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# THE AUSTRALIAN ‘SONGLINES’: SOME GLOSSES FOR RECOGNITION

GARY LILIENTHAL\* AND NEHALUDDIN AHMAD\*\*

## ABSTRACT

In Australia, successive governments have sought to extinguish ‘native title’, preferring English feudal socage, but not the Australian Indigenous systems of land title. Australian governments want courts, constituted overwhelmingly by non-indigenous lawyers, to decide land disputes as for feudal socage. Therefore, this article suggests a need to understand this attempted radical reframing of Australian Indigenous titles to land, through the convenient lens of Goffman’s frame analysis. The research question is whether Anglo-Australian frame transformation of the Indigenous land titles into mere religion, song and art, extinguishes land title. The article tries to show that Australian indigenous land title is communal allodial title, as a bundle of subsisting rights by operation of Australian Continental Common Law, which therefore cannot be extinguished by the fraud inherent in frame transformation. Indigenous land title is true communal allodial title, beset by a fraudulent colonial occupation, suggesting a lack of internal reason in colonial policy and administration. Successive governments have tried to frame transform the highly sophisticated and ancient indigenous legal and social system, including sophisticated celestial mapping and navigation systems, into mere religious art. This frame transformation is reversible by epideictic rhetoric. The Indigenous system is transmitted phylogenetically, in which governance government officials can have no participation. Indigenous land title cannot be extinguished.

## I INTRODUCTION

In Australia, successive governments have sought to extinguish what is now called at law ‘native title’.<sup>1</sup> Australian land title is based on the English common law land title system of feudal socage, rather than on the ancient subsisting Indigenous Australian systems of land title. This implies a severe disadvantage to holders of ancient subsisting land title.

To explain socage, during the Middle Ages the villeins of England slowly changed their feudal food and labour obligations into an annual money payment, known as a quit-rent,

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<sup>1</sup> See especially the *Native Title Act 1993* (Cth) s 10 (‘NTA’), which limits recognition and protection of what it now calls ‘native title’, to be only in accordance with the Act. It appears to extinguish any subsisting common law land title. The *NTA* arguably appears to target rhetorically an audience of Australian government officials, court officials, and elected officials, in that it seeks no broad express public consent. See also Marcus Tullius Cicero, *Rhetorica Ad Herennium* (Harry Caplan trans, Harvard University Press, 2004). This sets out six sources of law: nature; statute; custom; previous judgments; equity; and, agreement. Custom is defined in it as that which in the absence of any statute is by usage endowed with the force of statute law, which it defines as law set up by the sanction of the people: at 91, 93.

creating a socage tenure.<sup>2</sup> The statute *Quia Emptores* 1290, 18 Edw 1, c 1 ('*Quia Emptores*'),<sup>3</sup> the scarcity of labour after the Black Death, and lower values of land with the rise of trade and industry, increased the process of converting feudal dues into quit-rents, and by the 16th century quit-rents had become the norm.<sup>4</sup> The one monetary conversion exception was the swearing of an oath of fealty to the lord, arguably still now in existence in the form of implied obligations of tenure.<sup>5</sup> Arguably, none of this is relevant to Australia.

Australian governments want courts, constituted overwhelmingly by non-indigenous lawyers,<sup>6</sup> to adjudicate the inevitable land disputes as matters of feudal socage.<sup>7</sup> This argues a very substantive shift in frame, or context, for Australian Indigenous land title,<sup>8</sup> arguably without Indigenous peoples' fully informed consent. Therefore, this article suggests a need to understand this attempted reframing of Indigenous titles to land, through the convenient lens of frame analysis, and to try to uncover something useful to resolving current disadvantage.

The concept of frame analysis is derived from Erving Goffman's 1974 work.<sup>9</sup> Social scientists use it to analyse how people understand situations and undertakings. Its procedures can give the practitioner the ability to re-set perspectives. This article deals with the apparent reframing of what is essentially 'the customary laws of Indigenous Australian peoples', of the Continent of Australia, into an alternative non-Indigenous frame of the sacred, artistic, religious, and the so-called 'Dreaming'.<sup>10</sup> Ronald Berndt says Australian Indigenous peoples have their own religious traditions of the so-called dreaming and ritual systems, with an emphasis on the life transitions of adulthood and death.<sup>11</sup> Eliade states: 'There is a general belief among the Australians that the world, man, and the various animals and plants were created by certain supernatural beings who afterwards disappeared, either ascending to the sky or entering the earth'.<sup>12</sup>

The Anglo-Australian legal system views the mythical narratives as mere religion and art.<sup>13</sup> However, these Indigenous narratives may well serve a similar common law

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<sup>2</sup> Sir Paul Vinogradoff, *Villainage in England: Essays in English Mediaeval History* (Cambridge University Press, 1892) 291–292, 306–307.

<sup>3</sup> A 1290 statute preventing tenants from alienating lands by subinfeudation.

<sup>4</sup> W F Finlason, *The History of Law of Tenures of Land in England and Ireland* (Stevens & Haynes, 1870) 54; Sir Frederick Pollock, *The Land Laws* (Macmillan, 1883) 72.

<sup>5</sup> Sir Paul Vinogradoff, *Villainage in England: Essays in English Mediaeval History* (Cambridge University Press, 1892) 291–292, 306–307.

<sup>6</sup> See especially Gary Lilienthal and Nehaluddin Ahmad, 'Australian Aboriginal Human Rights and Apprehended Bias: Skirting Magna Carta Protections?' (2015) 27 *Denning Law Journal* 146.

<sup>7</sup> Sol Bellear, 'Australia Redefines Hypocrisy and Human Rights in Bid for UN Position', *Huffington Post*, (15 July 2016) < [huffingtonpost.com.au/sol-bellea/australia-redefines-hypoc\\_b\\_8217768.html](http://huffingtonpost.com.au/sol-bellea/australia-redefines-hypoc_b_8217768.html) >.

<sup>8</sup> Peter Sutton, 'The Robustness of Aboriginal Land Tenure Systems: Underlying and Proximate Customary Titles' (1996) 67(1) *Oceania* 7.

<sup>9</sup> Erving Goffman, *Frame Analysis: An Essay on the Organization of Experience* (Harper and Row, 1974).

<sup>10</sup> For which we adopt the term 'the customary laws of Indigenous Australians'.

<sup>11</sup> Ronald Murray Berndt, *Australian Aboriginal Religion* (E J Brill, 1974) 4–5.

<sup>12</sup> Mircea Eliade, *Australian Religions: An Introduction* (Oxford University Press, 1973) 1.

<sup>13</sup> However, the Theogony of Hesiod was transmitted by song, as have been most ancient transmitted legal and cultural systems worldwide. See Hesiod, *Hesiod's Theogony* (Richard S Caldwell trans, Focus Classic Library, 1987) 4.

purpose, in Indigenous Australia, to that of the English legal and equitable maxims, in England, namely as containing and transmitting widely accepted customary laws.<sup>14</sup>

Kuypers regards frames as commanding rhetorical entities, equivalent in rhetorical force to an act of state. He describes frames as follows: '[Frames] induce us to filter our perceptions of the world in particular ways, essentially making some aspects of our multi-dimensional reality more noticeable than other aspects. They operate by making some information more salient than other information'.<sup>15</sup>

Reframing the Indigenous customary law into a religion, song, or art simply allows Anglo-Australian 'churches', for example, to deploy their 'priests' to reframe the Indigenous customary laws. They can force the more recent doctrines of Christianity onto a people whose cultural systems are tens of thousands of years older. Kuypers notes four categories of framing analysis: (a) frame bridging; (b) frame amplification; (c) frame extension; and, (d) frame transformation. Argument in this article deploys frame transformation.<sup>16</sup> Frame transformation is an apparently forced process, for use when the planned frames 'may not resonate with, and on occasion may even appear antithetical to, conventional lifestyles or rituals and extant interpretive frames'.<sup>17</sup>

When this reframing is indicated, new significations are required to capture new support. Goffman named this process 'keying'.

Keying is a systematic transformation across materials, which are already meaningful according to a schema for interpretation. For keying to take place, those who participate must be aware that a systematic alteration will create a radical reconstitution. The keying must have an agreed time span.<sup>18</sup>

Thus, it suggests 'activities, events, and biographies that are already meaningful from the standpoint of some primary framework transposed in terms of another framework', such that they now are seen differently.<sup>19</sup> For keying to be successful, to allow frame transformation to be stable, it must take place by informed conscious consent, or else the strength of the archaic heritage may reverse the process,<sup>20</sup> as it unravels just the same as does fraud.

By analogy, in the 1847 case of *Franks v Weaver*,<sup>21</sup> the court teased out something of the nature of fraud. The report extracted the case as follows.

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<sup>14</sup> See especially William Noy, *The Grounds and Maxims and also an Analysis of the English Laws* (Riley, 1808) 39–41. This was rejected by imposition of a non-reframed reverse onus on the plaintiffs in *Milirrpum v Nabalco Pty Ltd* (1970) 17 FLR 141, in which Blackburn J rejected the plaintiffs' claim of common law communal native title, because the plaintiffs did not establish that their predecessors had had the same links as themselves to the relevant areas of land, at the time of the establishment of New South Wales. See *Mabo v Queensland [No 2]* (1992) 175 CLR 1, [41] ('*Mabo (No 2)*').

<sup>15</sup> Jim A Kuypers, *Rhetorical Criticism: Perspectives in Action* (Lexington Press, 2009).

<sup>16</sup> Jim A Kuypers, 'Framing Analysis From a Rhetorical Perspective' in Paul D'Angelo and Jim A Kuypers (eds), *Doing News Framing Analysis* (Routledge, 2010) 181.

<sup>17</sup> David A Snow et al, 'Frame Alignment Processes, Micromobilization, and Movement Participation' (1986) 51 *American Sociological Review* 464, 473.

<sup>18</sup> Erving Goffman, *Frame Analysis: An Essay on the Organization of Experience* (Northeastern University Press, 1985) 43.

<sup>19</sup> *Ibid* 45.

