “‘When the big man died, what would happen to all that timber, and the land? … They’d talked … about the danger of leaving any property to Harriette. At present, because of the marriage, she may legally be a white woman, but once Daniel went … Well, it was risky.’” Ibid at 82.

\(^9\) “‘They set one day aside for Aboriginal people to do their shopping, and told him that was his day off. Not that he had any money, most of it was banked for him, somewhere. He never saw it.’” Ibid at 130.

\(^9\) Ibid at 64.

\(^9\) Ibid at 120 – 121.

\(^9\) Ibid at 292.

\(^9\) “‘They had some good ideas those, Nazis,’ Ern said.” Ibid at 156.
[Ern] and his fellow eugenicists do not consider Indigenous people to be part of the civic body. Therefore they do not have to treat them justly and as respected, fellow citizens. Indigenous people are answerable to the settlers, but the settlers are under no obligation to reciprocate.99

As Harley, talking of his ancestor Sandy One Mason, summarises, “Sandy Mason … was not – whatever his own beliefs – the equal of any white man.”100

Likewise, in My Place Morgan informs about how the main characters do not enjoy respect or equality. We are told, for example, of how Daisy is exploited by the Drake-Brockman family. Despite their assertions that she is one of the family they removed her from her own family and exploited her as an unpaid servant. They denied her fair pay,101 refused to give her holidays, did not permit her time off to visit her daughter and would not allow her daughter to stay with her.102 She tells of the difficulties faced by Aboriginal people in obtaining housing, jobs and the like. They needed permission to go anywhere.103 They were not citizens and were not allowed to vote.104 And, worst of all, they endured the forced removal of their children because they were not deemed, by white law, to be fit parents.105 White people did not live in fear of having their children removed just because of the colour of their skin. Gladys recounts how she was threatened by her (white) husband:

100 Scott, above n.2 at 44 – 45.
101 Morgan, above n.5 at 345.
102 “Alice had kicked me out again. … She owed me back wages, got me to work for nothing, then kicked me out. I was just used up. I been workin’ for that family all those years, right since I was a little child, and that’s how I get treated. … I should have known. When they didn’t want Gladdie stayin’ there, I should have known.” Ibid at 427.
103 “I wasn’t allowed to go anywhere. I had to have permission …” Ibid at 424.
104 “I heard of this native bloke, … he still wasn’t a citizen, … And he wasn’t even allowed to vote.” Ibid at 266.
105 “[I]f you had children, you weren’t allowed to keep them. You was only allowed to keep the black ones. They took the white ones off you ‘cause you weren’t considered fit to raise a child with white blood.” Ibid at 420.
'Nobody will let someone like you bring up kids and you know it. I’m the one that’ll get custody. I’ll give them to my parents.'

As Gladys explains, “Aboriginal women weren’t allowed to keep their children fathered by a white man.”

It is, however, Daisy who comments most particularly on the lack of equality experienced by Aboriginal people. She explains how:

“Cause you’re black, they treat you like dirt. You see, in those days, we was owned, like a cow or a horse. I even heard some people say we not the same as whites. That’s not true, we all God’s children.”

So extensive was this discrimination against Aboriginal people that Daisy and Gladys determine never to tell Gladys’s children of their Aboriginality:

Mum said she didn’t want the children growing up with people looking down on them. I understood what she meant. Aboriginals were treated the lowest of the low. It was like they were the race on earth that had nothing to offer.

Morgan’s revelations of such discrimination and inequality are important. As she says of My Place:

I think probably what it – My Place – did was make people reassess their view of Australia as a nation, because our motto as Australians is “a fair-go,” everyone should have “a fair-go.” It was very clear that Aboriginal people have never had that “fair-go.”

Both novels are replete with such examples of this lack of “a fair-go”. What they make abundantly clear is that the discourse of assimilation denied Aboriginal people the right to be treated equally, and that the rule of law was a privilege.

106 Ibid at 377.
107 Ibid at 377.
108 Ibid at 419.
109 Ibid at 279.
110 Ben-Messahel, S. “Speaking with Sally Morgan” (2000) 14(2) Antipodes 99 at 100. This lack of a fair go is also noted by Kevin Rudd: “There is a deep and abiding belief in the Australian community that, for the stolen generations, there was no fair go at all.” Above, n.1 at 170.
enjoyed only by white Australians. The law defined and categorised Aboriginal people on a scale of black to white, and determined the rights, privileges and opportunities to which they were accordingly entitled or were denied. In *Benang*, Sandy Two Mason meets with Neville seeking permission for his family to come and live with him. Neville replies:

‘This is no affair of yours. The department is running the children’s affairs, and you have no business here.’ The Chief Protector looked up from his desk, from his papers and his card indexes. ‘Sandy you have to come under my laws, you can’t get away from them.’

‘I’m not an Aboriginal. I defy you to call me one.’

…

‘What do you call your common-law wife?’

‘A white woman.’

The undeniably white man shook his head, and tut-tutted softly. ‘No. She is a half-caste.’

Uncle Sandy Mason would not be denied. ‘Her father was a white man, her grandfather was a white man.’

…

He knew the law. ‘I am not an Aboriginal but I am treated as if I am one. I want to be exempted. My family and myself not being Aboriginals should not be pauperised and kept under the act.’

The Chief Protector held his hands in front of him with their palms up.

‘The proof is to the contrary, Sandy. *And it is I, or my representatives, who decide who is or is not Aboriginal*. I’m thinking of your family, Sandy.”

Identity is important. It is “a site of conflict and negotiation: a discursive practice”\(^{112}\) that impacts directly on the lives of Aboriginal people. Those who were identified as falling under the jurisdiction of the Act were not permitted to behave equally, to be treated equally, or to be perceived equally, with white Australians. These laws ensured that Aboriginal people remained firmly within state control, as some of the most legislated about people in the country. At the same time, however, they ensured that they remained excluded from the benefits

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\(^{111}\) Scott, above n.2 at 124 – 125. My emphasis.

and protections of the law enjoyed by those fortunate enough not to fall within the ambit of the 1905 Act.

These exclusions and inequalities were further perpetuated by the inability of Aboriginal people to contest them. That is, the discourse of assimilation and the way in which the law constructed Aboriginal identity denied Aboriginal people the right to object to the discrimination to which they were subjected by the legislation. Assimilation “sought to reduce their otherness to the same of white Australia”, and in seeking to make them the same, it denied Aboriginal people “an authoritative speaking position.” They were silenced within the dominant discourse. In other words, the discourses of assimilation and equality created a différend in silencing Aboriginal voices, within the public sphere, and denying Aboriginal people the ability to challenge the injustices and inequalities to which they were subjected.

Morgan and Scott both comment on and critique this silencing. In My Place, for example, Daisy is unable to challenge the way the Drake-Brockmans treat her. She is silenced by and within the dominant discourse and so is unable to argue that she has been exploited financially and physically. She does not have the resources, the language or even the right to challenge the way in which she has been treated. There were no measures in the law that protected her from such mistreatment: there was no mechanism for her to protect her personal rights. She was invisible. White society and white law would not hear her claims.

