

## DENIAL, MODERNITY AND EXCLUSION: INDIGENOUS PLACELESSNESS IN AUSTRALIA

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### I INTRODUCTION

Colonisation is a key feature of modernity. The imperatives of modernity are space-conquering economic growth and its attendant processes of statist order building. Indigenous peoples, with their place-based, sustainable, state-free social order, have been chronic obstacles to modernisation to be overcome by whatever means – typically by violence concealed behind liberal legalities. The legal fiction that Australia was *terra nullius* (land of no one) justified the territorial acquisition of this continent and expropriation of Australia's Indigenous people, denied their personhood, culture and governance systems, and legitimated their exclusion from most benefits of modernisation. The violence of this exclusion has been masked by law and ideologically managed by official and institutional denial. This article focuses on explaining the centrality of exclusion to modernity, and the consequences of exclusion still manifest in the placelessness of Australia's Indigenous citizens and their de facto designation as non-citizens.

Denial, as conceptualised by Stanley Cohen, is the process whereby atrocities are neutralised, normalised, legitimised or rendered invisible by being blocked out of consciousness and conscience. Such denial involves denial of knowledge, denial of feeling, denial of responsibility, and/or inaction in the light of knowledge.<sup>1</sup> Acknowledgment, the first step toward the remediation of atrocities,<sup>2</sup> involves cognition, emotion, morality and action. Action requires that we know, remember, rescue and do justice. Official, historical and cultural modes of denial are manifest at the organisational level and imbricated into the state order. The massive ideological and material resources of the modern state and market<sup>3</sup> articulate and mobilise these modes of denial in official discourses such as law, government reports, policy and programme objectives, media commentary and scholarship<sup>4</sup> and

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<sup>1</sup> Stanley Cohen, *States of Denial: Knowing about Atrocities and Suffering* (2001) 9.

<sup>2</sup> Ibid x-xi.

<sup>3</sup> Ibid 9-13.

<sup>4</sup> Deborah Lipstadt, *Denying the Holocaust: the Growing Assault on Truth and Memory* (1994);

museology.<sup>5</sup> ‘Blindsight’, for instance as denial of the genocide of Indigenous peoples, comes in each of the forms Cohen identifies:

- literal and conscious denial – ‘no Indigenous massacres occurred’;
- interpretive denial – ‘these were not massacres: they were the dispersal or transfer of the Indigenous population for their protection’; or ‘it was not official: it was private genocide, by settlers and rogue police’;
- implicatory denial – ‘it’s not genocide: the forcible removal of children was aimed to give them the benefits of white civilization’.<sup>6</sup>

Tatz identifies four dimensions of the genocidal policies of, or condoned by, Australian authorities:

First, the essentially private genocide, the physical killing committed by settlers and rogue police in the nineteenth century ... second, the twentieth-century state policy and practice of forcibly transferring children from one group to another with the express intention that they *cease being Aboriginal*; third, the twentieth-century attempts to achieve the biological disappearance of those deemed ‘half-caste’...; fourth, a *prima facie* case that Australia’s actions to protect Aborigines in fact caused them serious bodily *or* mental harm.<sup>7</sup>

The outcome of genocide – the most extreme form of exclusion – is either death or placelessness. The human consequences of placelessness include anomic suicide, massive levels of incarceration and of ill health, and the life expectancy of people living in an LDC (a least developed country). Legal techniques perpetuating placelessness include overtly deployed ‘move on’ powers exercised by police to exclude Indigenous ‘itinerants’ from urban public space, notably in the Northern Territory and Queensland. Placelessness is also perpetuated by the apparently ‘inclusive’ technique of the native title claims process. In reality the claims process is far from inclusive. Indigenous people are divided, against each other, into two categories. In the first are ‘someones’ whose traditional rights and interests are worthy of assimilation into the common law of Australia by recognition of their native title. For them, the *terra nullius* fiction has been partially extinguished: they enjoy conditional inclusion. In the second category are the excluded rest, ‘no ones’

Deborah Lipstadt, *History on Trial: My Day in Court with David Irving* (2005); Henry Reynolds, *Why Weren’t We Told? a Personal Search for the Truth about Our History* (1999); Keith Windschuttle, *The Fabrication of Aboriginal History: Vol One, Van Diemen’s Land 1803-1847* (2002); Stuart Macintyre and Anna Clark, *The History Wars* (2003); Robert Manne (ed), *Whitewash: On Keith Windschuttle’s Fabrication of Aboriginal History* (2003).