<sup>20</sup> *Ibid* 43; See especially Sigmund Freud, 'Moses and Monotheism', in James Strachey and Anna Freud (eds), *The Standard Edition of the Complete Psychological Works of Sigmund Freud Volume XXIII (1937–39)* (Hogarth Press, 1939).

<sup>21</sup> (1847) 50 ER 596; 10 Beav 297, 297–304 (Lord Langdale MR) ('*Franks v Weaver*').

The Plaintiff invented and sold a medicine under his own name. The Defendant also made and sold a similar medicine, and on his labels, he used the Plaintiff's name and certain certificates given of the efficacy of the Plaintiff's medicine, in such an ingenious manner, as, prima facie, though not in fact, to appropriate and apply them to his own medicine. Held, that, although there were other differences in the mode of selling, the proceeding was wrongful, and the Defendant was restrained by injunction.<sup>22</sup>

Lord Langdale MR held that nobody could define what fraud was, because it is so multiform. Fraud is a form rather than as a state of affairs. He stated that in the present case it consisted in the crafty<sup>23</sup> adaptation of certain words in such a manner, ordinarily and constantly, as to be calculated to make it appear to persons when he was selling the product that the thing sold was prepared by the plaintiff.<sup>24</sup> Craftiness in words arguably means knowingly arranging a secondary meaning without prior public informed consent to the usage. The Defendant's attempt at a frame transformation without informed consent, unravels into litigation.

In the 1610 case of *Waggoner v Fish*,<sup>25</sup> the court held that strangers and foreigners devised and practised, by sinister and subtle means, ways of defrauding the charters, liberties, customs, good orders and ordinances of London. The court held that such acts were criminal fraud.<sup>26</sup> Mutatis mutandis, colonial frame transformation performed on the Australian Continental Common Law, without prior informed consent, would likely be criminal fraud under the English law itself, and would therefore inevitably unravel.

The two types of frame transformation are: (a) domain-specific transformations, as in attempts to alter group status; and, (b) global interpretive frame transformation, as in attempts to change world views by conversions of thought, or complete conquest such as religious conversion.<sup>27</sup> Both appear to be what the non-Indigenous majority are trying to do in Australia, by attempts at radical thought conversion of ancient land title-holders' status, and purporting to transform the frames of the land titles' underlying narratives,<sup>28</sup> without the victims' prior informed consent.

From all this, the question arises as to whether Anglo-Australian frame transformation of the Indigenous land titles as mere religion and art extinguishes those Indigenous titles. This article attempts to show that Indigenous land title is characterised as communal allodial title, as a bundle of subsisting rights by operation of Indigenous customary laws, which therefore cannot be extinguished by the criminal fraud inherent in frame transformation without informed consent. The article's methodology will be to try and reframe the term 'native title' into its true meaning.

The article's structure incorporates an initial briefing on the nature of allodial land title, and its failed struggle for emergence in English land law. Then, argument progresses to a critical analysis of Indigenous underlying titles and proximate titles. After setting this

<sup>22</sup> *Franks v Weaver* (1847) 50 ER 596; 10 Beav 297, 297 (Lord Langdale MR).

<sup>23</sup> The word 'craft' was explained, in the *Rhetorica ad Herennium*, as 'the topic of an argument considering security. Security is to provide some plan for ensuring the avoidance of a present or imminent danger, the two subheadings for which are 'might' and 'craft'. Craft is exercised by means of money, promises, dissimulation, accelerated speed, deception and other similar means. Craft is only another name for strategy'. See Cicero, above n 1, 171.

<sup>24</sup> *Franks v Weaver* (1847) 50 ER 596; 10 Beav 297, 303.

<sup>25</sup> (1610) 2 Br & Gold 284; 123 ER 944.

<sup>26</sup> Ibid.

<sup>27</sup> Snow et al, above n 17, 43–44.

<sup>28</sup> For example, the British attempted to re-frame Indigenous creation mythical narratives into the pejorative term 'dreaming': interview with Rita Metzenrath, Senior Records Officer of the Australian Institute of Aboriginal and Torres Strait Islander Studies (Canberra, 22 November 2016).

scene, the article looks critically at the songlines as devices marking out a lawful system of land titles, and finally at how these songlines form chains of connection into an ancient and subsisting Indigenous Australian customary laws.

The research outcomes will strongly infer that it is most likely that Indigenous land title is true communal allodial title, arguing a fraudulent colonial occupation, and implying a lack of internal reason in colonial policy and administration. Colonial officials have tried to frame transform the highly sophisticated and ancient Indigenous legal and social system, including sophisticated celestial mapping and navigation systems, into a gallery of mere religious art. This ancient system is transmitted phylogenetically, to which governance colonial officials can therefore have no participation. The research shows that Indigenous land title cannot be extinguished. The research also suggests the frame transformation can be reversed by effective epideictic rhetoric.

## II ALLODIAL TITLE

To illustrate the Common Law mindset on land title, in pre-Norman England, there were three kinds of estates, allodial, folcland and bocland.<sup>29</sup> The allodial proprietor held his land of no lord. He swore no oath of homage, as described below. With this, he was said to be free. However, despite this so-called freedom, he was subjected to the *onorous trinoda necessitas*: the duty of building bridges and castles; and, serving as a soldier to defend the community. Coke described homage as follows:

Homage is the most honourable service, and most humble service of reverence, that a franktenant may do to his lord. For when the tenant shall make homage to his lord, he shall be ungirt, and his head uncovered, and his lord shall sit, and the tenant shall kneele before him, on both his knees, and hold his hands jointly together between the hands of his lord, and shall say thus: I become your man from this day forward of life and limbe, and of earthly worship, and unto you shall be true and faithfull, and beare to you faith for the tenements that I claim to hold of you, saving the faith that I owe unto our sovereign lord the king; and then the lord so sitting shall kisse him.<sup>30</sup>

Even before the Norman conquest, either by subinfeudation or by commendation, much of the country's land was in feudal tenure, inferring the obligations of homage. The old universal allodial tenure receded into two classes of tenant. The first class was a few great magnates too strong for the king to remove. The second was a class of landowners too weak to cause trouble.<sup>31</sup> These two types of freeholder, also called 'socmen', existed even in Anglo-Saxon times. Their socage meant the paradox of absolute land ownership along with the *trinoda necessitas*. However, the Norman kings retained only the name 'socage', altering its substantive meaning to a genus of land ownership always subject to a lord.<sup>32</sup> This Norman discretionary expansion of socage obligations to the king could only fetter free alienation of land.

Allodium is almost as uncertain of meaning as in its origin. The Century Dictionary defines it as 'real estate held in absolute independence, without being subject to any

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<sup>29</sup> William Stubbs, *Select Charters and Other Illustrations of English Constitutional History from the Earliest Times to the Reign of Edward the First* (Clarendon Press, 1905) 7.

<sup>30</sup> Eduardo Coke, *The First Part of the Institutes of the Laws of England or a Commentary upon Littleton* (J & W Clarke, 1832) 64a.

<sup>31</sup> Ibid 13; Augustus Henry Frazer Lefroy, 'Anglo-Saxon Period of English Law' (1917) 26(5) *Yale Law Journal* 388, 393.

<sup>32</sup> R Storry Deans, *The Student's Legal History* (Stevens and Sons, 3<sup>rd</sup> ed, 1913) 5.



rent, service or acknowledgement to a superior'.<sup>33</sup> Despite the statement so frequently met in treatises and judicial opinions, that allodial ownership is absolute ownership of the soil, it is probable that no subject or citizen in any English-speaking country has ever been permitted to hold his land in 'absolute independence'.<sup>34</sup> Rather, 'every man holds his estate ... subject not only to the right of eminent domain, but to the right of the government to control the use of it by such rules and limitations as the public good requires',<sup>35</sup> such as taxes, stamp duty, excise, and similar obligations derived from tenure. 'Allodial' ownership, in the English-speaking realm, appears to retain the paradox of ownership freed from the more oppressive duties of service and fealty, with the accompanying liability to distress, owed to some person with superior interests, such as a superior lord, in the same land.<sup>36</sup> In this milieu, officialdom may not imagine true allodial title, and therefore its administrative decisions will be coloured so that allodial title holders do not exist.

### III INDIGENOUS UNDERLYING TITLES AND PROXIMATE TITLE

#### *A The Frame Transformation of Terra Nullius*

Indigenous land title systems, within the ancient customary laws of mainland Australia, are dual systems comprising both an underlying and a proximate or relational (rather than subinfeudated) land title.<sup>37</sup> Contemporary holders of these specific land interests hold title to those lands in the proximate sense of conformance to the wider-spread customary laws. Regional customary laws maintain underlying titles, often transmitted over archaeological periods of time as lore.<sup>38</sup> Sutton effectively posits that this distinction is not the same as the Australian positive law distinction between radical title and beneficial ownership.<sup>39</sup> In the High Court of Australia's *Mabo* decision, there is only occasional use of the term 'underlying' instead of 'radical' title. Its mention is to apply a reverse onus, apparently without express public consent, and therefore frame transformation without consent. Thus, Brennan J in *Mabo (No 2)* stated:

What the Crown acquired was an underlying title to land and a sovereign political power over land, the sum of which is not tantamount to absolute ownership of land. Until recent times, the political power to dispose of land in disregard of native title was exercised so as to expand the underlying title of the Crown to absolute ownership but, where that has not occurred, there is no reason to deny the law's protection to the descendants of indigenous citizens who can establish their entitlement to rights and interests which survived the Crown's acquisition of sovereignty.<sup>40</sup>

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<sup>33</sup> William Dwight Whitney, *Century Dictionary and Cyclopedia* (Century Company, 1914).

<sup>34</sup> Joseph Story, *Commentaries on the Constitution of the United States* (Hilliard Gray, 5<sup>th</sup> ed, 1891) 125, 126; *Wallace v Harmstad*, 44 Pa 492 (1863).

<sup>35</sup> Emory Washburn, *A Treatise on the American Law of Real Property* (Little Brown, 1876) 65.

<sup>36</sup> John Chipman Gray, *The Rule Against Perpetuities* (Little Brown, 3<sup>rd</sup> ed, 1915) 17.