113 Uhlmann, above n.47 at 46.
114 Slater, above n.42 at 62.
In *Benang*, Scott emphasises the power of language, and how it can either empower or silence. Ern, for example, reflects that “[t]o be able to speak … in such a controlled manner made [him] feel deliciously superior.”\(^{115}\) In contrast, Jack Chatalong is silenced by the dominant discourse. As a child, Jack speaks all the time, but when he is sent to school he is prevented from speaking:

Chatalong had been struck dumb. What happened to that easy way with words, the easy launching of them, the unthinking way he could set them into flight?\(^ {116}\)

He is denied the right to speak and the ability to be heard within the public domain. Scott is particularly critical of the way that Aboriginal voices have been literally silenced within the dominant discourse. He exposes how the colonisers denied Aboriginal people their language and their voice, forcing them to adopt the language of the colonisers:

I had inherited his language, the voices of others, his stories. That history whose descendants write:

*There was never any trouble. Never blood spilled, or a gun raised in anger.*\(^ {117}\)

In this way, Aboriginal history, Aboriginal identity and Aboriginal voices were literally silenced, so that there was no language left that could speak of the pain and injustice suffered. As Slater writes, when Harley goes into his grandfather’s study he:

is overwhelmed by written records, a deluge of oral histories, fragments of stories, half forgotten memories, pain that has never been spoken and cannot find a language by which to be released, hybrid tales, stories long buried under colonial representation and stories lying quiet, waiting to be reactivated and to re-enter the world.\(^ {118}\)

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\(^{115}\) Scott, above n.2 at 136.

\(^{116}\) Ibid at 101.

\(^{117}\) Ibid at 185.

\(^{118}\) Above n.79 at 151.
But Harley has no knowledge of his own “language in which he can generate a counter-narrative.”119 His only choice is to use the language of the colonisers:

I have written this story wanting to embrace all of you, and it is the best I can do in this language we share. Of course, there is an older tongue which also tells it.120

Importantly, however, these novels do not only highlight the way that Aboriginal people were silenced by the dominant discourse. They allow for Aboriginal stories to be told. In *My Place*, for Sally the silence and the invisibility have continued for too long and she is determined for an Aboriginal story to be told. Her mother, at least initially, remains unconvinced of the worth of her project. She implores Sally to “just leave the past buried” because it “won’t hurt anyone then.”121 As Sally replies, however, “‘Mum’ … ‘it’s already hurt people. It’s hurt you and me and Nan, all of us.’”122 Arthur also emphasises the necessity of allowing for Aboriginal stories to be told:

I want my story finished. I want everyone to read it. Arthur Corunna’s story! I might be famous. You see, it’s important, because maybe then they’ll understand how hard it’s been for the blackfella to live the way he wants. I’m part of history, that’s how I look on it. Some people read history, don’t they?123

Only when Sally started to listen to the untold stories of her family’s history did the truth begin to be told. In this way, these novels do more than simply tell a story. They allow for a voice to be heard within the dominant discourse that

119 Ibid at 153.
120 Scott, above n.2 at 497.
121 Morgan, above n.5 at 194.
122 Ibid at 194.
123 Ibid at 269.
challenges and critiques the law and the inequality that it has imposed upon Aboriginal people.\textsuperscript{124} As Trees writes about \textit{My Place}:

The Arthur Corunna section of the text is a powerful expression of an oppositional viewpoint that challenges this situation of inequality.\textsuperscript{125}

They also create a space for other accounts and critiques to be told. As Sally Morgan states:

\textit{My Place} helped to trigger other people to write and to share their stories. That was a great thing that people were encouraged and felt that they could start sharing their stories.\textsuperscript{126}

And it is through the telling of such stories that the injustices and inequalities to which Aboriginal people have been subjected can be acknowledged and addressed.

**Conclusion**

In this chapter, I have argued that \textit{My Place} and \textit{Benang} inform the reader that the rule of law, introduced into Australia at the time of settlement, did not, despite its assertion that everyone is equal before the law, result in the equal treatment of all Australians. They demonstrate that, rather, the discourses of equality and assimilation were used by the law to ensure that Aboriginal people were not treated equally with non-Aboriginal Australians. They were constructed by the law as ‘other’, as ‘primitive’ and ‘uncivilised’ and, under the guise of ensuring that all Australians would enjoy the same rights, privileges and opportunities, were subjected to a repressive and inhumane regime of discrimination and mistreatment, against which they were denied the right or the ability to object. These novels

\textsuperscript{124} Both works are also readily available. \textit{My Place}, in particular, is written in an idiom easily understood by Anglo-Australians. It has enjoyed wide appeal within non-Aboriginal circles and has sold over 500 000 copies. \textit{Benang} is a more difficult work. It is still, however, part of the dominant, mainstream, arena, as evidenced by its award of the Miles Franklin Award.

\textsuperscript{125} Trees, above n.67 at 73 – 74.

\textsuperscript{126} Ben-Messahel, above, n.110 at 99.
illustrate and critique the way in which the law defined Aboriginality and then subjugated Aboriginal people by denying them their identity and their equality and by silencing them, within the dominant discourse.

In the next chapter, I examine how novels such as *Benang* suggest that these issues of silencing and inequality can be addressed. In telling Aboriginal stories, and allowing Aboriginal voices and perspectives to be heard within the public domain, they can dismantle the conditions that give rise to the *différend*. And they can begin to tell stories of reconciliation, recognition and acceptance of difference, and of equality.
CHAPTER TEN

SORRY

Introduction
On February 13, 2008 the Prime Minister, Kevin Rudd, apologised to Australia’s Aboriginal people “for the laws and policies of successive parliaments and governments that have inflicted profound grief, suffering and loss on these our fellow Australians.” He acknowledged that previous policies and laws, particularly those authorising the removal of Aboriginal children from their families, were unjust and inhumane, and subjected Aboriginal people to repressive and discriminatory measures, the long-term consequences of which are still being felt today.

In Chapter Nine, I argued that stories about the Aborigines Act 1905 (WA) clearly inform the reader about the complicity of the law in the deliberate discrimination of Aboriginal people. They highlight the way in which the law defined Aboriginality, denied Aboriginal people their identity and ignored their equality, and they expose how, under the guise of equality, the law created a différend in its refusal to recognise or acknowledge Aboriginal perspectives and experiences. They reveal how Aboriginal people were systematically discriminated against by the colonial law and denied the benefits of the rule of law introduced into Australia at the time of settlement.

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2 These consequences are felt in a range of areas such as higher infant mortality rates, higher representation of indigenous people in the criminal justice system, lower life expectancy rates and so on.
In this chapter, I argue that Kevin Rudd’s apology is an essential precursor in achieving equality for Aboriginal people. I argue that it is important for the law to say ‘sorry’ and to acknowledge the injustices and inequalities that it has inflicted on Aboriginal people. As Aden Ridgeway has stated:

We cannot turn a blind eye to the Nation’s faults, or be deaf to what we do not want to hear, or even continue to deny that wrongs continue to be done. The beauty and splendour of this great Nation conceals the legacies of past policies and the symptoms of rottenness, decay and idleness.

It is also necessary for the law to be more pluralistic in its treatment and perception of, and relationship with, Aboriginal people. That is, it needs to acknowledge and respect Aboriginal peoples’ ‘otherness’ without trying to assimilate it or absorb it into itself. Such an approach would encourage reconciliation, foster mutual respect between Aboriginal and non-Aboriginal Australians and allow for Aboriginal people to be accorded equality at the level of both the legal and the social.