<sup>5</sup> Keith Windschuttle, ‘How Not To Run a Museum: People’s History at the Postmodern Museum’ (2001) 45(9) *Quadrant* 11; Bain Attwood, ‘Whose Dreaming? On History, Democracy and the National Museum of Australia’, *Australian Financial Review* (Sydney), 8 August 2003, 6.

<sup>6</sup> Cohen, above n 1, 6-9.

<sup>7</sup> Colin Tatz, ‘Genocide in Australia’ (Research Discussion Paper No 8, Australian Institute of Aboriginal and Torres Strait Islander Studies, 1999) 6 [I have replaced ‘to be’ with ‘being’, to be consistent with the original text; italics inserted to be consistent with original text].

– the majority of Indigenous people – to whom the fiction of *terra nullius* still applies: they have no title by virtue of their pre-contact occupation of the land. Their claims to native title rights and interests fail the tests for legal recognition because of the claimants' inability to show sufficient connectedness to their land as stipulated by the law. The native title claims process thus results in their perpetual placelessness.

## II MODERNITY, DENIAL, *TERRA NULLIUS* AND *HOMO SACER*

### A Modernity, 'Waste' Land and Wasted Lives

To understand the processes of exclusion, genocide, denial and the resulting placelessness of Indigenous peoples we must understand the dynamics of modernity in general. Modernity, compulsively designing for economic growth and for the building and keeping of order, generates waste: both the physical detritus of industrialisation now polluting the planet on an ecocidal scale and those human beings who impede the level of growth and degree of order required. For centuries such people have been disposed of on a genocidal scale. The survival of the modern form of life depends on the proficiency and dexterity of the techniques for waste disposal of both kinds.

From its outset modernisation has required territories, deemed the 'land of no one' and devoid of any sovereign administration (*terra nullius*), to provide dumping grounds for the human waste modernity itself creates.<sup>8</sup> In Australia the *terra nullius* concept was used to justify exclusion of Indigenous people.<sup>9</sup> Settlers were surplus people transported from Europe and dumped into the colonies, and Indigenous people – here deemed non-people and so not entitled to legal recognition – had to be cast out to make space for them. It is estimated that colonisation has been responsible for the genocide of 80 per cent of the Indigenous peoples of the lands settled by Europeans.<sup>10</sup> Darwin's observation that 'where the European has trod death seems to pursue the aboriginal' seems apposite.<sup>11</sup> Indeed Bauman suggests that the disposal of human waste is the deepest meaning of colonisation.<sup>12</sup> Outcasts who are not allowed to stay and the designation of people as redundant, as surplus, as human waste are the inseparable accompaniment of capitalist economic growth and of colonisation and order building.<sup>13</sup>

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<sup>8</sup> Zygmunt Bauman, *Wasted Lives: Modernity and Its Outcasts* (2004) 5.

<sup>9</sup> Henry Reynolds, *Law of the Land* (1<sup>st</sup> ed 1987, 3<sup>rd</sup> ed 2003).

<sup>10</sup> Henry Reynolds, *An Indelible Stain? The Question of Genocide in Australia's History* (2001); Ward Churchill, *A Little Matter of Genocide: Holocaust and Denial in the Americas 1492 to the Present* (1997); David Stannard, *American Holocaust: the Conquest of the New World* (1992); David Maybury-Lewis, 'Genocide against Indigenous Peoples' in Alexander Laban Hinton (ed), *Annihilating Difference: the Anthropology of Genocide* (2002).

<sup>11</sup> Charles Darwin, 'Australia, Entry for January 1836' in *The Voyage of the Beagle* (1839, 1909 ed).

<sup>12</sup> Bauman, above n 8, 6.

<sup>13</sup> Ibid.