<sup>37</sup> Proximate means, among other things, '1. next, nearest; 2. closely adjacent, very near; ... 4. next in a chain of relation': Arthur Delbridge (ed), *Macquarie Dictionary* (Herron Publications, 2<sup>nd</sup> ed, 1991) 1419 (definition of 'proximate').

<sup>38</sup> See especially Gary Lilienthal and Nehaluddin Ahmad, 'Abridgment and Conferral of Juridical Personality' (2015) 28 *The Journal Jurisprudence* 453.

<sup>39</sup> Sutton, above n 8, 11.

<sup>40</sup> *Mabo (No 2)* (1992) 175 CLR 1, 53.

Reay writes of 'residual rights' in the lands of an extinct clan by others of the same semi-moiety in the Northern Territory Borroloola region.<sup>41</sup> These rights facilitate succession to abandoned lands by other groups. This garners further sustenance from later research in the same region by Trigger.<sup>42</sup>

Williams writes of north-east Arnhem Land. She distinguishes 'radical title' to lands owned by a clan from a public formal grant procedure for establishing interests in small parcels of land for a non-clan group.<sup>43</sup> She observes that no absolute right in perpetuity is conveyed thereby, because the grant is subject to further 'renegotiation',<sup>44</sup> suggesting subjection to public rules. Keen describes this process, within the same region, as a grant of rights of ownership of small zones within a larger clan holding. The zones' root title remains within the clan.<sup>45</sup>

Perhaps these instances indicate that there has been a denizen-like layering of entitlements,<sup>46</sup> which might operate within Indigenous land title, but without any denizen status limitations.<sup>47</sup>

The English idea of a denizen was not that of a citizen because he did not have any political rights: he could not be a member of parliament or hold any civil or military office. However, the status of denizen allowed a foreigner to purchase property, although a denizen could not inherit property. Historically, paying for letters patent was thus a requirement of foreign land ownership in England.<sup>48</sup>

Continuing the Anglo perspective on this, showing no separation of status and public law rules, an old English statute refers to denizens as follows:

All manners of persons being aliens born using any manner of handicraft, be they denizens or not denizens, and inhabited within the city of London or suburbs of the same ... or within two miles compass ... shall be under the search and reformation of the [companies'] wardens ... with one substantial stranger being a householder of the same craft by the same wardens to be chosen.<sup>49</sup>

Thus, British colonial governments have long believed they can freely search denizens, in the perfect pejorative frame transformation of status, who have what they viewed as a lower status and more transient and ephemeral level of land tenure. Perhaps the British

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<sup>41</sup> Borroloola Land Claim, 1977-78. Includes 'Comments on the Borroloola land claim, submitted to Mr Justice Toohey', by Marie Reay [consultant to Aboriginal Land Commissioner]; and Borroloola land claim, report by Mr Justice Toohey, published 1979.

<sup>42</sup> David S Trigger, *The Garawa/Mugularrangu (Robinson River) Land Claim* (Northern Land Council, 1989) 15.

<sup>43</sup> However, it is unlikely that any such thing as a formal grant really exists. See Interview with Douglas Amar Amarfio (Canberra, 5 November 2016).

<sup>44</sup> Nancy M Williams, 'A Boundary is to Cross: Observations on Yolngu Boundaries and Permission' in Nancy M Williams and Eugene S Hunn, (eds), *Resource Managers: North American and Australian Hunter-gatherers* (Westview Press, 1982) 141.

<sup>45</sup> Ian Keen, 'Yolngu Religious Property' in Tim Ingold, David Riches and James Woodburn (eds), *Hunters and Gatherers: Property, Power and Ideology* (Oxford University Press, 1988).

<sup>46</sup> It suggests the subsistence of a system with some elements of that of denizens. See Interview with Douglas Amar Amarfio (Canberra, 5 November 2016).

<sup>47</sup> Sutton, above n 8, 11.

<sup>48</sup> William Blackstone, *Commentaries on the Laws of England* (University of Chicago Press 1979, (Facsimile Edition of the Four Books published by The Clarendon Press in the period 1765-69) book 1 ch X 374 ('Blackstone's Commentaries').

<sup>49</sup> Steve Rappaport, *Worlds Within Worlds: Structures of Life in Sixteenth-Century London* (Cambridge University Press, 1989) 45; Alexander Luders, *The statutes of the realm 1101-1713 printed by command of his majesty King George the Third; in pursuance of an address of the House of Commons of Great Britain; from original records and authentic manuscripts* (Record Commission, 1810) 208-9.

colonialists do not distinguish Indigenous people from denizens. Queen Elizabeth II personally signed the *Aborigines Welfare Ordinance 1954* (ACT),<sup>50</sup> providing for slavery-like systemic disadvantage, now fully repealed by the *Aborigines Welfare Repeal Ordinance 1965* (ACT) s 2 on 11 November 1965, as follows:

For the purposes of section seven of this Ordinance and the last preceding section, a member of the police force, or a person authorized in writing by the Minister, shall have access at all reasonable times to an aboriginal at any place in which he is residing or employed and may make such inspections and inquiries as that member or person thinks fit.<sup>51</sup>

Underlying title in Indigenous customary laws consists of the constitution of a particular zone of land, including (a) its physical borders or focal nodes, (b) its internal structure such as drainage, or its ecology, (c) its demarcation according to specific cultural identities, such as a particular language, a subsection couple, a focal residential site, totemic entities, site-related mythical narratives, verses of songlines, objects separated from public common use, (d) its kind of property, such as being unavailable for alienation due to its communal character, and (e) proper principles for claims of right by Indigenous people, such as descent from prior land custodians, conception, ceremonial incorporation, or prescriptive residence.<sup>52</sup>

Various groups often differ about the cultural content of an area of land. However, they tend to agree on a sufficient percentage of the issues, coinciding with the key juristic principles that determine customary proximate rights in land.<sup>53</sup> Underlying title inheres in living people through birth, succession or incorporation. Proximate title encompasses rights to make public land claims and, in consequence, to exercise rights, and satisfy custodial obligations to the land. These rights come through totem. In fact, the land has custodial obligations over the person.<sup>54</sup>

In a cognate way, in the English legal doctrine of tenure, the Crown claims an absolute bundle of rights, called 'radical title', emanating from its claim to sovereignty. Everyone else's property interests are held by virtue of the Crown's claim to what it says is superior title. Thus, 'in feudal-based legal terms, "tenure" does not refer to the holding of the land but to the relationship between Paramount Lord and tenant'.<sup>55</sup> In this theory of held interests, occupation consisting of comings and goings over time, sometimes being transformed to other forms of holdings, and radical title going on undisturbed in perpetuity, the crown's sovereignty claim in Australia is the weakest link in its radical title argument. This is because it has always been based on an initial claim of terra nullius, in which the entire existence of the Indigenous peoples of New Holland was repressed as non-existent. This repression will unravel again and again.<sup>56</sup> Brownlie

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<sup>50</sup> See *Aborigines Welfare Ordinance 1954* (ACT) s 1.

<sup>51</sup> *Aborigines Welfare Repeal Ordinance 1965* (ACT) s 10(1).

<sup>52</sup> Sutton, above n 8, 11.

<sup>53</sup> Ian Keen, *Knowledge and Secrecy in an Aboriginal Religion* (Clarendon Press, 1994).

<sup>54</sup> Interview with Douglas Amar Amarfio (Canberra, 5 November 2016).

<sup>55</sup> *Mabo (No 2)* (1992) 175 CLR 1, 53 (Brennan J). Land in Australian law is thus held of someone, not held absolutely, unless by the Crown.

<sup>56</sup> According to Freud, it is the insistent return of the repressed that can explain numerous phenomena that are normally overlooked: not only our dreams but also what has come to be called 'Freudian slips' (what Freud himself called 'parapraxes'). According to Freud, there is a 'psychology of errors'; that slip of the tongue or that slip of the pen, 'which have been put aside by the other sciences as being too unimportant' become for Freud the clues to the secret functioning of the unconscious. Indeed, he likens his endeavour to 'a detective engaged in tracing a murder'. Sigmund Freud, 'Volume XV Introductory Lectures on Psycho-Analysis (Parts I and II) (1915-1916)' in James Strachey (ed), *New Introductory*

illustrates this point, in which he suggests the rhetorical audience is other prospective invading colonial powers.

Even as to terra nullius, like a volcanic island or territory abandoned by its former sovereign, a claimant by right as against all others has more to do than planting a flag or rearing a monument. From the 19<sup>th</sup> century the most generous settled view has been that discovery accompanied by symbolic acts give no more than 'an inchoate title, an option, as against other states, to consolidate the first steps by proceeding to effective occupation within a reasonable time.'<sup>57</sup>

This radical forced frame transformation is without Indigenous consent. They are not its rhetorical audience. Without effective sovereignty based on legality of transfer, the crown's radical title must fail in law as mere fraudulent encroachment.

Similarly, underlying Indigenous titles are always present by operation of law, formed in ancient ornamental epideictic rhetoric.<sup>58</sup> Although existing groups can enjoy underlying titles in their proximate meaning, extinction of landed groups and out-migration may leave lands unoccupied for a time. This is cognate to a kind of community title, where non-Indigenous officials have use the term 'sacred site' pejoratively, to refer to certain significant and important things administered by people of higher degrees of learning, pursuant to their duty to the world.<sup>59</sup> It refers to an absence of active claims as of right over the land, whether made in absentia or not.<sup>60</sup> Some Indigenous people describe this situation as 'orphan country', meaning country without occupying custodians for the time being, even while people from neighbouring areas actively look after it, as proxies.<sup>61</sup>

The survival of an underlying title over a parcel of land, in Indigenous customary law, is not vitiated by temporary absence of its proximate title-holders. Claiming to operate Indigenous land title by virtue of its claim to crown radical title, the *NTA* purports to reverse this rule, by requiring evidence of claimants having maintained their system of traditional law and custom,<sup>62</sup> in a frame transformation to Imperial British thinking.<sup>63</sup>

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*Lectures on Psycho-Analysis (The Standard Edition) (Complete Psychological Works of Sigmund Freud)* (W W Norton, 1990) 27.