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3 It should be noted, however, that Rudd’s apology is not necessarily the first step. There have been many other steps along the way to reconciliation. These include the 1965 “Freedom Ride”, which exposed the segregation between black and white Australia; the 1967 referendum, which granted the Commonwealth the power to legislate for Aboriginal people and allowed for Aboriginal people to be counted in the national census; the establishment of the Tent Embassy in front of Parliament House in 1972 and the Whitlam government’s enactment of the Racial Discrimination Act in 1975; the statutory recognition of some land rights; Prime Minister Paul Keating’s 1992 Redfern Park address and the 1992 decision in Mabo v Queensland (No.2) (1992) 175 CLR 1.


5 After Mabo, there was some attempt to do this in relation to land rights with the introduction of the Native Title Act 1993 (Cth). This legislation was, however, significantly amended in the Native Title Amendment Act 1998 (Cth) enacted by the newly elected Howard Liberal-Coalition government. This Act arguably significantly curtailed native title rights, ignored the Racial Discrimination Act and further eroded Aboriginal peoples’ equality. For a discussion of these issues see Bartlett, R. Native Title in Australia 2nd ed. (Australia: Butterworths) 2004 at 52 – 55.
The texts on which I focus in this chapter are Kim Scott’s *Benang*, Alex Miller’s *Landscape of Farewell* and Gail Jones’s *Sorry*.

I also briefly discuss Sally Morgan’s *My Place*. I argue that these works not only expose the inequalities and injustices to which Aboriginal people have been subjected by the law, but they imagine a future in which there is a possibility of reconciliation, recognition and acceptance of difference and, most importantly, equality. I appreciate that this does not equate with societal change. However texts provide a frame for imagining what is possible. They give individuals the opportunity to do this, which is part of a process of change.

In the first half of this chapter, I provide an overview of Kevin Rudd’s apology and discuss the importance of saying ‘sorry’. In the second half, I examine how the novels discussed here highlight the importance of reconciliation between Aboriginal and non-Aboriginal people and emphasise the need for the recognition and acceptance of difference, as a precursor to the realisation of greater equality for Aboriginal people.

**The Apology**

In 1997, the * Bringing Them Home* report, detailing the experiences of Aboriginal people removed from their families as children, was tabled in federal parliament. The then Prime Minister, John Howard, infamously refused to take responsibility for its contents or to apologise to those who suffered under the policy of forced removal.

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Eleven years later, Kevin Rudd offered an apology to Australia’s Aboriginal peoples for the “pain … [t]he hurt, the humiliation, the degradation and the sheer brutality” inflicted on them by numerous policies and laws enacted by Australia’s parliaments. He acknowledged that the mistreatment experienced by Aboriginal people was “the product of the deliberate, calculated policies of the state as reflected in the explicit powers given to them under statute”, and accepted that “[w]e, the parliament of the nation, are ultimately responsible” for the injustices which they suffered:

The uncomfortable truth for us all is that the parliaments of the nation, individually and collectively, enacted statutes and delegated authority under those statutes that made the forced removal of children on racial grounds fully lawful.

Importantly, he makes absolutely clear the active complicity of the law in the authorisation and implementation of these deliberately discriminatory measures.

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9 In an explanatory note to her novel Sorry, Gail Jones explains the importance to Aboriginal people of saying sorry and the impact of John Howard’s refusal to do so: "The word ‘sorry’ has dense and complicated meanings in Australia. ... At an Australian Reconciliation Convention held in Melbourne in May 1997, Prime Minister John Howard refused to say ‘sorry’ to Aboriginal Australians for past government policies of mistreatment. The audience at the convention rose and turned their backs to the prime minister, shaming him in a silent protest with their bodies. Prime Minister Howard has since refused on many occasions to say ‘sorry’. ... One of the recommendations of the ‘Bringing them Home’ report was that a National Sorry Day should be declared. On 26 May 1998, one year after the tabling of the report, the first ‘National Sorry Day’ was held. It offered the community the opportunity to be involved in activities to acknowledge the impact of the policies of forcible removal on Australia’s indigenous populations. ... Sorry Day was an annual event between 1998 and 2004 and was renamed in 2005 as the National Day of Healing for all Australians. For Aboriginal people, ‘sorry business’ is the term given broadly to matters of death and mourning. It refers to rituals, feelings and community loss. ‘Sorry Day’ was meant to connote the restoration of hope for indigenous people.” Jones, above n.6 at 215 – 216.

10 Rudd, above n.1 at 169. He expressly states “we say sorry” to the Aboriginal people at 167. He uses the word sorry a number of times throughout the speech.

11 Ibid at 169.

12 Ibid at 170.

13 Ibid at 170.
There are three themes, in particular, that recur throughout the Prime Minister’s speech which are important in the context of this work: namely, reconciliation, mutual respect and equality. Reconciliation is posited by Rudd as an acknowledgement of, and acceptance of responsibility for, the way that the law treated Aboriginal people. It is a necessary first step in the “healing of the nation.” He states that:

Until we fully confront [the] truth, there will always be a shadow hanging over us and our future as a fully united and fully reconciled people. It is time to reconcile. It is time to recognise the injustices of the past. It is time to say sorry. It is time to move forward together.

Reconciliation does not, however, occur in isolation. It is not a single moment in time that remedies the injustices of the past. Rather, it envisages “[a] future based on mutual respect, mutual resolve and mutual responsibility.” It must, that is, acknowledge ‘otherness’. It must accept that differences exist within our community and that these differences deserve to be accommodated, not assimilated or absorbed into the mainstream, or denied or ignored altogether. They deserve equality of respect and equality of treatment. In other words, reconciliation and mutual respect are a precursor to equality. As Rudd puts it:

reconciliation is in fact an expression of a core value of our nation – and that value is a fair go for all. There is a deep and abiding belief in the Australian community that, for the stolen generations, there was no fair go at all.

The importance of these themes should not be underestimated. Together, they offer hope for a more just future for Aboriginal people, one in which “the injustices

\[14\] Ibid at 167.
\[15\] Ibid at 170.
\[16\] Ibid at 167.

As noted in Chapter Nine, this lack of a fair go is also commented on by Sally Morgan in her discussion of My Place. Ben-Messahel, S. “Speaking with Sally Morgan” (2000) 14(2) Antipodes 99 at 100.
of the past must never, never happen again.” 18 That is, they envisage a future of equality.

This vision is one which is also played out in literature. Sorry, Landscape of Farewell and Benang all explore the need for reconciliation and acceptance of ‘otherness’. Sorry and Landscape of Farewell, in particular, also emphasise the importance of apologising as a necessary starting point in this process. Sorry tells the story of Perdita, a child of English immigrants, who befriends Mary, an Aboriginal girl, and member of the stolen generation, who is sent to live with Perdita and her family in Western Australia. Mary and Perdita become very close, to the extent that when Perdita murders her father, and represses the memory, Mary takes the blame for the crime and is incarcerated for it. It is, after all, assumed that Mary, an Aboriginal girl covered in the blood of a white man, was guilty. The truth that she was raped by Perdita’s father and that this was why Perdita murdered him is unspoken. Once she recovers her repressed memory, Perdita feels terrible guilt for the injustice that her actions have wrought upon Mary. She does not, however, say sorry, and she comes to feel the full weight of this failure to apologise:

She carried the burden of such vast wrongdoing. There was no honour here to know Mary was blameless and imprisoned by something unspoken. 

