

Introduction

The central contention of this thesis is that Australian law was born from and continues as a project of white colonial violence. I posit white Australian law as indissociable from colonial violence in order to suggest that justice is what remains undone, it remains non-justiciable. I argue that the *lawful* practices that bring about Indigenous dispossession as well as the denial of Indigenous sovereignty are instances of *lawful* violence, both law *founding* and law *preserving* violence, practices that efface their own violent constitution. In making the argument that white law and sovereignty attempt to impose their violence by asserting a monopoly over the categories of *law* and *sovereignty*, I traverse a wide range of topics which may, *prima facie*, appear unrelated. It is my purpose to interconnect otherwise distinct areas of inquiry, specifically the areas of refugee asylum, land rights, migrant integration, anti-terrorism laws, human rights discourse, alien conscription and the apology to the Stolen Generations, in order to reveal the complex and racialised legal logic that underlies these otherwise separate areas of inquiry. Because this thesis posits law as a racial project of sanctioned violence, it moves too far from normative understandings of law to allow for a *legalistic* or *objective* approach to be taken. In fact, a legalistic approach is deliberately rejected since legalism and claims of objectivity, I argue throughout the thesis, are precisely the locations where law's violence is simultaneously produced and effaced. I thus begin with the *subjective*, a small part of my own history which marks my own relation to white Australia and therefore my relation to this thesis.

I was born in 1974, we lived in Earlwood. A very early memory was of an *Australian* neighbour, throwing empty glass beer bottles over the fence, aiming for our kitchen. She was

yelling and feeling justified in her behaviour. We were *bloody wogs*. She was enraged by our newly renovated kitchen and about where *we bloody wogs get the money* to do such things. I did not speak English until I attended Earlwood Public School, where despite excelling academically I felt generally inferior. School was not just school though, it was “English school” as distinct from but always superior to, the afternoon Greek school we attended. Despite the multicultural policies being advanced at the time, there were always reminders that we were not quite good enough. My mother’s decision to send us to afternoon Greek school was derided by “English” teachers, who from their authoritative positions, spoke down to my mother who they perceived as *illiterate* (her English was broken after all), saying that this would impede our ability to *properly* learn the English language. At high school I was told by the careers advisor, that there is *no way* I would be able to qualify to study law and then at law school I was often told that I could *not write* properly, or as one Law Professor put it my arguments were *anarchic*. But just in case these sound like the imaginings of a *paranoid wog* turned into truth only in retrospect, I will draw on Fiona Allon’s research which examines the place where I grew up and “takes Earlwood as a significant cultural landscape for exploring the tensions and conflicts between the representations and identities of place and between urban communities as they struggle to invest meaning in the environment around them” (2002:103).

The Sydney suburb of Earlwood became a place of *interest* when former Prime Minister Howard, after being elected to office repeatedly referred to his idyllic childhood there. He remembers it fondly as a place of ‘egalitarian innocence’ (Allon, 2002: 102). In an article published in the *Sydney Morning Herald* in 1996, Howard is described as having criticised “the effects of multiculturalism on the area, in particular its manifestation in housing styles and the subsequent ‘disfiguring’ of the suburb’s original brick and tile housing” (Allon, 2002:

102). What was being complained of, both by Howard and by an “environmental vision” residents group known as REVUE, was the ‘Mediterraneanisation’ of the area as reflected in the architectural styles which were *grievously disfiguring* the “charming 1920s homes” of Howard’s childhood (Allon, 2002:102). Allon reports that “Earlwood had apparently remained a picture postcard of middle Australia until the early 1970s, when the more affluent Greeks from Marrickville ‘crossed the Cooks River and began migrating up the hill’. The mutation of the area was, it is reported, irremediably sudden and irrevocably excessive” (2002:106). These reports about Earlwood reveal the omnipresent forms of racism that structured the place that was supposed to be my home. But our belonging in Earlwood was like my relation to the English language, it was provisional, tenuous and susceptible to practices of integration and assimilation. Even though the era of integration had ended, racialised contempt towards us could be cloaked in the discourses of multiculturalism or as Howard’s lament indicates, in the discourses of taste and architecture. The portrayal of the suburban migration “up the hill” from Marrickville to Earlwood reveals a contempt for the *attempt* by migrants to realise the implicit promise of migration that resulted from dire poverty; that of a better life. It also reveals that it was British white Australia that *acted* sovereign, *acted* entitled to the suburb in which I lived.