The order-building sovereign nation state<sup>14</sup> creates the distinction between law and lawlessness, belonging and exclusion:

Throughout the era of modernity, the nation state has claimed the rights to preside over the distinction between order and chaos, law and lawlessness, citizen and *homo sacer*, belonging and exclusion, useful (= legitimate) product and waste.<sup>15</sup>

The power to confer the status of citizenship is the pivotal technique used by modern states to distinguish the ‘belonging’ – non-waste – from the ‘excluded’ – the waste. The law defines both the citizen’s bundle of rights and the excluded’s absence of rights. Bauman draws the analogy between someone excluded as human waste created through modernisation and the Roman law concept of a non-person, *homo sacer*,<sup>16</sup> abandoned by the sovereign, ‘excepted’ from the benign protection of the law, and so without rights. The sovereign had, and has, the power to exclude people as non-citizens. They are excluded by the state by being displaced into a limbo realm of placelessness in both legal and physical terms. Such people occupy a zone of exception wherein the sovereign suspends its law’s protection from them<sup>17</sup> and their land or lives may be taken with impunity. We know who a citizen is by (supposedly) knowing that a citizen is not *homo sacer*.<sup>18</sup> Jews were *homines sacri* in Nazi Europe just as stateless persons are refugees or ‘irregular migrants’<sup>19</sup> in today’s ubiquitous garrison state. The war on terror increasingly dissolves the citizen/*homo sacer* distinction and makes of the sovereign’s entire realm a zone of exception.<sup>20</sup>

In the colonies Indigenous people, as their continuing struggles for authentic citizenship attest,<sup>21</sup> have been the paradigm non-people, non-citizens, *homines sacri*. If not, at worst, exterminated with legal impunity, they have been excluded and condemned to placelessness in ‘zones of exception’ such as reserves, mission schools or camps and other forms of segregation under the regime of the

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<sup>14</sup> Bauman, above n 8, 33.

<sup>15</sup> Ibid.

<sup>16</sup> Bauman employs the concept of *homo sacer* following the work of Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life* (1998). The plural of *homo sacer* is *homines sacri*.

<sup>17</sup> Bauman, above n 8, 32–3.

<sup>18</sup> Current cases involving detention and deportation of foreign-born Australian citizens Cornelia Rau and Vivian Solon Alvarez reveal that citizenship can offer little protection from exclusion once the fortress state’s agencies feel compelled to flex its order-keeping power; citizens easily become *homo sacer*.

<sup>19</sup> Prem Kumar Rajaram and Carl Grundy-Warr, ‘The Irregular Migrant as *Homo Sacer*: Migration and Detention in Australia, Malaysia and Thailand’ (2004) 42(10) *International Migration* 33; Bulent Diken, ‘From Refugee Camps to Gated Communities: Biopolitics and the End of the City’ (2004) 8 *Citizenship Studies* 83.

<sup>20</sup> Giorgio Agamben, *State of Exception* (2005).

<sup>21</sup> John Chesterman and Brian Galligan, *Citizens without Rights: Aborigines and Australian Citizenship* (1997); Paul Havemann, ‘Introduction, Chronology 3: Indigenous Rights in Political Jurisprudence of Australia, Canada, and New Zealand’ in Paul Havemann (ed), *Indigenous Peoples’ Rights in Australia, Canada and New Zealand* (1999).

sovereign's draconian 'protection'.<sup>22</sup> Indigenous people were included only to facilitate their disposal (for instance by assimilation). Occupying a zone of exception from inclusion, they are de facto or de jure excluded from the benefits of citizenship rights. Australia's Indigenous people's exclusion is, today, de facto; they are outcasts in their own land.<sup>23</sup>

### B *Modernity or Modernities?*

It may be comforting to claim that genocide was a facet of early/simple/industrial modernity and that it does not happen any more.<sup>24</sup> The law, state and dominant culture selectively forget, engaging in historical denial<sup>25</sup>: they deny the immediacy of genocide and ethnocide<sup>26</sup> or that what went on in Australia ought to be described as 'genocide'.<sup>27</sup> A core thesis of this article is that modernisation has always produced and legitimated atrocities and suffering (for cynical deniers, 'collateral damage'): massive human waste has been a persistent feature of early/simple *and* of late/reflexive/advanced modernity or post-modernity. The apparently 'civilising' imperatives of modernity have been life-wasting and brutal processes for production and order building.<sup>28</sup> In Australia these amount to genocide.<sup>29</sup>

Modern societies keep order by using anthropoemic ('vomiting out') and anthropophagic ('ingesting') techniques for excluding or absorbing alien 'others'. Anthropoemic techniques useful to space conquerors for several centuries included capital punishment, transportation of waste (surplus and difficult people) to Australia from Britain, and genocidal dispersal of wastes characterised by dispossession of Indigenous people. Anthropoemic waste-disposal continues in the over-representation of Indigenous people in Australia's prisons and urban ghettos (eg the infamous Block in Sydney's Redfern), and in the herding together of fragmented remnants of place-based, now displaced, Indigenous peoples in remote northern official dumping grounds (eg the reserves on Palm Island and Mornington Island and at Cherbourg and Yarrabah).