… there was no atonement. There was no reparation. 
That was the point, Perdita would realise much later, at which, in humility, she should have said ‘sorry’. She should have imagined what kind of imprisonment this was, to be closed against the rustle of leaves and the feel of wind and of rain, to be taken from her place, her own place, where her mother had died, to be sealed in the forgetfulness of someone else’s crime. Perdita should have been otherwise. She should have said ‘sorry’. 19

18 Ibid at 167.
19 Jones, above n.6 at 204.
By using the example of the effect of Perdita’s failure to apologise, or accept responsibility, for Mary’s unjust incarceration, this novel poignantly explicates how apology is fundamental to the possibility of a reconciled future. After Mary’s death, Perdita laments, “I should have said sorry to my sister, Mary. Sorry, my sister, oh my sister, sorry.” But it is too late, and Perdita’s failure to apologise renders her unable to move on from her past. She is so burdened by her secret that “[w]hat remains is broken as my speech once was.”

Saying sorry allows for the past to be acknowledged. As Daisy says in My Place, “You know what I think? The government and the white man must own up to their mistakes. There’s been a lot of coverin’ up.” It allows for the unspoken to be put into words. It forces the party who has done the wrong to name that which they have done. In this way, apologising is necessary in dismantling the conditions that give rise to the différend, and in facilitating reconciliation. It allows for the parties to speak to, and to hear and understand, each other. This is something that has been emphasised by Aboriginal people in their calls for an apology and in their responses to Kevin Rudd’s speech. It was also highlighted in the Bringing Them Home report:

the past is very much with us today, in the continuing devastation of the lives of Indigenous Australians. That devastation cannot be addressed unless the whole community listens with an open heart and mind to the stories of what has happened in the past and, having listened and understood, commits itself to reconciliation. … The Inquiry’s recommendations are directed to healing and reconciliation for the benefit of all Australians.

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20 Ibid at 211.
21 Ibid at 212.
22 Morgan, above n.7 at 434.
23 Above n.8 at 3 – 4.
The importance of apologising is also foregrounded in Alex Miller’s latest work, *Landscape of Farewell*.24 This novel tells the story of retired professor, Max Otto, Aboriginal academic, Vita McLelland, and Vita’s uncle, Aboriginal elder, Dougald Gnapun.25 Max and Vita first meet at a lecture given by Max on the subject of ‘massacre’, during which Vita confronts him for “presum[ing] to speak of massacre … and not speak of my people”.26 The two nevertheless become friends, and Max reveals to Vita his father’s complicity in the murder of Jews in World War Two, and his own “guilt-by-association”27 and inability to speak of “the crimes of his father’s generation.”28 The past is not spoken of in Max’s family. They have taken a vow of silence:

> Winifred and I knew we could never say anything that would change the way that things had been for our parents’ generation. It was too vast to deal with. Too awful. Without ever making a pact, we nevertheless permitted each other to keep silent about it. We expected each other not to speak of it. We respected our fathers and mothers by taking a vow of silence. It was a mistake, no doubt. It was fear and weakness that made us do it.29

Vita challenges Max for this failure to confront his past and question his father about his role in the genocide of the Jews:

> ‘It’s not a sin to have regrets, Max. It’s only a sin to deny having them so we don’t have to do anything about them.’ … ‘Why you didn’t ask your questions and why you didn’t write your book on massacre is probably a good deal more important and interesting than what would have been in such a book if you had written it.’30

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24 It was also touched on by Miller in *Journey to the Stone Country* (Crow’s Nest NSW: Allen & Unwin) 2003 which is discussed in Chapter Seven. At 344 – 345, Panya states: “No one never come here and asked me to forgive em. I never heard nothin from none of em. They knew where I was livin all these years, but not one of them Becks or Bigges ever come by and asked me to forgive em. All they wanna do is forget. … He just wanna explain everything his own way and forget what he done. But I never gonna forget.”

25 Dougald was also one of the characters in *Journey to the Stone Country*.

26 Miller, above n.6 at 15.

27 Ibid at 12.

28 Ibid at 12.

29 Ibid at 44.

30 Ibid at 49.
This paralleling of the familiar and accepted history of the German treatment of Jews, with an emerging history of black-white relations in Australia, is a useful tool by which Miller exemplifies the fundamental importance and necessity of apology. He effectively illustrates the way in which the failure to acknowledge, and speak of, past barbarities and injustices, and to apologise to those who suffered, shapes identity. Max is burdened by a past of which he has not previously spoken, and so, unable to fully embrace his future, plans (unsuccessfully) to end his life. Australia is similarly burdened by its history. Offering an apology to Aboriginal people allows for this history to be acknowledged and spoken about within the public domain, and so for our national identity to be re-formed. In this way, it is something which equally benefits white Australians. Non-Aboriginal people’s anxiety about where we belong that Hodge and Mishra write about, for example, begins to be addressed by an apology.31 It provides some legitimacy for non-Aboriginal people in this country.32 It is these points of needing to belong and of legitimacy that are emphasised by Miller in _Landscape of Farewell_.

In _Landscape of Farewell_, Max does, in fact, apologise to Vita for his paper’s shortcomings and omissions:

‘Permit me to apologise to you, Professor McLelland … for the poor quality of my paper. You are right, of course, to condemn such shoddiness. It saddens me greatly to have been responsible for your anger. Let me say again, I am sorry.’33

The apology is important for both Max and Vita. For Max it is important as it causes him to consider the difficulties of “[p]assing the baton of truth from our own

32 This was also a key concern for postcolonial writers in the late 80’s and 90’s.
33 Miller, above n.6 at 20.
generation to the next”\textsuperscript{34} and the need for inter-generational responsibility for past misdeeds. He reflects that:

We may not ourselves have participated in massacring our fellow humans – and surely no sane person will hold the children responsible for the murders committed by their fathers – but our troubling sense that we are guilty-by-association with their crimes is surely justified by our knowledge that we are ourselves members of the same murderin species as they. I am a human being first and only second, and by the chance of birth, am I the son of my father and mother. I know myself to by implicated in the guilt of both my species and my parents, for it is to these categories of being and to these only, that I owe a sense of membership.\textsuperscript{35}

For Vita its importance lies in its implicit sense of hope:

‘About the whole thing. It was impressive. It was a good moment. It was something I don’t want to forget. The way you came up to us and apologised. It was beautiful. … After something like that you just can’t go back to being silent, can you? Silence is no longer an option for you after something like that, is it? Silence would make a mockery of it all. We have to take the next step.’\textsuperscript{36}

Miller’s message here is clear. He weaves a compelling commentary about the importance of breaking silence, of accepting responsibility for past injustices and of apologising, as necessary first steps in reconciliation and reparation. As Vita states:

‘An apology is just a start. That’s all it is. It’s a start. It’s not everything. … If we don’t pay our debts, we can’t go on believing in ourselves. We’re just empty. We’re nothing. We’re a joke.’\textsuperscript{37}

