

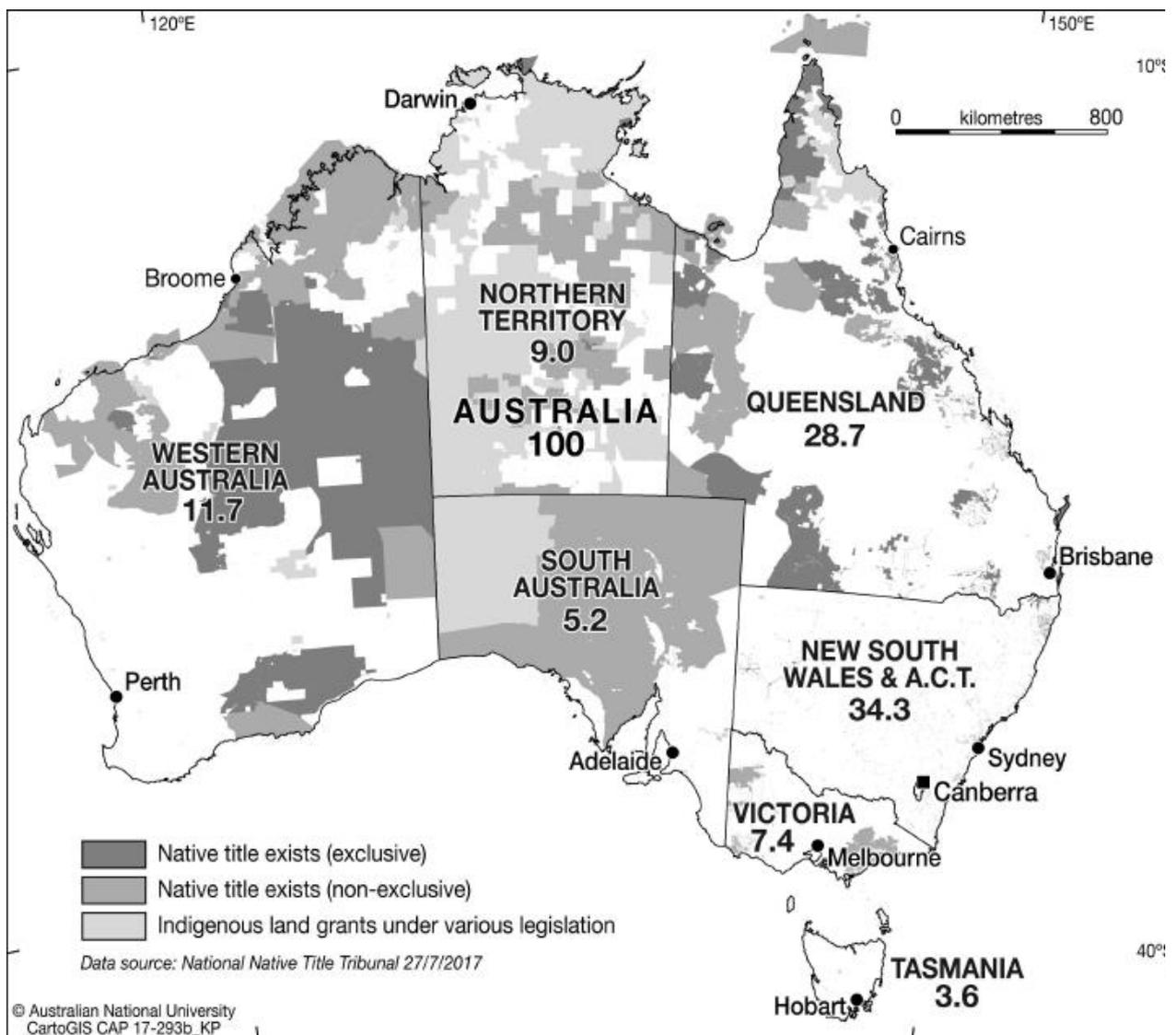


Some reasons for the rise of the Australian Indigenous Land and Sea Estate

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Note that this paper is not exactly as I delivered it. It has been revised to take into account comments made by the audience.

Look at this map.



It shows the extent of Indigenous property rights in land and sea in July 2017. If I showed a map of the situation up to 1965, there would be no grey shaded areas, as there was no Indigenous title.