This is a thesis that *must be* written in English but is born out of my ambivalent relationship with this language. In Derrida’s terms “a sort of *polemos* already concerns the appropriation of language: if, at least, I want to make myself understood, it is necessary that I speak your language, I must” (1992:4). For my purposes, “your language” is the language of the white coloniser which I must use in order to write about the colonial relations and racial supremacy that constitute the white Australian nation. I write as the Australian born descendant of Greek migrants, with the awareness that this positionality is the product of both white

supremacy *and* Indigenous dispossession. As Allon reminds me in relation to *my home*, Earlwood, “the white settlers and convicts hunted for game on the lands owned by the local Gwiyalgal people and began seizing territory and claiming it for ownership and development” (2002:106). Further, “armed with the convenient doctrine of *terra nullius*, the white colonisers began domesticating both the land and its inhabitants, trying to secure for empire what often seemed an abject, hostile land impervious to imperial gestures and conquest” (Allon, 2002:106). *My home* therefore is a location that is predicated on denial on a number of levels. It is a place that is symbolically *denied* to me even as I inhabit it. It is a place that is founded upon original acts of *denial* of Indigenous laws and sovereignty. And finally it is a place where the ongoing *denial* of Indigenous sovereignty continues through the occupation of the land in question by *all* non-indigenous peoples. Sherene Razack’s conceptualisation of a white settler society is apt here in allowing me to situate Earlwood within its national context and in describing the broader context in which I advance my analysis about law. She writes:

A white settler society is one established by Europeans on non-European soil. Its origins lie in the dispossession and near extermination of Indigenous populations by conquering Europeans. As it evolves, a white settler society continues to be structured by racial hierarchy. In the national mythologies of such societies, it is believed that white people came first and that it is they who principally developed the land; Aboriginal peoples are presumed to be mostly dead or assimilated. European settlers thus *become* the original inhabitants and the group most entitled to the fruits of citizenship. A quintessential feature of white settler mythologies is, therefore, the disavowal of conquest, genocide, slavery and the exploitation of the labour of peoples of colour (2002:1-2).

The central contention in this thesis, across all its topic areas is that in addition to the relations of “racial hierarchy” being colonial, they are also *legal* relations which sanction the use of Indigenous lands in the interests of white sovereignty through the mythical elevation of law in ways that function to efface colonial violence.

All of the arguments presented in this thesis are underwritten by the refusal to accept the *truth* proffered during the course of my legal education which posited law as the agent for social peace. That law is a project of racialised violence which functions to efface the colonial constitution of the Australian nation is an argument that arises primarily from the discursive unpacking and deconstruction of the two key legal judgements of *Tampa*¹ and *Mabo (No.2)*². In placing these cases under the critical spotlight and assisted by the critical insights of Jacques Derrida, Giorgio Agamben and Michel Foucault on law and sovereign power, I am able to textually locate instances of law's violence and then proceed to connect this effaced violence with broader questions of colonial law and governance. Specifically, the insights contained within Derrida's essay "Force of Law: The 'Mystical Foundation of Authority'", Giorgio Agamben's *Homo Sacer: Sovereign Power and Bare Life* and Michel Foucault's "Lecture Two" allow me to move beyond definitions of law offered in the disciplinary location of the law school. These were normative and self-serving definitions that functioned, and continue to function, to disguise the violence encoded within white law as well as to obfuscate the violence of legal interpretation methods which disallow critical interrogations of law.