\textsuperscript{34} Ibid at 20.
\textsuperscript{35} Ibid at 21. Noel Pearson has commented on intergenerational responsibility in relation to Australia: “As to the question of guilt, I am myself equivocal. I know very clearly that, as individuals, ordinary Australians cannot be expected to feel guilty about the past … However, as a nation, the Australian community has a collective consciousness and conscience that encompasses a responsibility for the present and the future, and the past. Our collective consciousness includes the past. For how can we as a contemporary community … share and celebrate in the achievements of the past, indeed feel responsibility for and express pride in aspects of our past, and not feel responsibility for and express shame in relation to other aspects of the past.” Quoted in McRae, H., Nettheim, G., Beacroft, L. and McNamara, L. \textit{Indigenous Legal Issues: Commentary and Materials} 3\textsuperscript{rd} ed. (New South Wales: Lawbook Co.) 2003 at 17.
\textsuperscript{36} Ibid at 59 – 60.
\textsuperscript{37} Ibid at 56.
Reconciliation, Pluralism and the Recognition of ‘Otherness’: The Road to Equality

Reconciliation is an emotive word that is difficult to define. Tim Rowse writes:

By the end of the decade of ‘Reconciliation’, 2000, it was clear that the term had taken on two competing meanings. In one vision, the differences between Indigenous and other Australians were to fade away; the nation’s unity would be predicated on the elimination of ‘difference’. In the competing view, ‘reconciliation’ would enact and enshrine the different ways that Indigenous and non-Indigenous Australians belonged to ‘Australia’. Difference, in this second view, was reconciliation’s fundamental principle; in the first view, it was its nemesis.38

I understand reconciliation to be about understanding, acceptance and difference. That is, it is about acknowledging how Indigenous people were treated by non-indigenous people, understanding and accepting that this has caused continuing pain and disadvantage for many Indigenous people, and accepting and respecting Aboriginality. As Kokoberra woman, and Young Australian of the Year in 2007, Tania Major states:

we need to face up to reality. Face up to the fact that there was a stolen generation … My mother was denied an education cos she was black. And I want people to realise that so they can understand how to interact with indigenous people.39

It is also about understanding non-Aboriginal privilege which gives social and economic advantage, and the way this is experienced by Aboriginal people.40 Perhaps most importantly, however, reconciliation is about addressing the

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38 Rowse, T. quoted in McRae et al., above n.35 at 67.
40 If we think about angry young Aboriginal men, in particular, this anger may often be about being excluded from that privilege. This is displayed, for example, in Keneally, T. The Chant of Jimmie Blacksmith (Australia: Harper Collins) 2001.
inequalities that exist between Indigenous and non-indigenous Australians. As Aden Ridgeway has written:

For Indigenous people, we require the tools to climb out of ‘black poverty’ so that there is human recognition of the need for land, and social and political organisation to preserve most of all, cultural identity. Our struggle to achieve ‘just reconciliation’ is our own need and desire to overcome the status of second class citizen and to cure ourselves of the problems associated with education, health and wider public services. Fundamentally, the Australian people must understand and respect that the solution must provide us with the capacity to cure our own ills. It must require that you also learn from us in how the cure is found and done, and most importantly through reconciliation, it will require you to need us more than we need you.

It is this spirit of acceptance and understanding that was emphasised by Kevin Rudd in his apology, and that is evident in the texts discussed in this chapter. In both Landscape of Farewell and Sorry, for example, it is manifest in the friendships that evolve between Max and Dougald, and Mary and Perdita. In Landscape of Farewell, Max and Dougald are forced, by Vita, to live together in Dougald’s home in outback Queensland. They happily co-exist, each respecting the other, their identities and their differences. Max, in this environment, is able to confront his

41 This is perhaps an overly simplistic view of reconciliation. It was introduced in the 1990’s as a government policy. In 1991 the federal government enacted the Council for Aboriginal Reconciliation Act (Cth) which established the Council for Aboriginal Reconciliation. According to the then Minister for Aboriginal Affairs, Robert Tickner, this body was to advise on issues that would “enable the nation to move forward over the coming decade with a broadly agreed agenda for reform which will meet the aspirations of Aboriginal people.” Robert Tickner, Minister for Aboriginal Affairs, quoted in McRae et al., above n.35 at 63. There has been much written about reconciliation. See, for example, Gratten, M. ed. Essays on Australian Reconciliation (Melbourne: Black Inc.) 2000; (1993) 3(61) Aboriginal Law Bulletin, reconciliation issue; Council for Aboriginal Reconciliation, Reconciliation: Australia’s Challenge (Canberra: AGPS) 2000.

42 Above n.4 at 237 – 238.

43 The novel has many scenes of Max and Dougald enjoying a quiet contentment and understanding. For example, Max recounts, “Scrubbing at the remains of burned food that clung to the insides of the pots, I found it difficult to recall with any certainty the conditions of my former life. I turned from the sink and looked towards Dougald. He caught my look and smiled. It was a slow, gracious, kindly, amused smile that drew up the loose folds of his cheeks and formed deep recesses and wrinkles around his eyes. There was much in his smile of understanding, and much was
past, and Dougald shares his own story with Max. At Dougald’s request, Max writes the story of his great grandfather, the warrior Gnapun. It is a story of the massacre of white settlers by Gnapun and the Aboriginal people whose country they have invaded. More important than the story, however, is that Max writes it with such understanding and acceptance that Dougald, after reading it, can only say, “You could have been there Max.” Equally important is Max's response, “Your approval means a great deal to me. I was afraid you might be offended by it.” There is no judging, simply understanding.

Mary and Perdita share a similar relationship of understanding in Sorry. Perdita accepts and respects Mary’s Aboriginality and heritage. She hates the colour of her own skin:

> It was freckled and pale, the mark of her foreignness in this place, the mark of implicit deficiency. She wanted so much to be dark. When she placed her forearm alongside Mary’s she saw the bright negative of a surer presence.

She shares Mary’s catch of a snake and together they offer it to the Aboriginal camp, “not mere food, but evidence of their special connection.” And she was “delighted” to be given a skin group by Mary, a symbol of her acceptance by Mary’s people. This stands in stark contrast to Perdita’s father’s acceptance of the theories of social Darwinism, and Mrs. Trevor, the station owner’s wife’s, opinion communicated to me of a sensitive response in him to our situation together in his home. I returned his smile.” Above n.6 at 74.

44 For example, he is able to write about his past one night in his journal. Ibid at 95 – 107.
46 Ibid at 214.
47 Jones, above n.6 at 73.
48 Ibid at 70.
49 Ibid at 72.
50 Ibid at 12.
that it was her duty to “civilize” the “half-caste girls”.\textsuperscript{51} It is the younger generation, and the friendship of Perdita, Mary and Mrs. Trevor’s son Billy, that represents the hope of understanding and reconciliation. Like \textit{Landscape of Farewell}, there is, between these three friends, only acceptance.