For Indigenous people after colonisation, there was no halcyon epoch of the inclusive society against which to contrast the present as the exclusive society or vice versa.<sup>30</sup> There is no context where the genocidal effects (if not the intent) of the

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<sup>22</sup> See, eg, *Aboriginals Protection and the Restriction of the Sale of Opium Act 1897* (Qld) ss 9-15; C D Rowley, *A Matter of Justice* (1978).

<sup>23</sup> C D Rowley, *Outcasts in White Australia* (1972).

<sup>24</sup> Zygmunt Bauman, *Modernity and the Holocaust* (1989).

<sup>25</sup> Cohen, above n 1, 13.

<sup>26</sup> A Dirk Moses, 'Revisionism and Denial' in above n 4; Alexander Laban Hinton, 'The Dark Side of Modernity: Toward an Anthropology of Genocide' in his (ed), above n 10.

<sup>27</sup> Kay Shaffer, 'Getting over the Genocide Question: Australia and the Stolen Generation Debates' (2002) 1(2) *Borderlands E-journal*, 1 <[http://www.borderlandsejournal.adelaide.edu.au/vol1no2\\_2002/schaffer\\_getting.html](http://www.borderlandsejournal.adelaide.edu.au/vol1no2_2002/schaffer_getting.html)> at 4 June 2005.

<sup>28</sup> Claude Lévi-Strauss, *Tristes Tropiques* (trans 1974) 387-8.

<sup>29</sup> Tatz, above n7.

<sup>30</sup> Jock Young, *The Exclusive Society: Social Exclusion, Crime and Difference in Late Modernity*

‘civilising process’ are better than the ‘de-civilising processes’ that preceded them.<sup>31</sup> There is no equivalent of the (1945-1980) Fordist Keynesian welfare state class compromise<sup>32</sup> for Indigenous people and other outcasts of modernity. Instead, these dehumanised targets of the ‘social work of dis-identification’ are compartmentalised into a discrete *homo sacer*-like category – their victimhood and rights denied, their culture vilified – a process apparently necessary to strengthen the positive identity of the settler population and its triumphal colonisation.<sup>33</sup>

Bauman’s concept of ‘liquid modernity’<sup>34</sup> seems a pertinent framework to escape the conceptual and ideological flaws of periodised theorising about modernity. Liquid modernity used in conjunction with the indicator of wasted lives captures the continuing wasting of lives inherent in the dynamics of modernity past, present and (I fear) future.<sup>35</sup> Can we really identify epochal rupture separating modernity from postmodernity, or early from industrial from late modernity? ‘Postmodern’ implies a state of affairs that has left modernity behind – so where are we now? ‘Late modern’ implies closure; late for what, relative to when? Nor is the present modernity uniquely reflexive: all human societies, both modern and non-modern, have been reflexive, detraditionalising and retraditionalising, perpetually reinventing themselves and their institutions. Is ‘reflexive modernity’ descriptive of the world ‘out there’, or a better descriptor of how we, as professional academic thinkers, ponder our own increasing ontological and material insecurity?<sup>36</sup>

By stressing the liquid or fluid dynamics of modernity, Bauman highlights its ubiquity in terms of time, space and place; its extensity, velocity and intensity; and its capacity to change what it encounters, to dissolve it, to generate waste and to flush it away.<sup>37</sup> Instead of adopting Giddens’s image of modernity as a ‘juggernaut’<sup>38</sup> let us imagine modernity as a tsunami, with all its power and impact. One must acknowledge that modernity is the product of human agency while the

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(1999); Jock Young and Roger Matthews, ‘New Labour, Crime Control and Social Exclusion’ in Roger Matthews and Jock Young (eds), *The New Politics of Crime and Punishment* (2003).

<sup>31</sup> Norbert Elias, *The Germans: Power Struggles in the Development of Habitus in the Nineteenth and Twentieth Centuries* (1996) 307–8; Robert Van Krieken, ‘Stolen Generations: Australian Civilization, Citizenship and Governance’ in Judith Bessant, Richard Hill and Rob Watts (eds), *Violation of Trust: Institutional Abuse and Child Welfare in Australia* (2005).