<sup>57</sup> Ian Brownlie, *Principles of Public International Law* (Clarendon Press, 4<sup>th</sup> ed, 1990) 146.

<sup>58</sup> See especially the argument on epideictic rhetoric constituting a form of control of law in Lilienthal and Ahmad, above n 38.

<sup>59</sup> Interview with Douglas Amar Amarfio (Canberra, 5 November 2016).

<sup>60</sup> Sutton, above n 8, 12.

<sup>61</sup> Peter Sutton, *Country: Aboriginal Boundaries and Land Ownership in Australia* (Aboriginal History Monographs, 1995) 53. While Sutton calls these proxies 'regents', it appears there is no such suggestion of meaning in Indigenous land thought. See Interview with Douglas Amar Amarfio (Canberra, 5 November 2016).

<sup>62</sup> *NTA* s 223(1).

<sup>63</sup> In 1866, in apparently new Imperial policy, Whitehall began what they speciously called a 'non-discrimination' policy in the Crown Colony of Hong Kong. This non-discrimination policy abandoned the earlier principle policy of having Chinese and British law administration side by side in Hong Kong. Whitehall thought that this 'experiment' of their merely indirect rule, by which Chinese people governed with their own officers by ancient Chinese law and custom, had broken down. Whitehall thought it could never work because of the specious aside that there was crime in the community, without saying what this really meant, and from whose point of view, suggesting frame transformation in operation. Thus, law and order had to be in firm British hands, with the Chinese officials having no authority. Whitehall felt that 'native' interests, used as a pejorative expression, would be served better through non-discrimination than by separate administration of Chinese law and custom run by Chinese officials. However, the policy stated that native law and custom must be respected 'as far as possible', except when the law was inapplicable. See Edwin Scott Haydon, 'The Choice of Chinese Customary Law in Hong Kong' (1962) 11(1) *The International and Comparative Law Quarterly* 231, 241.

This suggests continuing operation in Australia of the somewhat suspect international law doctrine of terra nullius, itself only said to have come from Roman Law.<sup>64</sup> European invaders applied this doctrine to take possession of foreign lands, and declare sovereignty, whenever they said no person was there for the time being. This sounds similar to the Spanish 'Regalian doctrine', by which any private title to colonial land has to be traced back to some grant, either express or implied, from the Crown of Spain.<sup>65</sup> It ostensibly had the same effect, as the English feudal legal maxim *nulle terre sans seigneur*, meaning there could be no land without a lord, a rule of English common law deriving from English custom, and therefore arguably of no relevance in Australia.<sup>66</sup>

Active custodianships over vacant Indigenous lands need not necessarily be in place for the underlying title to subsist, within the Indigenous land rules.<sup>67</sup> In Indigenous practice, this is designated as 'the law', meaning the revered rules integrating lands with languages, totems, dreaming tracks and other demarcations in the landscape. These 'dreaming tracks' are better described as cultural learning tracks at the level of the world of continuing creation.<sup>68</sup> This pattern is set permanently, integrated with the world at the time of its creation. The regional law, rather than any council, is what generates proximate land entitlements. There is no Crown. Such a cultural system is not a separate juristic actor, in the same way as the Common Law fictionalises that all land belongs to the Sovereign.<sup>69</sup> Keen suggests this overlay of revered norms is:

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<sup>64</sup> Terra Nullius appears to have been more a construction than a legal doctrine. Benton and Strauman argued that while res nullius was firmly rooted in Roman sources of law, terra nullius arose merely by analogical extension from res nullius. They added that neither concept constituted a doctrine of a legal vacuum. Thus, it would be misleading to use either term for imperial claims based on vacuum domicilium (vacancy). Brian Slattery, 'Paper Empires: The Legal Dimensions of French and English Ventures in North America' in John McLaren, A R Buck, Nancy E Wright (eds), *Despotic Dominion: Property Rights in British Settler Societies* (University of British Columbia Press, 2005) 51. Armitage made the connection that from the 1620s to the 1680s in Britain, and then in North America, Australia and Africa well into the nineteenth century, the argument from vacancy (*vacuum domicilium*) or absence of ownership (terra nullius) became a standard foundation for English and, later, British dispossession of indigenous peoples. David Armitage, *The Ideological Origins of the British Empire* (Cambridge University Press, 2000) 97. In this synthesis, res nullius underwent metamorphosis into terra nullius, only coming into use in the late 19<sup>th</sup> century, in international law discussions. Lauren Benton and Benjamin Straumann, 'Acquiring Empire by Law: From Roman Doctrine to Early Modern European Practice', (2010) 28(1) *Law and History Review* 1, 6. *Contra* Mark Frank Lindley, *The Acquisition and Government of Backward Territory in International Law* (Longmans, 1926).

<sup>65</sup> June Prill-Brett, 'Indigenous Land Rights and Legal Pluralism among Philippine Highlanders' (1994) 28(3) *Law & Society Review* 687, 691. In the US Supreme Court case of *Carino v Insular Government*, Holmes J stated '[E]very presumption is and ought to be against the government in a case like the present.... [W]hen, as far back as testimony and memory goes, the land has been held by individuals under a claim of private ownership, it will be presumed to have been held in the way from before the Spanish conquest, and never to have been public land': *Carino v Insular Government*, 212 US 449, 460 (1909) (Holmes J).

<sup>66</sup> The legal maxim was 'there is no land in England without its lord': *nulle terre sans seigneur*, G A Guyot, *Institutes Feodales, ou Manuel des Fiefs et Censives, at Droits en Dependans* (Saugrain, 1753) 28.

<sup>67</sup> Sutton, above n 8, 12.

<sup>68</sup> Interview with Douglas Amar Amarfio (Canberra, 5 November 2016).

<sup>69</sup> *Mabo (No 2)* (1992) 175 CLR 1, 9, 27 (Brennan J).

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a control practice or institution, that is, an organised set of long-term and short-term, specific and diffuse actions, coordinated roles, and a body of norms. ... The overall control effects are not achieved by any one action, although individual actions are indispensable.<sup>70</sup>

#### *B Indigenous Law*

The Indigenous law is a permanent reality, beyond human agency. Gerontocratic authority,<sup>71</sup> as Myers says of the Pintupi,<sup>72</sup> is the carrying on and passing on of the law. It includes looking after the young, and mediating an assumed cosmic order. In Pintupi exemplification, public goals and legitimate collective injunctions of personal autonomy exist a priori to society. Older men can articulate norms and their rules from the dreaming, arguably an instance of phylogenesis, as rules transmit through this psychoanalytic form of necessity. Phylogenesis is a biological form of process by which a taxon, as a group of one or more populations of an organism, or organisms, forming a unit of any rank, necessarily appears.<sup>73</sup> The term 'dreaming' likely refers to the time of creation, causing consciousness of something's necessary manifestation, when removed from an inapplicable frame transformation.<sup>74</sup>

Freud's writings assert his belief in the transmission of tradition through phylogenesis. According to Freud, a person's life is influenced by what he has experienced in the past and repressed into the unconscious, and also by innate factors, that is by what he called 'elements with a phylogenetic origin — an archaic heritage'.<sup>75</sup> Freud's writings see proof of this in the universality of symbolism in language, which is beyond extinguishment.<sup>76</sup>

Older men teach these rules, which therefore become imperatives for all juniors in the networked group.<sup>77</sup> Keen suggests that Indigenous Australian neatly bounded collective social worlds do not exist, network-based social models being a more appropriate characterisation.<sup>78</sup> The evidence shows that transitions between different Indigenous law schemes are sometimes gradual, and sometimes sudden. They tend to be policed through the bicultural skills of people living at the schemes' edges.<sup>79</sup> Sometimes differences are great, especially where people with only a recent history of non-Indigenous contact assert their own law in dialectic with that of weaker populations exiting the hinterland.<sup>80</sup> This type of disjunction raises serious questions of

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<sup>70</sup> Ian Keen, 'Aboriginal Governance' in Jon Charles Altman (ed), *Emergent Inequalities in Aboriginal Australia* (Oceania University of Sydney, 1989) 38.

<sup>71</sup> A gerontocracy is a society where leadership is reserved for elders. See George L Maddox, *The Encyclopedia of Aging* (Springer, 1987) 284.

<sup>72</sup> Fred R Myers, 'The Cultural Basis of Politics in Pintupi Life' (1980) 12 *Mankind* 197; Fred R Myers, 'A Broken Code: Pintupi Political Theory and Contemporary Social Life' (1980) 12 *Mankind* 311.

<sup>73</sup> Ernst von Mayr, *Das ist Evolution* (Goldmann, 2005); Storch von Volker, Ulrich Welsch and Michael Wink, *Evolutionsbiologie* (Springer Verlag, 2007); Rifat Hadžiselimović, *Introduction to Anthropogenesis Theory* (Svjetlost, 1986); Nipam H Patel, *Evolution* (Cold Spring Harbor Laboratory Press, 2007); Peter J Bowler, *Evolution: The History of an Idea* (University of California Press, 3<sup>rd</sup> ed, 2003).

<sup>74</sup> Interview with Rita Metzenrath, Senior Records Officer of the Australian Institute of Aboriginal and Torres Strait Islander Studies (Canberra, 22 November 2016).

<sup>75</sup> Freud, above n 20, 98.

<sup>76</sup> Ibid.

<sup>77</sup> Myers, 'A Broken Code: Pintupi Political Theory and Contemporary Social Life', above n 72, 312.

<sup>78</sup> Keen, above n 70, 19.

<sup>79</sup> Sutton, above n 61.