In contrast, the Aboriginal and non-Aboriginal characters in \textit{Benang} do not share this relationship of acceptance and understanding. Harley does not enjoy the respect of his grandfather, nor does he offer his respect to Ern. Rather, he and his Nyoongar uncles, force Ern to accompany them on a journey through their Nyoongar country. Ern has suffered a severe stroke and is unable to move or speak, and so is compelled to listen while Jack and Will tell Harley about their people and about the way that they have been treated by those, such as Ern, who pursued policies of assimilation and absorption. “Old Ern, almost immobile, had closed his eyes. No doubt he wished he could close his ears also.”\textsuperscript{52} This image of Ern, forced to listen to the stories of Harley’s uncles is an important one. It symbolises the need for those who perpetrated the wrongs to listen to the voices and stories of those who suffered them. As Newman states:

\begin{quote}
It is this manifestation of Ern Scat as the unwilling witness, an obvious metaphor for white Australia, successfully – if ahistorically – forced to listen to recounts of the misdeeds of himself and others, which brings this novel firmly within the witnessing exchange which is such a fundamental feature of reconciliation narratives.\textsuperscript{53}
\end{quote}

White Australia must listen to Aboriginal people as a precursor to understanding and acceptance.\textsuperscript{54}

\textsuperscript{51} Ibid at 22.
\textsuperscript{52} Scott, above n.6 at 386.
\textsuperscript{54} This willingness to listen to and hear Aboriginal peoples’ voices is also evident in McGahan, A. \textit{The White Earth} (Crow’s Nest NSW: Allen & Unwin) 2005. Here, Ruth wishing to atone for the
The telling of (and listening to) such stories is important. Anthony Uhlmann writes that there must be:

an attempt to understand, on the part of non-indigenous Australians, the lived experience of the other neighbours who are indigenous Australians. … My suggestion is that stories have a place in this process, one which is of relevance not only to ‘average readers’ but to the law as a system of interpretation.55

This is an important point. It is also one which was the focus of postcolonial writing in Australia in the 1980’s and 1990’s. This writing foregrounded the need to listen to colonised peoples’ stories. Importantly, this is not just about Aboriginal people writing these stories, but also the way non-Aboriginal people take up these issues and write about them. The importance of this is seen in the national apology and call for reconciliation. The telling of stories such as Benang, Landscape of Farewell and Sorry allows for alternative experiences and perspectives to be told. They tell of things that have been kept silent and demand that Aboriginal perspectives be listened to. They are, in this way, enormously valuable in facilitating understanding between people, and in informing of the impact of the law at the level of both the legal, in the way that it denied Aboriginal people equality, and the social, in the way in which the knowledge and perceptions created by it are experienced and perpetuated in the community. These stories create a space for reconciliation, and demand greater understanding and acceptance, and, perhaps more importantly, explicate that if reconciliation (and so

misdeeds of her father, meets with and listens to the Aboriginal women at Cherbourg who were forced from Kuran Station, and raises with them the possibility of them re-acquiring their land. By the end of the novel the possibility of the land being returned has increased. William inherits the property after his uncle’s death. At the outset of the novel, William wants to inherit the property for himself. However, by the end of the novel, and after listening to the stories relayed to him by Ruth, and the voices that he hears in the bush, he is no longer sure. There is an unspoken desire, in the spirit of reconciliation, to return the land to the Aboriginal owners. This novel is discussed in Chapter Seven.

equality) is to be realised, the law (and society) needs to be open to difference. That is, they highlight the need for acceptance of, and respect for, ‘otherness’. And, importantly, this ‘otherness’ needs to be accommodated, not absorbed or assimilated. Attempts at the latter led to the injustices contained in the legislation detailed in Chapter Nine, and the law (and society) must ensure that such atrocities do not recur.

In Chapter Two, I introduced the idea of pluralism. I explained there that pluralism embraces diversity. It recognises that a variety of norms and perspectives can exist within society, and that there is no single universal or totalizing theory that orders or explains everyone’s experiences or existence. Our positivist law does, however, promote a singular, unified system, one which emphasises totality and denies alterity. One of the consequences of this emphasis on singularity and totality, as evidenced by the assimilation and absorption policies pursued by Australian governments throughout the twentieth century, is that the law seeks to reduce all differences to the same, and to digest ‘otherness’ into itself. As Uhlmann explains it:

A totalising language … seeks to absorb the other within the idea of the same and assimilate the other to the same’s self-understanding and as such is unjust and violent.56

Perhaps most importantly, however, this insistence upon uniformity silences that which does not conform.57 As Uhlmann continues:

The worst possible violence, however, is silence. … Indigenous Australians have experienced the worst possible violence of terra nullius, a silence of non-recognition, and they have experienced the violence of the totalising

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56 Ibid at 46.
57 Positivism and the way that it denies and silences difference is discussed in Chapter Two.
monologic discourse of assimilation which sought to reduce their otherness to the same of white Australia.58

The law has denied Aboriginal people their identity, refused to recognise their existence, and so has silenced Aboriginal peoples’ voices within the dominant domain. This denial of identity was predominantly within the public domain, however it also occurred privately for those children who were taken away and were not given any knowledge of who they were (and are). This often became an issue for them as adults, or once they discovered their identity.59

The dangers of singularity and totality are manifest, for example, in Benang in Ern’s “eugenicist fantasy – a fantasy of a world without difference”,60 which promotes the absorption of the black into the white and the removal, for ever, of any traces of an Aboriginal ‘race’. It seeks to reduce “a rich and variously shared place to one fragile, impoverished consciousness”,61 a process which makes Harley feel “impoverished, weakened, reduced.”62 Pluralism, however, offers an alternative to this denial and repression of difference. It foregrounds that other ways of perceiving law and other ways of experiencing law exist, and that law is not “one system, imposed on one society.”63 It emphasises the local and the diverse, and is open to, and willing to listen to, ‘otherness’. This is an important point. As Lyotard has said of totalising theories:

58 Above n.55 at 46.
59 This is an issue, for example, for Harley in Benang.
61 Scott, above n.6 at 33.
62 Ibid at 33.
The nineteenth and twentieth centuries have given us as much terror as we can take. We have paid a high enough price for the nostalgia for the whole and the one.64

For Lyotard, this desire for totality culminated in the Gulag and Auschwitz.65 In Australia, it has led to the (legally sanctioned) theft of land and the introduction of inhumane and discriminatory legislation. Pluralism challenges this totality, and allows ‘otherness’ to exist without being reduced to the same.

In Benang, Scott illustrates the possibilities of pluralism through Harley, who “experiences the heterogeneity of the world and proximity with otherness without needing to assimilate it into his knowledge system.”66 He is educated to be white, and denied his own identity. That is, he is reduced to the sameness of being white. Yet, he is nevertheless able to hear other (Nyoongar) voices and stories, and so:

begins to recognize what possibilities exist outside this authoritative discourse that might enable him to become someone other that the “first white man born”.67

He rebels against Ern’s insistent reduction of difference to sameness, and seeks to write a counter history which allows the diversity and multiplicity of his people to be heard and celebrated.68

Benang is thus a text that tells many different stories, and presents many different experiences and perspectives. It is “a meeting place” that allows for these plural stories to be told and that enables exchange and understanding between Aboriginal

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65 Lyotard is discussed in Chapter Four.
66 Slater, above n.60 at 63.
67 Ibid at 61.
68 Ibid at 61 – 62.
and non-Aboriginal Australians to begin. As Harley explains at the outset of the novel:

> it is not really me who sings, for although I touch the earth only once in my performance – leaving a single footprint in white sand and ash – through me we hear the rhythm of many feet pounding the earth, and the strong pulse of countless hearts beating.