<sup>32</sup> On Fordism generally see Robert Boyer and Yves Saillard (eds), *Regulation Theory: the State of the Art* (2002); Ash Amin (ed), *Post Fordism: a Reader* (1994).

<sup>33</sup> Abram De Swaan, ‘Widening Circles of Dis-identification; On the Psycho- and Socio-Genesis of the Hatred of Distant Strangers – Reflections on Rwanda’ (1997) 14 *Theory, Culture and Society* 105.

<sup>34</sup> Zygmunt Bauman, *Liquid Modernity* (2000); Zygmunt Bauman and Milena Yakimova, *A Postmodern Grid of the World Map: Interview with Zygmunt Bauman* (2002) *Eurozine* <<http://www.eurozine.com/article/2002-11-08-bauman-en.html>> at 11 January 2005.

<sup>35</sup> Lynda Crowley-Cyr, ‘Social Exclusion, Indefinite Detention and Mental Illness in Australia’s Outsourced Wastelands’ (paper presented at International Law and Mental Health Congress, Paris, 4-8 July 2005).

<sup>36</sup> Bauman and Yakimova, above n 34.

<sup>37</sup> Bauman, above n 34, 3-5.

<sup>38</sup> Anthony Giddens, *The Consequences of Modernity* (1991) 151.

tsunami is a force of nature. We can do little to alter the latter – though the collective global altruism of the response to the tsunami of 26 December 2004 might signify hope for humanity’s humanity after all?<sup>39</sup>

Since the 1980s a few historians such as Henry Reynolds<sup>40</sup> have chronicled disposal of the Indigenous populations as genocidal violence. A classic illustration of denial at work is that this history has been decried as ‘black armband’ history because it does not stress the pluses of modernisation.<sup>41</sup> Genocide first took the form of unnumbered massacres.<sup>42</sup> Few have been publicly acknowledged, nor the names of Indigenous people who died recorded. Hence, unlike at Auschwitz, where there were a few survivors, denial in Australia is aided by missing testimony, as there was no one left to bear witness to the massacres.<sup>43</sup> Many Indigenous people still bear witness to the traumatic consequences of the forcible removal of Indigenous children – an act of the state whose genocidal character is actively denied by Australian courts and governments.<sup>44</sup> This genocidal legacy now flourishes in the social, economic and political conditions in which Australia’s Indigenous people live. These conditions explain their suicide and self-harm rates and truncated life expectancy.<sup>45</sup>

### C *Modernity and Terra Nullius*

From formal contact with the European at the end of the eighteenth century, the genocidal dimension of settlement has been rendered opaque by *terra nullius* ideology. Australia’s legitimacy as a sovereign state and ownership of its estate were built on direct denial of the Aboriginals’ place-based culture and physical estate – ‘*terra aboriginalis*’. The application of the *terra nullius* doctrine from 1788 meant that no claims to traditional lands based on pre-contact possession and ownership were recognised. Indigenous people became placeless *homines sacri*; inevitably this meant denial of recognition of their law,<sup>46</sup> and refusal to consider the

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<sup>39</sup> Lynda Crowley-Cyr, ‘Homelessness, Deviance, Denial and Social Exclusion’ (paper presented at Australia and New Zealand Society of Criminology Annual Conference, Wellington, New Zealand, 9-11 February 2005).

<sup>40</sup> Henry Reynolds, *The Other Side of the Frontier: Aboriginal Resistance to the European Invasion of Australia* (1981).

<sup>41</sup> Geoffrey Blainey, ‘Black Future’, *The Bulletin* (Melbourne), 8 April 1997, 22.

<sup>42</sup> Indigenous artist Fiona Foley has incorporated the names of upwards of 100 massacres in Queensland alone, in her artwork *Witnessing in Silence* on a Brisbane courthouse: Miriam Cosic, ‘Rage Revealed in Urban Landscape’, *The Australian* (Sydney), 10 March 2005, 14; Chris Healey and Fiona Foley, ‘Silent Witness’ in Caroline Turner and Nancy Sever (eds), *Witnessing To Silence, Art and Human Rights* (2003).

<sup>43</sup> A point made by Healey and Foley, above n 42, 26-7 referencing Giorgio Agamben, *Remnants of Auschwitz: the Witness and the Archive* (1999).

<sup>44</sup> *Kruger v Commonwealth* (1997) 146 ALR 126.

<sup>45</sup> Colin Tatz, ‘Aboriginal Suicide Is Different’ (Criminology Research Council Project 25/96-7, 1999).