<sup>80</sup> Erich Kolig, 'Dialectics of Aboriginal Life-space' in Michael C Howard (ed), *'Whitefella Business': Aborigines in Australian Politics* (Institute for the Study of Human Issues, 1978) 49–80; John E.

disadvantage for the non-Indigenous imposed colonial legal regime, for the recognition of native title. Cases may arise when Indigenous senior law people disagree over the allocation of proximate tenure to a particular zone,<sup>81</sup> the frame transformation following their disagreements exposed publicly, to their detriment, in native title claims in Australian courts.<sup>82</sup> As an example of colonial judicial policy, in the 1931 case of *Eshugbayi Eleko v Officer Administering the Government of Nigeria*,<sup>83</sup> the Judicial Committee of the Privy Council crafted a highly pejorative formula for application of local customary law. They inferred that natives were barbarous, and that British colonisers were a civilising influence.<sup>84</sup>

The principle of the forming of the local law, and its lore, by the regional interests inheres within founding myths of the different regions of Australia, its transmission being by song. Typically, in these mythical narratives, a significant ancestral figure travels across the landscape, allotting areas of land to various groups.<sup>85</sup> These ancestral beings are archetypal entities,<sup>86</sup> giving great authority to elders instructing the young.

Groups with their lands are, from their formation, bonded with many similar such entities, forming part of an intelligible provincial cultural scheme. Stanner states his frame transformed interpretation as follows.

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Stanton, 'Old Business, New Owners: Succession and 'the Law' on the Fringe of the Western Desert' in Nicolas Peterson and Marcia Langton (eds), *Aborigines, Land and Land Rights* (Australian Institute of Aboriginal Studies, 1983) 160–171; Kingsley Palmer, 'Migration and Rights to Land in the Pilbara' in Nicolas Peterson and Marcia Langton (eds), *Aborigines, Land and Land Rights* (Australian Institute of Aboriginal Studies, 1983) 172–179; Sutton, above n 8, 13.

<sup>81</sup> Peter Sutton, Petronella Morel and David Nash, *The Muckaty Land Claim* (Northern Land Council, 1993) 40.

<sup>82</sup> Similarly, in Hong Kong, the British were able to induce public contradictions in the experts' evidence. D E Greenfield, 'Marriage by Chinese Law and Custom in Hong Kong' (1958) 7 *International and Comparative Law Quarterly* 437 450; Government Printer, *Chinese Marriages in Hong Kong*, 1960, 20(1). The Hong Kong legislation, forming the basis of choice of Chinese Customary Law, provided dissonantly for Chinese law: 'such of the laws of England as existed when the Colony obtained a local legislature, that is to say, on the 5th day of April, 1843, shall be in force in the Colony, except so far as the said laws are inapplicable to the local circumstances of the Colony or of its inhabitants, and except so far as they have been modified by laws passed by the said legislature.' *Supreme Court Ordinance 1873* (HK) s 5.

<sup>83</sup> [1931] AC 662 ('*Eshugbayi Eleko*').

<sup>84</sup> 'Their Lordships entertain no doubt that the more barbarous customs of earlier days may under the influences of civilisation become milder without losing their essential character of custom. It would, however, appear to be necessary to show that in their milder form they are still recognised in the native community as custom, so as in that form to regulate the relations of the native community inter se. In other words, the court cannot itself transform a barbarous custom into a milder one. If it still stands in its barbarous character it must be rejected as repugnant to 'natural justice, equity and good conscience.' It is the assent of the native community that gives a custom its validity, and, therefore, barbarous or mild, it must be shown to be recognised by the native community whose conduct it is supposed to regulate': *Eshugbayi Eleko* [1931] AC 662, 673 (Lord Atkin).

<sup>85</sup> Ronald Murray Berndt and Catherine Helen Berndt, *A World that Was: The Yarlaldi of the Murray River and the Lakes, South Australia* (Melbourne University Press, 1993); Sutton, above n 8, 12. Sutton referred to these people as heroic figures, but technically they are not heroes.

<sup>86</sup> Interview with Rita Metzenrath, Senior Records Officer of the Australian Institute of Aboriginal and Torres Strait Islander Studies (Canberra, 22 November 2016).

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When everything significant in the world was thus parcelled-out among enduring groups, the society became made up of perennial corporations of a religious character. ... The religion was not the mirage of the society, and the society was not the consequence of the religion. Each pervaded the other within a larger process.<sup>87</sup>

It is not apparent from whence Stanner derives his parcelling, corporations, religious character, and, pervasion. One suspects these are reverse constructs, operating similarly to the British inevitable application of its frame of denizen theory, but applied in Australia. The target audience for this power rhetoric is most likely British colonial officials and ethnic-British residents, suggesting a technique for frame transformation, of moving the rhetorical target away from those most affected.

The broader Indigenous land title systems include underlying titles from which individual people and groups can make local claims through succession, inheritance, or incorporation. This communal title is not destroyed when a group might be compacted into a single person. For cases of succession, an extinct land-holding group can be revived from the conception or succession of a single person. The title even retains its communal character in its proximate form.<sup>88</sup> Even non-Indigenous people appear to recognise this point in, for example, the *Aboriginal Land Act 1991* (Qld) ('*QALA*'). Section 3 of the *QALA* partially describes a 'group of Aboriginal people' as 'if there is only one surviving member of a group of Aboriginal people — that person', suggesting a snippet of recognition of a subsisting communal element to Indigenous land title.

#### *C Continuity of Underlying Title During Processes of Succession*

When a local land-holding group dies out, proximate title may continue lawfully without holders for more than a generation.<sup>89</sup> Sutton uses here the term 'ceased to be an estate'. However, this apparent frame transformation is incorrect, as there are no legal estates in the Indigenous land system.<sup>90</sup> There are documented customary rules for succession to the land, and for the appointment of either individual or collective proxies to hold custody of local title, in the event of delayed succession. In the case of unresolved succession to vacant land, the land title continues its former status. It will not be terra nullius.<sup>91</sup>

However, completely ignoring this example of Indigenous customary laws, as if it were a nullity, NSW Governor Bourke's Proclamation of 1835 implements the doctrine of terra nullius administratively, basing British settlement on it, and reinforcing the repressed notion that the land of the Australian continent belongs to no nation prior the British Crown's claims to possession.<sup>92</sup> According to this frame transformation, Indigenous people therefore cannot sell or assign the land, nor can they acquire it, other than through distribution by the British Crown, because the Crown thinks they are not there. Although people of the relevant times recognise that Indigenous occupants have

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<sup>87</sup> William Edward Hanley Stanner, 'Religion, Totemism and Symbolism' in Ronald Murray Berndt and Catherine Helen Berndt (eds), *Aboriginal Man in Australia* (Angus and Robertson, 1965) 237.

<sup>88</sup> Sutton, above n 8, 14.

<sup>89</sup> Nicolas Peterson and Jeremy Long, *Australian Territorial Organization: A Band Perspective* (Oceania University of Sydney, 1986); Sutton, above n 61, 59.

<sup>90</sup> Interview with Douglas Amar Amarfio (Canberra, 5 November 2016).

<sup>91</sup> Evidence to the Joint Select Committee on Aboriginal Land Rights in the Northern Territory, Parliament of Australia, Canberra, 1977, 1002–1014 (Nicolas Peterson, Ian Keen and Basil Sansom); Kolig, above n 80, 49–80; Kim Akerman, 'Kimberley and Dampier Land' in Peter Sutton, *Country: Aboriginal Boundaries and Land Ownership in Australia* (Aboriginal History Monographs, 1995) app 2 99; Sutton, above n 61, 59.

<sup>92</sup> Sir Richard Bourke, *Governor Bourke's Proclamation 1835 (UK)*, No 3, 26 August 1835.



title rights in the land, as confirmed in a House of Commons report on Aboriginal relations as early as in 1837,<sup>93</sup> Australian positivist law still followed the principles in Bourke's proclamation, until the Australian High Court's decision in the Mabo decision in 1992,<sup>94</sup> despite Brownlie's advice as to the resultant kind of title.<sup>95</sup>

Terra nullius is a Latin expression from Roman sources of European-based international law, meaning 'nobody's land'. In this form of international law, it describes territory never subjected to the sovereignty of any (European style of) state, or over which any prior (European style of) sovereign has relinquished sovereignty. For an example of re-framing through dictation of international law, see the following example.

In the Western capitalist world, suppression of the weak by the strong and the eating of small fish by big fish are not only tacitly condoned by bourgeois international law but also are cloaked with a mantle of 'legality'.<sup>96</sup>

According to this apparently regional form of European international law,<sup>97</sup> apparently frame transformed into worldwide international law, sovereignty over territory, which is terra nullius, might be acquired through occupation.<sup>98</sup> Indicating an alternate frame in which the international law between Indigenous nations subsists, there has been very little reliable evidence of Indigenous groups forcibly encroaching on boundaries and taking land, although some cases exist. It appears to be abhorrent to Indigenous people.<sup>99</sup>

#### *D The Status of Estates Subject to Disputed Proximate Title*

Observations from many parts of the Australian land mass show that, without local resources or significant demarking features, boundaries of local estates or dreaming track pathways (songlines) are either shared by the abutting groups, or are the property of all the locally connected groups. At these zones, the adjoining lands are without specific borders. This is the case in both Arnhem Land and Central Australia.<sup>100</sup> Pink makes anthropological field observations in collaboration with senior Arrernte people, in Central Australia, addressing the questions of clan estate borders and no-man's lands. They observe that non-owners respect totemic clan sites strictly, and treat them like boundary posts. Desert areas, and country without water at the peripheries, lack any associated transmitted songs or painted designs. They are organised communally as what Pink calls 'tribal land', rather than as private clan holdings.<sup>101</sup> In this sense, 'tribal

<sup>93</sup> Report of the Parliament Select Committee on Aborigines (British Settlements), Parliament of Great Britain (20 February 1837).

<sup>94</sup> *Mabo (No 2)* (1992) 175 CLR 1.

<sup>95</sup> Brownlie, above n 57, 146.

<sup>96</sup> Ying Tao, 'Recognize the True Face of Bourgeois International Law from a Few Basic Concepts' in Jerome Alan Cohen and Hungdah Chiu (eds) (1960) *People's China and International Law: A Documentary Study* (Princeton University Press, 1974) 42.