Derrida's unpacking of the word "enforceability" has been crucial to the analysis of law put forward in this thesis. He argued that this particular word "reminds us that there is no such thing as law (*droit*) that doesn't imply *in itself, a priori, in the analytic structure of its concept*, the possibility of being "enforced", applied by force. There are, to be sure, laws that are not enforced, but there is no law without enforceability, and no applicability or enforceability of the law without force" (1992:6). I place this formulation in dialogue with normative understandings that equate law with social peace in order to challenge the logic

¹ *Ruddock v Vardarlis* [2001] FCA 1329

² *Mabo and Others v Queensland (No.2)* [1992] 175 CLR 1

upon which normative *legal truths* are produced. Following Derrida I am able to argue that all law is constituted by violence, even if that violence lies dormant through un-enforced law. Derrida asks, “How are we to distinguish between the force of law of a legitimate power and the supposedly originary violence that must have established this authority and that could not itself have been authorized by any anterior legitimacy, so that, in this initial moment, it is neither legal or illegal – or, others would quickly say, neither just nor unjust (1992: 6)? In the Australian context, this Derridean question makes it possible to frame the imposition of white colonial law as “originary violence”, a framing that generates an investigation of the very meaning of *legality* since this “originary violence” was, and remains, “neither legal or illegal”. In relation to this legal ambiguity, Derrida foregrounds Montaigne’s thesis which highlights that these violent ambiguities are effaced through the self-generated, self-serving legal narrations of law that invest law with transcendent qualities. Specifically Montaigne contends that, “laws keep up their good standing, not because they are just, but because they are laws: that is the mystical foundation of their authority, they have no other” (1992: 13).

This theorisation dovetails with critical legal scholar Peter Fitzpatrick’s contention that in the context of empire, “the mythic elevation of law” (1992:6) is what operates to render “law’s contradictory existences into a patterned coherence” (1992:2). Fitzpatrick states:

In the affirmation of empire, law becomes the preserve of officials who have ‘the last word’, even if the word is infused with the strivings of legal philosophers...There is a mystery as to how such a transformation takes place. The answer lies in the operative forces infusing law - forces of infinite competence, perfectibility and cohering order. These forces elevate a particular and official interpretation of law and invest this law with abilities and values which render it transcendent and constant. Law is thus accorded a singularity and inviolability which more than match the efforts of prior positivists to secure its autonomy (1992: 5).

In my textual unpacking of *Tampa* and *Mabo (No.2)*, I draw out the contradictions or aporias which constitute these judgements. In addition to this I also focus my analysis on the way in

which these legal texts produce law as coherent and non-violent. These are self-generated definitions which when *enforced* function to deny other systems of law and sovereignty. White colonial law displaces Indigenous laws and sovereignties when it “takes on and retains its quality of transcendent effectiveness as an enduring type of sovereign rule. Like the monotheistic sovereign, law is a transcendent unity” (Fitzpatrick, 1992: 56).

Throughout this thesis I attempt to disclose the indissociable relation between white law and sovereignty. Agamben names the relation between sovereignty and law as paradoxical. He argues that, “The paradox of sovereignty consists in the fact the sovereign is, at the same time, outside and inside the juridical order” (Agamben, 1998: 15). Normative understandings of law do not recognise any paradox since law and sovereignty are seen as distinct domains of power, which in the Australian context, are kept distinct and regulated by the Constitution which establishes the framework necessary for the separation of powers. At several crucial points within the thesis I question this constitutional doctrine, since it functions to efface the colonial relations that have founded it. The role of executive power, examined in the context of *Tampa* and the non-justiciability of sovereignty examined in the context of *Mabo (No.2)* are brought together in a way that grounds Agamben’s insight that “Sovereign violence opens a zone of indistinction between law and nature, outside and inside, violence and law” (1998:64). In Foucauldian terms, the indistinction between violence and law can be understood as the problem of the “system of right” which is “centred entirely upon the King, and is therefore designed to eliminate the fact of domination and its consequences” (1980: 95). In other words, the *protections* that law offers to its subjects, conceals that this is a relation of subjugation and of violence.