<sup>46</sup> *R v Murrell* (1836) 1 Legge 72 (and Decisions of the Superior Courts of New South Wales, 1788-1899, <[http://www.law.mq.edu.au/scnsw/cases1835-36/html/r\\_v\\_murrell\\_and\\_bummaree\\_1836.htm](http://www.law.mq.edu.au/scnsw/cases1835-36/html/r_v_murrell_and_bummaree_1836.htm)>), followed as recently as *R v Wedge* [1976] 1

possibility of any pre-existing sovereignty<sup>47</sup> or recognisable communal native title.<sup>48</sup> The myth concerning communal native title was exploded as official discourse, at least, by the landmark 1992 High Court decision in *Mabo v Queensland (No 2)*<sup>49</sup> which finally acknowledged that Indigenous people's pre-contact 'native title rights and interest' in land could have survived the imposition of the radical title of the Crown. Some judges took the opportunity to sweep *terra nullius* away as official doctrine.<sup>50</sup> The common law recognition of native was codified in a set of garbled, denial-perpetuating concessions under the *Native Title Act 1993* (Cth) ('NTA').

Section 223(1) of the NTA states the version of native title the Crown is prepared to acknowledge. In so doing the very acknowledgment perpetuates the denial. The section merits deconstruction. First, only rights and interests which may be recognised are a species of right that can be 'recognised by the common law of Australia', ie are capable of being assimilated into the settler legal order.<sup>51</sup> Further, this is only if the claimant, after more than 200 years of exclusion and denial under the *terra nullius* doctrine, can still prove 'a connection with the land or waters claimed'<sup>52</sup>; and further still, only if the claimant can prove, despite 200 years of non-recognition of Indigenous law and governance, that 'the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed'.<sup>53</sup> Any naïve assumption that there would be a presumption favouring Indigenous survivors was washed away by a tidal wave of denial early in the life of the NTA. The onerous burden placed<sup>54</sup> on Indigenous people was articulated in interpretation of the section by a trial judge who dismissed a claim stating:

the tide of history [had] washed away any real acknowledgment [by the Yorta Yorta People] of their traditional laws and any real acknowledgment of their traditional customs.<sup>55</sup>

The judgment in effect denied their connection to land, and for them their personhood inasmuch as this rested in that connection.

The process for initiating a claim to native title reflects the same denial of history

NSWLR 581.

<sup>47</sup> *Coe v Commonwealth* (1979) 53 ALJR 403.

<sup>48</sup> *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141.

<sup>49</sup> (1992) 175 CLR 1.

<sup>50</sup> Ibid 58 (Brennan J).

<sup>51</sup> *Native Title Act 1993* (Cth) s 223(1)(c).

<sup>52</sup> *Native Title Act 1993* (Cth) s 223(1)(b). Though see *De Rose v South Australia* (2004) 145 FCR 290.

<sup>53</sup> *Native Title Act 1993* (Cth) s 223(1)(a).

<sup>54</sup> Richard Bartlett, *Native Title in Australia* (2004) 74–6.

<sup>55</sup> *Members of the Yorta Yorta Aboriginal Community v Victoria* [1998] FCA 1606, [122]–[123], affirmed (2002) 214 CLR 422; Bruce Buchan, 'Withstanding the Tide of History: the Yorta Yorta Case and Indigenous Sovereignty' (2002) 1(2) *Borderlands E-journal* <[www.borderlandsejournal.adelaide.edu.au/vol1no2\\_2002/buchan\\_yorta.html](http://www.borderlandsejournal.adelaide.edu.au/vol1no2_2002/buchan_yorta.html)> at 17 June 2005.

(of genocide, exclusion, the deeming of *terra aboriginalis* to be *terra nullius* and the construction of Indigenous peoples as *homines sacri*). Before Indigenous claimants can become registered as native title claimants, they must, under s 62(2)(ii) of the NTA, provide the Registrar of the National Native Title Tribunal with details including:

- (e) a general description of the factual basis on which it is asserted that the native title rights and interests claimed exist and in particular that:
  - (i) the native title claim group have, and the predecessors of those persons had, an association with the area; and
  - (ii) there exist traditional laws and customs that give rise to the claimed native title; and
  - (iii) the native title claim group have continued to hold the native title in accordance with those traditional laws and customs;
- (f) if the native title claim group currently carry on any activities in relation to the land or waters – details of those activities ...