In the next few minutes I want to explain how this massive change came about in such a short time – only 52 years.

My purpose in telling this story is to give a demonstration of how we might think historically about a particular human rights regime – in this case Indigenous land and native title rights – and how it is a product of humanitarian thought.

In telling this story I am offering you an alternative to a concept that was offered to you yesterday by Professors Perera and Pugliese. Encouraging us to link the ways that Aboriginal people have been treated and the ways that some seekers of asylum have recently been treated, our two colleagues referred to ‘the violence of the settler colonial state’. I am dissatisfied with the ahistorical and essentialist tendencies of that concept.

Australia has a large Indigenous land and sea estate for three reasons:

1. Because Indigenous Australians have demanded it since mid-C19.
2. Because, when meeting that demand, non-Indigenous Australians have adhered to the prudent political rule that no non-Indigenous property interest should be reduced or removed.
3. Because there have been four currents of thought in non-Indigenous political culture that have been conducive to conceding an Indigenous land and sea estate.

I want to devote my talk to this third reason, and deal with a, b, c, and d.

1. At the end of the C19 and the beginning of C20, colonial authority took seriously the responsibility to protect vulnerable Aboriginal people. As colonial occupation expanded into remote regions, protectors such Archibald Meston (1895), W.E.Roth

(1905) and W Baldwin Spencer (1912) advocated that in remote Australia governments should declare large reserves. Between 1897 and 1959 large reserves were declared in Western Australia, Queensland, South Australia and the Northern Territory. Missionaries were allowed to establish enclaves within these reserves, and in World War Two and the Cold War some reserves were temporary sites of defence infrastructure. But other kinds of transformative colonial intrusion were severely restricted. By the 1960s Aboriginal people of these remote regions could make a credible claim that their customary law was intact. When governments wished to make concessions to the demand for land rights, beginning in South Australia in the 1960s, there was lots of reserve land that could be transferred to some kind of Indigenous title without taking land off any non-Aboriginal people. This possibility was first realised in legislation in South Australia in 1966, in Victoria in 1970, in Western Australia in 1972, in New South Wales in 1974, in the Northern Territory (the largest title transfer by far) in 1977 and in Queensland in the mid-1980s. That is, the C19 argument for protection created the possibility of politically painless concessions to Aboriginal demands in the last third of the twentieth century. Much, but not all, of the grey areas on the map can be accounted for in this way.

2. Detribalisation. Since the mid-C19 two grand narratives have enabled non-Indigenous Australians to make sense of Indigenous Australians: the Dying Native and the Detribalising Native. By the 1950s the Dying Native story had lost credibility, for two reasons: regimes of protection had proven to be biologically effective, and there was increasing recognition that reckonings of the Aboriginal population had to include people of mixed descent. As the credibility of the Dying Native Story weakened, the

Detribalising Native story became more important. That is, it was believed that all Aboriginal people would pass through stages of ‘detribalisation’. The currency of this belief encouraged the colonial sense of responsibility to assimilate. To assimilate was thought to be a constructive and humane way to turn ‘detribalisation’ into something positive – for Aboriginal people and for the nation. However, those who were thoughtful about this responsibility to assimilate began to realise that it was difficult to manage the processes of detribalisation so that it **did** lead to assimilation and not to social pathology. Among these thoughtful observers were people such as Don Dunstan. Dunstan introduced a kind of land rights bill into the South Australian Parliament in 1966. My reading of his arguments for the bill revealed something that surprised me. Dunstan did not believe that the Aboriginal people had a customary right to the land. Rather he believed that South Australian Aborigines had become insecure and embittered; they had closed ranks, self-protectively and they were turning their backs on efforts to assimilate them. In his observation, they were becoming a dependent and resentful enclave. In the remote North West of the state, they had not yet become so resentful, but Dunstan feared that they would. He therefore presented his land rights bill as a strategy to ameliorate Aboriginal insecurity. He speculated that if Aboriginal Australians experienced security of tenure they would be more receptive to programs to integrate them – through employment, schooling and better housing – in the wider South Australian community. In other words, ‘land rights’ in this early South Australian form was a substantial change in the tactics of assimilation, in response to the perceived psychological stresses of detribalisation.

I have found evidence of this way of advocating land rights in two other episodes in the land rights saga.