Critical to this project's critique of white law and sovereignty is the research produced by Indigenous Australian scholars whose work exposes the violence of the white sovereign state. Irene Watson argues that, "In the beginnings of Australia its foundation relied upon the power of force and so it does still – so how do we begin to engage with the continuity of an overpowering force" (Watson, 2007:27)? Watson identifies the relations of colonial violence that structure the Australian nation. Her question is compelling as it graphically brings into view the omniscience of sanctioned relations of violence, *law's violence*. Specifically in relation to *Mabo (No.2)* she argues that "the question of sovereignty was not a question that was pleaded before the court but it was a question that was crucial to the outcome of *Mabo (No 2)*" (2007: 25). So although this High Court decision is often celebrated, mostly by the white law that produced it, as generating rights for Indigenous peoples, Watson's analysis demands that such *rights* be understood as part of the ongoing relations of force that deny Indigenous sovereignties.

Tony Birch has argued that the denial of Indigenous sovereignty and land is inextricably linked to interpretations of the past. He states:

A sovereign right to land and the interpretation of the past in Australia are inextricably linked. Land belonging to Indigenous nations throughout Australia was and continues to be contested by white Australia through acts of violence...And, in the aftermath of what constituted murder and genocide, official denial and collective and complicit amnesia became the most common response by colonists, ensuring that the vigilance of a sanitised colonial memory was established early in the life of the embryonic nation (Birch, 2007: 110).

The High Court in *Mabo (No.2)* has been complicit in sanitising the national memory. Even as the Court *overturned* the doctrine of *terra nullius*, ostensibly bringing the past into view, this *overturning* was used to sanitise and forget the bloody processes that founded white law and which continue so long as Indigenous sovereignty is denied. Whilst *terra nullius* was *overturned*, the bloody question that founds and enables white law's continued operations is

excised from the national memory, as an effect of the ruling that the question of sovereignty is non-justiciable.

Aileen Moreton-Robinson asserts that “Indigenous sovereignty has never been ceded but this is denied by Australian law” (2007:3). She contends that:

In Australia, judicial and political systems have not treated Indigenous sovereignty as a serious issue with which the Australian nation has to contend. Unfortunately, it has been the case that, where Indigenous sovereignty has been raised in courts and parliaments, legal and political decisions have in one way or another found in favor of the patriarchal white sovereignty of the nation state...Some people might regard this statement as unfair because federal and state governments have provided some Indigenous people with various land rights regimes, and the High Court has ruled that native title exists on vacant Crown land. However to interpret these legislative and judicial measures as a formal recognition of Indigenous sovereignty is to misunderstand the nature of these regimes and the investments and interests that refuse such an outcome (Moreton-Robinson, 2007:4).

The denial of Indigenous sovereignty continues as a matter of law. This denial does not only occur when the white law explicitly deals with questions of Indigeneity, but at every instance that white law discriminates in favour of itself. Every time white law asserts sovereign power, it functions to produce the coloniser *as* Indigenous. Thus, following Moreton-Robinson critical insights, I am able to argue that Anti-terrorism legislation, migration legislation, refugee asylum law and alien conscription of migrant youth are connected since they are all white enactments of sovereignty, a form of sovereignty that is predicated on Indigenous dispossession and the denial of Indigenous sovereignty. This white form of sovereignty is strengthened, maintained and legitimated at the level of white law which works to further embed colonial relations onto Indigenous lands.