Harley (and Scott) insists that we listen to these stories, to these “many feet”, even if it makes us uncomfortable:

> I offer these words, especially to those of you I embarrass, and who turn away from the shame of seeing me; or perhaps it is because your eyes smart as the wind blows the smoke a little toward you, and you hear something like a million million many-sized hearts beating, and the whispering of waves, leaves, grasses … We are still here, Benang.

For Scott, it is by listening to these stories that Australia can begin to acknowledge the diversity of its culture, “displace colonial logic” and “begin to create new ways of narrating Australia.” As Slater explains, by listening to Harley’s story and the multiplicity of stories which he tells:

> Australians can begin to rearticulate the country and themselves, in the hope of forging a new ethics of engagement, and thereby constituting a “new” country. In experimenting with a dialogic style of writing, Harley deploys writing as a tool for transformation in which he does not capture otherness and reduce it to the same, but rather forges connections.

Perhaps most importantly, then, Benang is a text which shows how it is possible to recognise and respect difference, and which demands that such difference be accommodated and accepted as “legitimate modes of being.” Scott emphasises

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70 Scott, above n.6 at 9.
71 Ibid at 497.
72 Slater, above n.69 at 148.
73 Ibid at 158.
74 Ibid at 148.
that it is no longer acceptable for difference to “be digested into a more complex unity.” The denial of diversity has led to the inequalities and discrimination suffered by Aboriginal people. By informing the reader of the treatment of Nyoongar people, their resistance to this treatment, and of their experiences and stories, Scott presents the possibility of a future in which difference can be respected and accepted. He shows how Australia can appreciate and listen to ‘otherness’ without making the mistakes of assimilation once again.

In *My Place*, Daisy asks:

Do you think we’ll get some respect? I like to think the black man will get treated same as the white man one day. Be good, wouldn’t it? By gee, it’d be good.

If this equality is to be realised, the acceptance of and respect for difference that is foregrounded in *Benang* is essential. As explained in Chapter Eight, there is a difference between standards of formal and substantive equality. The latter will not be achieved simply by removing measures, such as the 1905 *Aborigines Act*, or by stipulating that Aboriginal people are entitled to the same rights and opportunities as non-Aboriginal Australians. This assumes that we are all the same, and, as discussed above, we are not. In his apology, Kevin Rudd envisages:

A future where all Australians, whatever their origins, are truly equal partners, with equal opportunities and with an equal stake in shaping the next chapter in the history of this great country, Australia.

It is important, if this is to be achieved, for the law, and for society as a whole, to appreciate Aboriginal peoples’ differences.

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76 Ibid at 72 – 73.
77 Morgan, above n.7 at 434.
78 This is discussed in Chapter Eight.
79 Rudd, above n.1 at 167.
At the time of telling his story to Sally in *My Place*, Arthur Corunna did not think that Australia had reached this point:

> You see, the trouble is that colonialism isn’t over yet. We still have a White Australia policy against the Aborigines. Aah, it’s always been the same. They say there’s no difference between black and white, we all Australians, that’s a lie. I tell you, the black man has nothin’, the government’s been robbin’ him blind for years. There’s so much the whitefellas don’t understand. They want us to be assimilated into the white, but we don’t want to be. They complain about our land rights, but they don’t understand the way we want to live. They say that we shouldn’t get the land, but the white man’s had land rights since this country was invaded, our land rights.80

Arthur makes an important point. Achieving equality necessitates that Aboriginal peoples’ voices be heard within the dominant discourse. That is, Australia must configure itself as postcolonial.81 Arthur laments that colonialism “isn’t over yet”, and, as explained in Chapter Four, Australia is still a colonial country. We continue to live by the colonisers’ law and it is the colonisers’ culture which predominates. We live in a country where the colonisers are still present. Nevertheless, Australia can, and must, embrace its multiplicity, listen to local voices and perspectives, endeavour to understand their differences, and so begin to accord equality to all who live here.

*My Place* and *Benang* both demonstrate the possibility of change. They both highlight how the 1905 Act in denying Aboriginal identity resulted in a lack of equality for Aboriginal people and how, with the recognition and acceptance of difference, this can begin to change. In *My Place*, in particular, Sally does not, for example, harbour the same fears and shame experienced by her mother and

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80 Morgan, above n.7 at 267 – 268.
81 There are, however, many difficulties associated with according Australia, as a settler nation, postcolonial status. These are discussed in Chapter Four.
grandmother. She does not need to worry that her children will be taken away because they are Aboriginal. She is able to receive a university education and pursue a professional career. She is able to write the story of her family with a voice that can be heard within the dominant discourse. These are but small steps. They are, however, a beginning and, importantly, they illustrate hope and potential for equality.

**Conclusion**

In Chapters Nine and Ten I have focused on stories about equality to show how literature can inform readers about the law. In particular, I have argued that these novels show how the law has not, despite its assertions, treated everyone equally. The novels discussed in Chapter Nine clearly expose that the rule of law, introduced into Australia at the time of settlement, has not accorded Aboriginal people equality. Rather, Aboriginal people have been denied equality, denied their identity and have been subjugated by a positivist, colonial law that defined them as ‘inferior’ and ‘uncivilised’ in order to justify its policies of assimilation and discrimination. The law as embodied in the *Aborigines Act* 1905 (WA), did not accommodate difference or pluralism. It repressed and denied Aboriginal identities and differences, and silenced Aboriginal voices within the dominant discourse, denying Aborigines the right or the ability to object to the injustices to which they were subjected.

Importantly, however, these texts also highlight the possibility of transition from the law as enshrined in the 1905 Act, to a law which recognises Aboriginal peoples’ diversity and ‘otherness’, and treats them with the equality promised by the rule of
law. I have argued in this chapter that the law, if equality for Aboriginal people is to be realised, must be more pluralistic in its treatment of, and relationship with, Aboriginal people. The texts discussed here show how the law can engage with difference, rather than repressing it and silencing it. And importantly, they demonstrate that this recognition and acceptance is an essential precursor to achieving equality.

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CONCLUSION

At the end of writing this thesis I am left with an overriding and resounding thought. This is not my country. I am, at best, a visitor. At worst, an invader. I have enjoyed the benefits of belonging to a culture which has flourished at the expense of the many and diverse cultures which have existed here since before colonisation. I am complicit in the violent history of the oppression of Aboriginal people. It is the law of the colonisers, my law, that has denied the existence of Aboriginal people, stolen Aboriginal land, separated Aboriginal families and failed to accord Aboriginal people equality. This law has deliberately constructed Aboriginal people as ‘primitive’, ‘uncivilised’ and ‘inferior’, and actively used these constructions to justify its own right to Aboriginal land and the forced assimilation of Aboriginal people into white Australia. It has legitimated Aboriginal dispossession under the principle of terra nullius and deprived Aboriginal people of its full rights and protections under the guise of equality, of making all Australians the same. And it silenced them. It did not recognise Aboriginal peoples’ voices, perspectives and experiences, and it denied them the right and the ability to challenge, within the dominant discourse, the injustices to which they were subjected.