In 1979, after consultation with Aboriginal people, a Select Committee of the New South Wales Parliament chaired by Maurie Keane wrote one report recommending land rights, and another documenting socio-economic inequality and recommending changes in the delivery of state government services. Keane explained in a foreword that ‘the implementation of the Committee’s recommendations on Land Rights is an essential pre-requisite for the resolution of the other complex socio-economic issues affecting the Aboriginal people.’ Convinced that dispossession was the leading cause of poverty and ill-health among Aboriginal people, Keane drew on a paper by Charles Rowley that touched on the psychology of Aboriginal poverty.

“No medical patching or family advising or skilful social work can reverse the downward spiral of welfare until these groups acquire a minimum of basic property.”

Recently, the Noongar people were able to negotiate a settlement of their native title claim with the Barnett government. At the 2015 Native Title Conference I had an opportunity to ask Glen Kelly, a Noongar negotiator, what considerations made the Barnett government amenable to these negotiations. Mr. Kelly’s public response was that one concern in the mind of the government was that many Noongar seemed to be alienated from Western Australian society. Kelly said that Noongar leaders suggested that the high rates of criminal incarceration, particularly among youth, and the young age structure of the region’s Aboriginal population spelled continuing trouble for the state; the security of a negotiated land settlement would

ameliorate this Noongar alienation. That is, according to this testimony, Noongar advocates could be confident that in the mind of the government there persists a version of the narrative of detribalisation that we find in Dunstan's and Keane advocacy of land rights: detribalisation as a danger to community security that could be addressed by assuring Noongar land security.ⁱ

3. The third narrative that has enabled non-Indigenous Australians to comprehend Indigenous Australians is what we might call the universal development story. Since World War Two, 'development' has been the globally hegemonic ideology, leading to the widespread conviction that there is a human right to develop. The currency of this idea in Australia affects how land rights are considered. Let me give just one vignette of this way of thinking. In May 2015 Indigenous leaders met in Broome to discuss the Indigenous Estate. They were hosted by two government-appointed guardians of Australian liberalism: the Aboriginal and Torres Strait Islander Social Justice Commissioner Mick Gooda and the Human Rights Commissioner Tim Wilson. Wilson is reported to have said that 'Property rights are actually the forgotten human right. Without property rights you don't get security, you don't get people being able to materialise the efforts of their labour, and in the end, without property rights you don't have economic development.' Such language evoked the human need and right to develop through the exercise of property rights. The implementation of land rights has encouraged and is encouraged by the wide appeal of this idea that it is the destiny and right of all humans to develop by mobilising a property right.

4. The fourth story whose currency makes Australians amenable to the Indigenous Estate is a relatively new story about the human relationship to the non-human world. Humans once lived within the limits of the earth's natural endowments; then humanity developed technologies so powerful that we have begun to change the earth's natural systems, to our potential detriment. The possible future evoked by that story is grim: the human species might destroy or severely damage the physical and biological bases of its existence. In this story, the early 21st century is imagined as a moment of choice, a potential turning point, in which humanity might adopt new ethics and new technologies for relating to the non-human world, re-establishing the material possibility of human existence. Through this increasingly important narrative, the Indigenous Land and Sea Estate is imaginable as one means to repair the human engagement with the non-human world. The 'Indigenous Protected Areas' program is one expression of this way of thinking about the Indigenous Land and Sea Estate. In the words of legal scholar Lee Godden, there has developed 'a greater appreciation of the inherent tie between Indigenous cultural identity, and connections to land and waters within a prevailing western ecological conservation paradigm'.

The Indigenous Land and Sea Estate is a materialisation of a particular strand of human rights discourse: the idea of distinct Indigenous rights. In Australia the Indigenous Land and Sea Estate – large and growing - is secured by bipartisan acceptance. How has this come about, and so quickly? My attempt to answer this question is another episode in my career-long effort to historicise Australia's liberal political culture. I cannot be satisfied with suppositions of the settler colonial state's foundational and enduring violence. Of course, settler colonial sovereignty, like all sovereignties, is achieved and

secured by violence. However the supposition that the settler colonial state is violent leaves out too much that we need to understand about the contingent pliancy and the intellectual nimbleness of our humanitarian tradition. We need a history of settler colonial benevolence, as well.

ⁱ In correspondence with me since I delivered this paper, Mr Kelly has not contradicted this account of his words.