Suvendrini Perera is a cultural theorist whose groundbreaking work in Australian race relations and particularly refugee studies has been crucial to the approach taken in this thesis. This is because her work exposes the workings of the white state along three interrelated

axes. Firstly she identifies the state's "attempts to contain Indigenous sovereignty, both at the level of rights and self-determination and at the level of 'the ability to be', through a renewed insistence on assimilation" (Perera, 2007:5). Secondly she identifies state power as expressed through "the consolidation of national borders, either through excision or expansion, and a preoccupation with maritime security in the form of 'Operation Resolute', a military initiative that combines punitive responses to perceived incursions, whether by asylum seekers or illegal fishermen, in Australia's surrounding waters" (Perera, 2007:5). And thirdly through the Australian state's "regional expansionism through external policing, military and peacekeeping operations...These activities are framed within a climate of (in)securitisation, characterised by the expansion of the defence budget, the rehabilitation of imperial ambition in global affairs" (Perera, 2007:5). Perera's expansive vision of the reach of white sovereign power serves as an impetus for my interrogation of white law across a series of sites that whilst seemingly disconnected are inextricably bound through their relation to state power.

This thesis is delineated into two parts. Part One entitled *Actis Juris Imperii: The Violence of White Sovereignty*, is comprised of four chapters, with each chapter shifting the question of white sovereignty onto different terrain, but remaining within a national frame. Part Two entitled *Actus Legis Nemini Facit Injuriam: The Laws of Being Lawful*, is also comprised of four chapters each examining a component of Australian law's violence which, whilst concerning domestic affairs also has an international dimension. The exception is Chapter Eight which shifts the emphasis back to the Australian Parliament and focuses specifically on the Australian context in order to come full circle in the examination of Australian violent legal relations. All eight chapters that comprise this thesis are in constant dialogue because they each expose a specific dimension of Australian law's violence and as such reveal the

multifaceted operations of white power which functions to Indigenise colonial law and sovereignty.

In Chapter One, I introduce the *Tampa* crisis by placing it within the context of Australia's racialised legal history. In order to argue that xenophobia is not sufficient to account for practices of state violence, I stage a critique of key figures in Australian refugee and cultural studies in order to unmask their implication in the practices they allegedly critique since they avoid naming practices of exclusion as an effect of the ongoing colonial status of Australian law. In Chapter Two I continue my examination of the *Tampa* crisis with a specific emphasis on how the violent exclusion of the refugees was enabled through the both the *enforcement* and *non-enforcement* of Australian law. Here Australian law's violence is shown as contemptuous of international refugee Conventions, these being violently bypassed in a climate of border security. In Chapter Three I introduce *Mabo (No.2)* in order to interconnect the question of denied refugee asylum to the question of denied Indigenous sovereignty. In both cases, not just in *Mabo (No.2)* where it was explicitly stated, the question of sovereignty is non-justiciable. These two instances of white sovereign violence must be understood as interconnected if the power that produces such violence is to be effectively challenged. In Chapter Four I further deconstruct the *Mabo (No.2)* judgement with a particular focus on the way in which this case relates to questions of migrant assimilation and integration, practices that are demanded of migrants as a legal technique of Indigenous dispossession.

In Chapter Five I stage an interrogation of human rights discourse in *Tampa* and *Mabo (No.2)* in order to reveal that despite existing outside of Australian law, human rights discourses are incorporated into and become an integral part of white colonial violence. In Chapter Six, the emphasis is on Australia's domestic response to international concerns about terrorism as

reflected in the *Anti-Terrorism Act 2005*. I use this piece of law to examine the way in which white law presents itself as impartial and non-violent when in fact it is absolutely implicated in different regimes of violence. In the context of the Anti-Terror laws I extend the critique of the separation of powers introduced in Part One of the thesis. Chapter Seven, explores a little known aspect of Australia's racial history, that being the conscription of migrant youth known as *alien* conscription. This Chapter, like the two preceding it, foregrounds the complicity of *domestic* Australian law with the *international* global events of war, violence and poverty. In Chapter Eight, the final chapter, I stage a critical deconstruction of Prime Minister Rudd's apology to the Stolen Generations, in order to expose the sleights of hand that constitute his apology and function to systematically efface the ongoing violent impact of colonial law. Finally, I argue, the apology to the Stolen Generations functions not as a remorse for law's violent practices but as a defence of white colonial law.