<sup>97</sup> It appears that this problem arose for the People's Republic of China, in the 2015 South China Sea Arbitration. China declined to participate in the arbitration, for the reason that it did not recognise principles of Roman Law, and international judicial decisions, supplemented by force of frame transformation into public international law. See Gary Lilienthal and Nehaluddin Ahmad, 'The South China Sea Islands Arbitration: Making China's Position Visible in Hostile Waters' (2017) 18(2) *Asian-Pacific Law and Policy Journal* 1, 39.

<sup>98</sup> *New Jersey v New York*, 523 US 767 (1998).

<sup>99</sup> Typescript from Peter Sutton, researcher on aspects of traditional Aboriginal land takeovers marked by conflict, to the Northern Land Council, party to the Finnis River Land Claim, 1980, app.

<sup>100</sup> Sutton, above n 61, 59.

<sup>101</sup> Olive Pink, 'The Landowners in the Northern Division of the Aranda Tribe, Central Australia' (1936) 6 *Oceania* 275, 283–4; Sutton, above n 8, 15.

lands' means lands with perpetual community title, where no alienation is allowed, inferring communal allodium.<sup>102</sup> This suggests a boundary taxon emerging as an organism in, but not confined to, a specific land title context,<sup>103</sup> as transmission of collective memory in land title by phylogenesis. Since it appears as necessary and continuing creation, it can be frame transformed into mere singing of tracks, to a non-Indigenous audience whose cultural background represses allodial land title.

Wheeler describes 'tribal over-rights',<sup>104</sup> which may be a reverse construct. He observes that small groups own small areas. All members of the larger tribe, to which these groups belong, have general access to all the lands.<sup>105</sup> Trespass is a criminal offence constituted by one tribe entering the territory of another.<sup>106</sup> In the western part of Cape York Peninsula, 'main places',<sup>107</sup> ('*aak mu'em*'), are available freely to visiting groups from elsewhere in the immediate region. They are not free to camp, without permission, at the more private places.<sup>108</sup> Within *aak mu'em*, visitors can have regular shade areas allotted to them, just like a public space within a hotel.<sup>109</sup> These are aspects of reciprocal usufructuary rights within lands, held by those not claiming them as their own. Mutatis mutandis, colonial invaders commit local criminal offences, their superiors having denied the existence of local law, when they so encroach on such lands.

#### *E The Role of Regional Elders in Validating Proximate Entitlements*

The Indigenous Australian social and governance structures feature knowledge specialists, for enquirer referrals.<sup>110</sup> In some land claims, in the Northern Territory and Queensland jurisdictions, elders from groups with adjoining country give evidence to vouch for the applicants' claims, and to waive any entitlement to make their own claims. Elders also may vouch for those whom Government officials remove from their country.<sup>111</sup> These elders appear to represent the regional system of land dealings, in underlying title. Their waivers of local entitlements to others' countries are of proximate title. They can influence public acceptability of proximate title claims. Regional elders meet from time to time, to work through conflicting land claims.<sup>112</sup> Depopulation during successive administrations, and the thought of having to establish an Anglo-Australian form of legal title in court under Australian law, may accentuate the need for such assemblies. Arguably, such legal title is foreign to the core of the Indigenous systems, and its publicly stated purposes may be specious.<sup>113</sup> The evidence is strong that there has been a widespread and continuing system of regional assemblies

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<sup>102</sup> Interview with Douglas Amar Amarfio (Canberra, 5 November 2016).

<sup>103</sup> Nicolas Peterson and Jeremy Phillip Merrick Long, *Australian Territorial Organization: A Band Perspective* (Oceania University of Sydney, 1986) 53-54.

<sup>104</sup> Gerald Clair Wheeler, *The Tribe, and Intertribal Relations in Australia* (John Murray, 1910) 40, 44-45, 62.

<sup>105</sup> Ibid 45.

<sup>106</sup> Ibid 46.

<sup>107</sup> *aak mu'em* in Wik-Ngathan. See Peter Sutton, *Wik-Ngathan Dictionary* (Caitlin Press, 1995) 48.

<sup>108</sup> See Keen, above n 53, 114, where a similar distinction applies in North-East Arnhem Land.

<sup>109</sup> Sutton, above n 8, 16.

<sup>110</sup> Interview with Douglas Amar Amarfio (Canberra, 5 November 2016).

<sup>111</sup> In one Northern Territory case a group of male elders drawn from the relevant wider region gave evidence, which did not support a group's claims, but the group was nevertheless legally successful. See Aboriginal Land Commissioner, *Finniss River Land Claim* (Australian Government Publishing Service, 1981).

<sup>112</sup> Sutton, above n 8, 16.

<sup>113</sup> Interview with Douglas Amar Amarfio (Canberra, 5 November 2016).

of this kind.<sup>114</sup> A senior jural public, in what Sutton calls ‘religious matters’,<sup>115</sup> is what he asserts is a commonplace theme in the various ethnographies.<sup>116</sup> If Sutton is using this term ‘commonplace’ in its technical sense, this suggests non-Indigenous social scientists write the ethnographies with a pejorative purpose of denunciation in the characterisation of the assemblies as religious.<sup>117</sup> In his frame transformation, Sutton views land tenure as being at the heart of a ‘religious system’.<sup>118</sup>

Rather, Strehlow describes a land title succession dispute in Central Australia, observing ‘[t]he conflicting arguments were irreconcilable; neither of them was supported by sufficient legal authority to win general acceptance’.<sup>119</sup> Likewise, Strehlow explicitly acknowledges the role of the region’s senior men, who articulate the customary law, and whose authority opponents have to satisfy.<sup>120</sup>

Proximate title can be revived whenever a larger group has become defunct. If the underlying customary title subsists, and there are either authoritative people or a consenting public with juridical personality, new proximate title-holders can have their title ratified.<sup>121</sup> In some places, indicia of title can include significant objects, held by the region’s elders, used in cases of reviving extinct groupings. For example, a child can be conceived in the pertinent area, thus founding a revived group with rights to the local title. Ultimately, the child may be recognised as the lawful holder of the land’s significant indicia of title.<sup>122</sup> A child itself may not make claims over such indicia of title, because they are of communal significance, knowledge specialists being in charge of their administration. Elders confer them on the child with approved rites,<sup>123</sup> thus conferring juridical personality onto the child.

These procedures infer the practical distinctions between underlying and proximate title. Inter-group competition for individual members provides another example. In the Tennant Creek region, where two differing regional land title systems and language categories adjoin, the ceremonial interests on both sides may claim one individual as a member of both systems. Each of the two regional groups may assign this person to custodianship of different sites, without resolving the matter. Once, a man from one group killed a man from the other. By way of compensation, the killer’s father gave his

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<sup>114</sup> Keen, above n 70, 17–42.

<sup>115</sup> The use of the word ‘religious’ suggests a reverse construct from an English frame of reference. See Interview with Douglas Amar Amarfio (Canberra, 5 November 2016).

<sup>116</sup> Commonplace is an amplification of something that was already agreed, like a publicly disliked error, putting the target person in the same category as all other similar and disliked actors. It amplifies evils attached to something, fitting all people taking part, in common. It may be used as a judicial attack on those involved by denouncing them for mere errors, which might be so disliked publicly, that these mere errors might be attached to oratory of criminal offences and used as additional criminal denunciations. George Alexander Kennedy (trans), *Progymnasmata: Greek Textbooks of Prose Composition and Rhetoric* (Society of Biblical Literature, 2003) 79, 105, 148, 201, 202.

<sup>117</sup> Interview with Douglas Amar Amarfio (Canberra, 5 November 2016).

<sup>118</sup> Sutton, above n 8, 16.

<sup>119</sup> Theodor George Henry Strehlow, *Aranda Traditions* (Melbourne University Press, 1947) 156.

<sup>120</sup> Ibid.

<sup>121</sup> This would be beyond colonial policy, with its resort to a deliberately pejorative terra nullius theory. The frame transformation is achieved by annihilating Indigenous juridical personality. See especially the argument on abridgment of juridical personality by public pejorative rhetoric, in Lilienthal and Ahmad, above n 38.

<sup>122</sup> Keen, above n 45, 272–91; Keen, above n 70.

<sup>123</sup> Strehlow, above n 119; Theodor George Henry Strehlow, ‘Culture, Social Structure, and Environment in Aboriginal Central Australia’ in Ronald Murray Berndt and Catherine Helen Berndt (eds), *Aboriginal Man in Australia Essays in Honour of Emeritus Professor A P Elkin* (Angus and Robertson, 1970) 121–145.

son to the father of the man the son had killed. The receiving father assigned the replacement son into his own land title group. However, the son's land identity retained his ancestral origin despite his re-identification.<sup>124</sup>

Group local entitlements may be reduced or forfeited, either through long-term out-migration, or by relevant regional elders making a communal decision. All proximate title interests are by consent. Divestment or withdrawal of proximate rights is possible, because people all have multiple legitimate rights in several different local countries. This is because they remember ancestors from several countries. Thus, withdrawal of local land rights by community consensus does not leave people landless. Instead, it shifts their focus to another place.<sup>125</sup>

Stanner says that totemic disinheritance is 'not really possible', but cites cases where the children of men who marry incorrectly lose their paternal totems. He observes: 'There are rules, both religious and secular, governing acquisition [of totems], so that a person's totem could be said to be a matter of right, but public ascription and agreement (disputes do arise) both seem necessary conditions'.<sup>126</sup>

These are not cases of alienability of land. It is impossible, under Indigenous land holding customary laws, to alienate land by exchange. Rather, people may succeed to proximate title by operation of law, or may be divested of it by operation of another law,<sup>127</sup> implying the title cannot be extinguished. This indicium of the rule of law appears to eliminate some capriciousness of lordship in land title.

#### *F The Possibility of the Divestment of Proximate Entitlements*

A group's local title can be reduced or forfeited, by long-term out-migration, or by authorised elders making a communal decision. People all have multiple paths to rights in different countries at the same time, whenever they remember ancestors from those different countries. Withdrawal of local title from a small group by communal decision merely shifts their primary focus to their other entitlements,<sup>128</sup> the titles themselves remaining stable.