This is what the literary texts that I have examined here tell me. The stories they tell are not always or entirely fictitious. They recount the reality of the way that the law has mistreated Aboriginal people. It is a fact that Australia was simply taken by the English on the basis that it was an empty land. It is a fact that the law legitimated and justified the dispossession of Aboriginal people. It is a fact that Aboriginal people continue to struggle today for recognition of their land rights and that native title rights are not accorded, within our legal system, a status equal
to non-native title property rights. It is fact that the law implemented a barbaric and repressive regime of oppression and discrimination against Aboriginal people. And it is a fact that not until 2008 would Australia’s federal political leaders acknowledge and apologise for the way that our law treated (and treats) this country’s Indigenous peoples.\(^1\) It is these facts that are exposed in the novels discussed here.

While writing this thesis I was asked by an (anonymous) friend, “why do you want to write about this stuff? It’s all over now anyway.” It is made clear by the texts discussed here that it is not “all over”. Aboriginal people continue to feel the impact of the law’s mistreatment of them. They continue to feel the consequences of being forcibly removed from their land and of being forcibly separated from their families. These consequences are manifest in many areas from educational and employment opportunities and the over representation of Aboriginal people in the criminal justice system, to life expectancy and infant mortality rates, and so on. As Kim Scott states, in many areas of life, “Australia’s Indigenous communities remain at a disadvantage compared to the rest of the population.”\(^2\) It is important that we are made aware of these realities. This is why the works discussed here are so valuable.

Importantly, however, these texts inform the reader about the law in a number of important ways, beyond the impact that it has had on the lives of Aboriginal people. They expose how the law regulates not only the legal but also the social in the way that it creates normative standards that shape the way that people perceive, and are perceived by, each other. That is, they reveal how the law

\(^1\) It should be noted here that some state leaders have issued their own apologies.

\(^2\) Scott, K. “Covered up with Sand” (2007) 66(2) *Meanjin* 120 at 121.
constructs identity and how it creates the ‘other’. This ‘other’, which is different, or somehow does not conform to the law’s constructed standards and values, is then often marginalised and excluded from many aspects of the law, and society. In this thesis, I have focused on the way in which the law has constructed and marginalised the Aboriginal ‘other’. There are, however, many other instances in which the law has constructed (and constructs) identity. Women, refugees, asylum seekers, illegal immigrants, terrorists and gay and lesbian are just some of the identities that have been formed and reformed by the law. It is this power of the discourse of law, in the way that it constructs identity, produces knowledge and creates ‘truth’ that is revealed in the novels discussed here. They highlight Foucault’s claims that “power produces knowledge”\(^3\) and that “[d]iscourses generate truths.”\(^4\)

Perhaps most importantly, however, these texts explicate how the law, in the way that it produces such knowledge and constructs identity, silences. They expose how the law denies those it identifies as ‘other’ a voice within the dominant discourse so that they are unable to question and challenge the wrongs perpetrated against them. That is, the failure of the law to recognise, or listen to, Aboriginal peoples’ voices, perspectives and experiences has given rise to a différend. Their “versions of reality are either silenced or already judged.”\(^5\)

I have argued in this thesis that, through their portrayal of these issues, the texts discussed here clearly inform about the structures and limitations of our positivist legal system and, in particular, its insistence on identifying that which is within

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law and that which is not. As explained in Chapter Two, it is this concern with excluding the non-law that has led to the law’s marginalisation of that which is not deemed within law or does not conform to law’s self imposed and defined standards. That is, it has led to the castigation, marginalisation and exclusion of the ‘other’ and the different. I have critiqued the way in which this positivist (and colonial) law has excluded Aboriginal perspectives from its domain, refused to acknowledge or respect Aboriginal laws and Aboriginal legal systems and excluded Aboriginal people from full and equal access to its benefits, while, at the same time, including them within its controls and restrictions.

Throughout this thesis, I have argued that the law needs to be more flexible. Arguing from a postcolonial perspective, I have suggested that the law needs to be more open to, and to listen to, local voices and perspectives. It needs to be more open to the possibility of different ways of doing things and different ways of perceiving and relating to law and society. It needs to accommodate these differences, not assimilate or digest them. It needs to listen, not silence. And, it needs to embrace equality, not merely formally, but substantively. In this way, the injustices and the discrimination identified in this thesis can be addressed.

Importantly, the texts analysed here do show that the law can be more flexible and open to change. This is seen, for example, in the transition from the pre-\textit{Mabo} law, as represented in \textit{The Timeless Land, Doctor Wooreddy’s Prescription for Enduring the Ending of the World} and \textit{The Chant of Jimmie Blacksmith}, to the post-\textit{Mabo} law portrayed in \textit{The Secret River, The White Earth} and \textit{Journey to the Stone Country}. As explained in Chapter Seven, these novels show how, as evidenced in, and following, the \textit{Mabo} decision, the ‘other’ is beginning to be recognised by our
law, and how this law, when challenged, can change. And so, for example, the theories of social Darwinism and constructions of Aborigines as 'primitive' and 'uncivilised', that were supported in Eleanor Dark's telling of Australia's settlement, are questioned and critiqued in Kate Grenville's re-writing of this story. She presents a law which recognises that the application of terra nullius to Australia was a fiction. Similarly, the novels discussed in Part Three demonstrate a transformation from a law which endorsed and promoted policies of protection, segregation and assimilation as enshrined in the repressive and discriminatory *Aborigines Act 1905* (WA), to one which can potentially embrace the respect and equality argued for in the novels discussed in Chapter Ten.

I hope in this thesis that I have shown that the law is important. As explained in Chapter One, law is not just about regulating speed limits or contractual obligations. It is not just about a principle of international law that stipulated that if land was 'empty' an occupying nation could claim sovereignty over it, or about legislation that prohibited Aboriginal people from entering a pub, or getting married without permission. It is about creating perceptions and normative standards that shape the way we relate to the world, and that continue to lead to prejudice and discrimination. And so, even though the law may have changed in the way that it treats Aboriginal people, the consequences of past injustices continue to be felt by those who suffered. The law must be aware of the impact that it has on individuals beyond the purely legal, and it must be willing to change both to accommodate and to guide community standards.

A review in the *Canberra Times* says of Kim Scott’s *Benang* that it is:

> haunting and poignant, [and that it] pierces the heart even as it seeks to lance the savage bleeding of the wounds of white settlement in Australia.
At the end of the book the reader must choose a moment’s silence, the held
breath, as in the presence of art or worship, or the sudden clamouring of the
heart, shouting that such a thing should never be allowed to happen again.6

If literature can herald such sentiment and determination, and inform the reader
about the way the law operates and the impact that it can have on individuals and
society as a whole, then it is a powerful and useful medium. Not only can it
educate about the law, it can also imagine the possibilities of difference; of mutual
respect, recognition of ‘otherness’ and equality. At the beginning of this thesis, I
quoted Paul Keating’s Redfern Park speech where he called on all non-Aboriginal
Australians to imagine that it was they who suffered the injustices that have been
inflicted on Aboriginal people, because “if we can imagine the injustice then we
can imagine the opposite. And we can have justice.”7 Literature is a medium for
the expression of this imagination. Kevin Rudd’s apology to Australia’s Indigenous
peoples shows how the imagination can be translated into reality.

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6 Quoted on the cover of Scott, K. *Benang* (Fremantle: Fremantle Arts Centre Press) 2000.
7 Keating, P. “The Redfern Park Speech” in Gratten, M. ed. *Essays on Australian Reconciliation*
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