#### *G The Relative Stability of Geographic Units of Land Affiliation*

The issue of drainage in demarcating land units suggests land titles' capacity for long-term stable endurance.<sup>129</sup> In western Cape York Peninsula, the profile and substance of the lands remain relatively constant and clear-cut, inferring political and ecological stability.<sup>130</sup> In the Princess Charlotte Bay region of eastern-central Cape York Peninsula, careful mapping, along with linguistic research, shows the local small clan estates have very old names, possibly many centuries old. From a very large sample, they often have names, which are both cognate and different, in many of the region's languages. This

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<sup>124</sup> Sutton, above n 8, 18.

<sup>125</sup> Stanner, above n 87, 207, 230.

<sup>126</sup> Ibid.

<sup>127</sup> There were also 'secret waters' for use only by senior local men. See Keen, above n 53, 114, where a similar distinction applies in North-East Arnhem Land; Sutton, above n 8, 52.

<sup>128</sup> Stanner, above n 87, 207–237 230; Sutton, above n 8, 18.

<sup>129</sup> Nicolas Peterson, 'The Natural and Cultural Areas of Aboriginal Australia: a Preliminary Analysis of Population Groupings with Adaptive Significance' in Nicolas Peterson (ed), *Tribes and Boundaries in Australia* (Australian Institute of Aboriginal Studies, 1976) 50–71; Sutton, above n 61, 50.

<sup>130</sup> Peter Sutton, *Wik: Aboriginal Society, Territory and Language at Cape Keerweer, Cape York Peninsula, Australia* (PhD thesis, University of Queensland, 1978) 59–60.

indicates their continuing use in those languages for several centuries, diverging from common original roots. Many clan names derive from focal site names.<sup>131</sup>

The clan names are very stable. Kolig finds that as soon as a clan ceases performing its duty of looking after their assigned lands, others have to step in. This does not allow a clan to expand its land holdings, because those who are the next most closely affiliated with the abandoned lands take over. However, within two to three generations, ties between the two groups, and the memory of their common origin may dissolve.<sup>132</sup> Similarly, in the Cape Keerweer region of Cape York Peninsula, totemic personal names and language affiliations suggest that certain pairs of geographically separated clans are a single clan in a single land title region.<sup>133</sup> In observing North-East Arnhem Land, Keen says that Yolngu people ‘contested the definition of country, as well as rights over it. The definition of country was not “objective” but relative to a person’s perspective, interest, and loyalties’.<sup>134</sup> Lush coastal countries tend to have widely agreed country definitions more than in inland areas. Moiety and group identities in coastal areas are less disputed.<sup>135</sup> Identity and location of so-called nodal sites<sup>136</sup> are more consistent than clan identity, with some evidence of colonial attempts at their erasure.<sup>137</sup> Such sites are nodes in lacework patterns of what are known as ‘songlines’.<sup>138</sup>

#### IV THE SONGLINES

In his 1987 book *The Songlines*, the British author Bruce Chatwin describes ‘the songlines’ as: ‘the labyrinth of invisible pathways which meander all over Australia and are known to Europeans as “Dreaming-tracks” or “songlines”’; to the Aborigines as the “Footprints of the Ancestors” or the “Way of the Lore”’.<sup>139</sup>

Indigenous Australian creation myths tell of fabled totemic beings, which roam over the continent in the Dreamtime. Actually, there are many of these ancient entities. Dreamtime is a British frame transformation, which refers to an ancient time of creation, suggesting a reframe into the European idea that creation happened sometime in the past.<sup>140</sup> This being sings out the name of everything whose path it crosses: birds, animals, plants, rocks, waterholes. In this way, it sings the world into existence.<sup>141</sup>

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<sup>131</sup> Peter Sutton, *Flinders Islands & Melville National Parks Land Claim* (Cape York Land Council, 1993) 31.

<sup>132</sup> Kolig, above n 80, 62–63.

<sup>133</sup> Sutton, above n 131, 82–83.

<sup>134</sup> Keen, above n 53, 102.

<sup>135</sup> Ibid 105.

<sup>136</sup> Canberra contains an intensity of Songline nodes and Canberra’s street design appears to follow the Songlines. See Interview with Shane Mortimer, Social Scientist and Senior Ngambri Nation Elder (Canberra, 20 May 2015).

<sup>137</sup> Sutton, above n 8, 19.

<sup>138</sup> Interview with Douglas Amar Amarfio (Canberra, 5 November 2016).

<sup>139</sup> Bruce Chatwin, *The Songlines* (Random House, 2012) 2. Many Indigenous peoples in Australia do not have a linear concept of time. In their perspectives, yesterday is the same day as today, only different. Tomorrow is all the same day for them. Thus, although the Dreamtime may be the creative period in the distant past, it nevertheless reaches to the present. See William Edward Hanley Stanner, *White Man Got No Dreaming* (Australian National University Press, 1979) 23–40.

<sup>140</sup> Interview with Rita Metzenrath, Senior Records Officer of the Australian Institute of Aboriginal and Torres Strait Islander Studies (Canberra, 22 November 2016).

<sup>141</sup> Chatwin, above n 139, 2.

A songline, which many non-Indigenous people frame transform to a dreaming track, is one of the pathways across the land or sky,<sup>142</sup> marking the ancient routes created during the ancient times, which local creator-beings follow. There is thus a suggestion of their navigation at least partially by the stars. These songlines are embedded in customary songs, dances, painting and stories. A person with this knowledge can navigate the land by using the song's words, which describe waterholes, landmarks, and other natural occurrences. Sometimes, the creator-beings' paths are apparent from their imprints, or petrosomatoglyphs, in the land, such as for example, large land depressions as their ancient footprints.<sup>143</sup>

By singing these songs in the prescribed sequence, Indigenous people may navigate huge distances, often through Australia's interior deserts. The Australian continent contains a wide-ranging lace-like network of songlines. Some are a few kilometres, and others are hundreds of kilometres through the lands of many different Indigenous peoples. They traverse areas peopled by those with different languages and different cultures. Thus, different sections of the song are in different languages. Such foreign languages are not a navigation obstacle, because the song's melody itself also describes the land, over which it passes. The rhythm is critical to interpreting the song. Listening to the land's song is essentially cognate to walking the songline and observing its described land.<sup>144</sup>

Molyneaux and Vitebsky observe that Dreaming Spirits 'also deposited the spirits of unborn children and determined the forms of human society,' so establishing common law and its totemic paradigms.<sup>145</sup>

The Yolngu people of Arnhem Land tell of Barnumbirr, a creator-being connected with the planet Venus, coming from the eastern island of Baralku. This being guides the first people to Australia, then flies across it from East to West. It names and creates the plants, animals, and the land's natural features.<sup>146</sup>

Woodford's frame transformation states that songlines are connected to Indigenous art sites within the Wollemi National Park in New South Wales,<sup>147</sup> apparently unable or unwilling to see evidence of lawful sovereign land demarcation.

## V CHAINS OF CONNECTION

The Tingari are a group of ancestral elders who, during creation, travel over western deserts performing rituals by which they create or open up the country.<sup>148</sup> In the course of their many adventures, they become the physical features of the sites they so open up. Thus, their archetypes become the symbolic meanings of the physical land features,

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<sup>142</sup> Hugh Cairns and Yidumduma Bill Harney, *Dark Sparklers: Yidumduma's Wardaman Aboriginal Astronomy: Night Skies Northern Australia* (H C Cairns, 2003).

<sup>143</sup> John Bradley, *Yanyuwa Families, Singing Saltwater Country: Journey to the Songlines of Carpentaria* (Allen & Unwin, 2010).

<sup>144</sup> Ibid.

<sup>145</sup> Brian Leigh Molyneaux and Piers Vitebsky, *Sacred Earth, Sacred Stones: Spiritual Sites and Landscapes, Ancient Alignments, Earth Energy* (Duncan Baird, 2001) 30.

<sup>146</sup> Ray Norris, Priscilla Norris and Cilla Norris, *Emu Dreaming: An Introduction to Australian Aboriginal Astronomy* (Emu Dreaming, 2009).

<sup>147</sup> James Woodford, 'songlines across the Wollemi', *Sydney Morning Herald* (Sydney), 27 September 2003.

<sup>148</sup> Lloyd D Graham, *The Nature and Origins of the Tingari Cycle* (AusAnthrop, 2002) 1 <ausAnthrop.net/research/articles.php>.

and thus, these features represent a marking-out of the land.<sup>149</sup> These archetypal mythic narratives lack spatio-temporal perspective, and some manifest in the form of long tracks spanning vast distances.<sup>150</sup> Graham proposes that this reasoning evidences a continental customary cultus, which forms clans, marks out land territories and therefore implies part of a body of Indigenous customary laws.<sup>151</sup>

Throughout northern and central Australia, there are places acknowledged as revered sites with a range of associated restrictions. However, this is not mere reverence. It is arguably evidence of operational common law. The restrictions can be divided into secret men's and secret women's business, and their nature can depend on the nature of the site. For example, the site can be an increase site, or a custodianship site.<sup>152</sup> Colonial archaeological and ethnographic investigations all suggest that some of these sites may be so constituted, for from a few hundred to many thousands of years. Some of these locations are used for initiation, or for teaching. Some of them are designated for 'increase' ceremonies, so that species of plants or animals may thrive.<sup>153</sup> This suggests the operation of legislation and acts of administration.

At some very powerful locations, senior men or women can access the power of the familial past, with a view to influencing the present and future, again inferring phylogenetic transmission. Some of these places are where ancestral beings transform the land with enduring, and even disquieting consequences. These are, in effect, proprietorial acts over land.<sup>154</sup> Others are final places of rest, where they enter water, stone, or earth. Some are marked with rock art, arrangements of stone, scar trees or temporary clay sculptures. Many are not so marked. Not all of the rock-art sites are revered. Many locations have paintings of some ancestral beings, again suggesting phylogenetic record. In the far north, sacred sites often feature big old banyan trees. In other places, other kinds of trees or plants are also sacred. Destroying them can be said to have precipitated catastrophic storms and floods.<sup>155</sup>

All such places have been looked after with such customs as access restrictions, special ceremonies, songs, or talking with ancestors. Today, many are additionally 'protected' with non-Indigenous legislation, such as national parks statutes, World Heritage declarations and other administrative barriers. The introduction of this range of non-Indigenous positive laws has certain negative outcomes, such as increasing distrust of oral history by those persuaded to the idea of 'development', a term with an obscure meaning, indicative of frame transformation. Another consequence is the isolation of so-called sacred sites from songline tracks and their larger hinterland landscapes.<sup>156</sup>

The connections between these sacred sites are frequently difficult for non-Indigenous officials to understand. Officials routinely dismiss them, or consider them insignificant. One of the reasons for this denial is due to the sheer size of the lands these connections touch. Also, non-Indigenous people have set up obstacles to managing the scope of

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<sup>149</sup> Ibid 2.

<sup>150</sup> Ibid 3.

<sup>151</sup> Ibid 4.

<sup>152</sup> Interview with Rita Metzenrath, Senior Records Officer of the Australian Institute of Aboriginal and Torres Strait Islander Studies (Canberra, 22 November 2016).

<sup>153</sup> Paul Taçon, 'Chains of Connection' (2005) 9 *Griffith Review* 1.

<sup>154</sup> Interview with Rita Metzenrath, Senior Records Officer of the Australian Institute of Aboriginal and Torres Strait Islander Studies (Canberra, 22 November 2016).

<sup>155</sup> Taçon, above n 153.

<sup>156</sup> Ibid.

such landscapes, having arranged for them to traverse so many non-Indigenous political boundaries.<sup>157</sup>

A mythic map of Australia would show thousands of characters, varying in their importance, but all in some way connected with the land. Some emerged at their specific sites and stayed spiritually in that vicinity. Others came from somewhere else and went somewhere else. ... Many were shape changing, transformed from or into human beings or natural species, or into natural features such as rocks but all left something of their spiritual essence at the places noted in their stories.<sup>158</sup>

Thus, the continent is demarcated by ancient mythical narrative, inferring ancient transmitted lore, suggesting settled common law. In plotting all these tracks, many correspond with customary seasonal travel paths. Some also correlate with today's highways and other roads. The plot would show a strong correlation between dreaming songline tracks and the so-called 'sacred' places of ancestral beings. There is also a correspondence between meeting places and dreaming tracks, some rock art formations and some stone arrangements.<sup>159</sup>

It constitutes a map comprising integrated social, geological, historical, biological, archaeological and ecological data. It depicts communities of people living in expansive 'provinces', and others living at junctions. It shows converging influences from many directions, or influences in a state of effluxion. Keep River and Riversleigh-Boodjamulla are such junctions. The Kimberley, Cape York and Arnhem Land resemble provinces. Central Australia is special case of a province, in which people travel in and out of, as the climate changes and resources are available.<sup>160</sup>

Prior to recent times of European-colonial destruction, people have maintained these tracks by ceremony, visual art, song, oral history, commercial trade, and other kinds of formal exchange. These tracks conceptualise land differently than by western ideas of roads, printed maps, and political borders.<sup>161</sup> Their methods for connection are both northern and southern phenomena in Australia. Southern colonisers ignore details of Indigenous traditional law, most probably because European colonisation has destroyed so much more in the south,<sup>162</sup> as an effective military scorched earth policy.

The Dreamtime or Dreaming incorporates narrative, history, innovation, traditional practice, religion and individual experience, concentrated onto the land. Thus, the most ancient of lore, generated by the time of creation, is programmed into the land itself. Each Indigenous people expresses its own word and understanding for the Dreamtime, meaning creation. A common theme is of connections and relationships to other peoples, other creatures, the land, the past and the creator ancestral archetypal beings. It generates both the law and the lore for Indigenous peoples, permitting sufficient stored and transmitted wisdom for survival in a harsh natural and political landscape.<sup>163</sup>

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<sup>157</sup> Ibid 2.

<sup>158</sup> Catherine Helen Berndt, 'Aboriginal Mythology' in David Horton (ed), *The Encyclopedia of Aboriginal Australia: Aboriginal and Torres Strait Islander History, Society, and Culture* (Aboriginal Studies Press, 1994).

<sup>159</sup> Taçon, above n 153, 3.

<sup>160</sup> Ibid.

<sup>161</sup> Ibid.

<sup>162</sup> Ibid 4.

<sup>163</sup> Ibid.



## VI CONCLUSION

Allodial title refers, as in argument's opening discussion, to real estate held in absolute independence, not subject to any kind of response to a person in a superior hierarchical position. It is unlikely that any citizen of any English-speaking country has ever held land in absolute independence. These apparently feudal people thus might not imagine that any other person could do so, as they were subject to their own foreign English feudal legal maxim *nulle terre sans seigneur*, meaning there could be no land without a lord. It is most likely that Indigenous land title is true communal allodial title, with the word 'communal' including connotations of ancient forms of governance.

In Australia, the British Crown purported to acquire an underlying land title along with a sovereign political power over land, which together was less than absolute ownership of land. The Crown's sovereignty claim in Australia is weak, because it is based on the fiction of *terra nullius*, a somewhat suspect legal doctrine more like government policy, in which the colonial mind repressed the entire existence of the Indigenous peoples. The Crown's sovereignty claim is only an inchoate title to repel the invasions of other colonial powers. This suggests its so-called radical title is still subject to prior Indigenous land title. Its political power of frame transformation has been used in disregard of Indigenous land title, to try to expand the Crown's claimed underlying title to absolute ownership. This failure to work out title with Indigenous people, in breach of prior Indigenous Australian law, suggests occupation based on fraud, a criminal encroachment, and therefore, an occupation ineffective in law.

British colonial people believed they could freely search denizens, in the perfect pejorative frame transformation of status.<sup>164</sup> It appears British colonialists could not distinguish Indigenous people from what British culture had known as denizens, pejoratively implementing the frame transformation articulating Indigenous land title as merely ephemeral. British colonial rhetoric was not targeted towards Indigenous people, suggesting a British policy of articulating Indigenous people's juridical personality as low status. Rather, colonial rhetoric was targeted towards British officials and their opponent colonial powers.

NSW Governor Bourke's Proclamation of 1835, administratively implemented the doctrine of *terra nullius*, and Australian colonial behaviour appears to have followed it, through continuing frame transformation, ever since. This is despite a House of Commons report on Aboriginal relations in 1837 reporting that Indigenous inhabitants had title to or rights in their lands.

The radical forced frame transformation was without any Indigenous consent, as they were not its rhetorical audience. Communications with Indigenous people were framed pejoratively, apparently pursuant to the Imperial policy expressed in the 1931 Privy Council case of *Eshugbayi Eleko*. Without effective sovereignty based on legality of transfer, the Crown's radical title must fail in law as mere fraudulent encroachment.

Government officials have used the term 'sacred site' to reframe significant matters administered by Indigenous people of higher degrees of learning. From the above discussion, it is likely they are incapable of such cognition. Stanner's reframing of Indigenous law and lore into a corporate, religious character, suggests a technique for frame transformation, of moving the rhetorical target away from those most affected. This creates serious disadvantage, as people are talked about instead of talked with.

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<sup>164</sup> Rappaport, above n 49, 208–9.

Sutton purported to characterise the authority of the Indigenous Elders over land title matters, as having jurisdiction restricted to 'religious matters'. He called it a commonplace theme in the colonial ethnographies, suggesting commonplace denunciations used in the pejorative facets of frame transformation. Woodford's frame transformation informed readers that 'songlines' were merely tracks between artistic sites. Taken together, these frame transformations of a highly sophisticated and ancient legal and social system into a mere religious art gallery, are likely to have constituted sufficient pejorative denunciation to satisfy British officials of their own assertions of terra nullius.

Indigenous law is a permanent reality, beyond human agency, run by gerontocratic authority. It shows many instances of phylogenesis, as rules transmit through this psychoanalytic form of necessity. For example, the term 'dreaming' likely means the time of creation, causing consciousness of something's necessary manifestation, where creation happens anew continually. The very idea of creation being a solely past event is foreign to the customary laws of Indigenous Australians. Freud saw proof of this in the universality of symbolism in language, which arguably could not be extinguished. Boundary taxa emerging organically in specific land title contexts, strongly suggest phylogenetic transmission of collective memory in Indigenous land titles. Graham saw indicia of this in a continental customary cultus, which formed the clans, marked out the land territories and therefore generated part of a larger body of Indigenous customary law. This law is so sophisticated that, the most ancient of lore, integrated with the time of creation, is effectively programmed into the land itself as a library in perpetuity. It cannot possibly be extinguished, unless by military-style scorched earth actions. Taken together, at this level of development of the human consciousness, government officials have insufficient connection to Australian land to be able to understand their ancient environment. No doubt their anxiety at being constrained within a foreign place, and imagining they are in charge, is what has produced their aggressive form of frame transformation, leaving Indigenous peoples at such severe disadvantage.

Trespass is a criminal offence in Indigenous law, constituted by one tribe entering the territory of another. Mutatis mutandis, colonial invaders commit local criminal offences, their superiors having been in denial of the existence of local law, when they so encroached on such lands. They effectively claim Crown immunity from a foreign Crown. It is impossible, under Indigenous land holding customary laws, to alienate land. Arguably, this rule is embedded in tens of thousands of years of practical wisdom, suggesting that the current land title system will ultimately come apart. The continent's network of songlines, which many non-Indigenous people have frame transformed to dreaming tracks traversed by people singing songs at open-air art galleries, is an encoded map of Australia, tied to celestial navigation techniques, as well as to social and legal constraints for travelling and surviving along them. Together, their lace-like network generates land title plots, depicting communities of people living in expansive 'provinces', and others living at junctions. The pejorative colonial frame transformation of Aboriginal law has created relentless human suffering, but is likely to fall into desuetude, just as it has inevitably in so many other parts of the now only ephemerally recognised British Imperial realm. The research suggests the frame transformation can be reversed by well-crafted and judiciously delivered epideictic rhetoric.