The courts have determined that the proof of survival of genocide is not enough. Mere proof of the continuance of the society<sup>56</sup> will not suffice to show maintenance of connection<sup>57</sup> with the claim area and continued acknowledgment and observance of traditional customs.<sup>58</sup> Further, s 190(B) sets down the rigorous threshold test for initiating a claim to reach native title claimant status, under sub-s (5):

The Registrar must be satisfied that the factual basis on which it is asserted that the native title rights and interests claimed exist is sufficient to support the assertion. In particular, the factual basis must support the following assertions:

- (a) that the native title claim group have, and the predecessors of those persons had, an association with the area; and
- (b) that there exist traditional laws acknowledged by, and traditional customs observed by, the native title claim group that give rise to the claim to native title rights and interests; and
- (c) that the native title claim group have continued to hold the native title in accordance with those traditional laws and customs.

Sections 190B(7)(b)(i)-(iii) state further that in relation to the *prima facie* proof of physical connection:

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<sup>56</sup> *Ward on Behalf of the Miriuwung and Gajerrong People v Western Australia* (1998) 159 ALR 483, 582.

<sup>57</sup> *Members of the Yorta Yorta Aboriginal Community v Victoria* [1998] FCA 1606.

<sup>58</sup> *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 60.

The Registrar must be satisfied that at least one member of the native title claim group:

- (b) previously had and would reasonably have been expected currently to have a traditional physical connection with any part of the land or waters *but for things done* [emphasis added] (other than the creation of an interest in relation to land or waters) by:
  - (i) the Crown in any capacity; or
  - (ii) a statutory authority of the Crown in any capacity; or
  - (iii) any holder of a lease over any of the land or waters, or any person acting on behalf of such a holder of a lease.

The euphemistic 'but for things done' provision was an attempt to recognise the stolen generation phenomenon as well as the 'locked gates' phenomenon which may have forcibly severed connection. Since the 1998 amendment of the NTA by the Howard Government, however, only physical, not spiritual and ceremonial, connection is recognised in order to dam the feared flood of 'ambit, frivolous or vexatious' claims.<sup>59</sup>

#### D *Modernity and Homo Sacer*

The opacity of the genocidal process was deepened in the provisions of the *Constitution Act 1900* wherein the Imperial Parliament created a federation of colonies into the Commonwealth of Australia. The *Constitution* constituted a compact of governmental entities rather than a 'we the people' social contract. This was not a 'common wealth' for all, especially not Indigenous people.<sup>60</sup> The integrity of the *terra nullius* fiction had to be sustained by ensuring that Indigenous peoples remained *homines sacri*. The *Constitution* deliberately writes them out in three crude steps, as follows.

1. Indigenous peoples were to get no standing as Her Majesty's subjects or as citizens of the new polity. Section 51(xxvi) gave the Commonwealth Parliament what is called the 'race power': 'the power to make laws with respect to the people of any race, other than the aboriginal race in any state, for whom it is deemed necessary to make special laws'. Indigenous peoples remained wards of the states. The states' powers included land, fauna and flora; the 'aboriginal race' was presumably deemed *ejusdem generis* with these. Indigenous people were relegated to a zone of exception from the protection of the new state of Australia. The 'race power' was created to empower the new federal Parliament to pass special discriminatory laws for

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<sup>59</sup> Bartlett, above n 54, 182-4.

<sup>60</sup> George Williams, 'Race and the Australian Constitution: From Federation to Reconciliation' (2000) 38 *Osgoode Hall Law Journal* 643.

the control, rather than the benefit, of the people of any race, as a part of order building and waste management. The power enabled the state to legislate control of the 'influx' of 'foreign workers' – another *homo sacer* category – such as the Chinese and the Indians, as well as to regulate their daily lives.

2. Section 127 stated that 'in reckoning the numbers of people of the Commonwealth or of a state or other part of the Commonwealth, aboriginal natives shall not be counted'. Excluding Indigenous peoples from the census meant their *homo sacer* status as non-persons was empirically assured. Counting them would have shown that this supposed *terra nullius* was the land of someone, and might even have led to argument that their numbers entitled them to representation in the democratic institutions of the new order-building state. The *Constitution* was amended following a 90 per cent 'yes' vote in the 1967 referendum. As a result s 127 was removed and the specific exclusion of 'people of the aboriginal race' excised from s 51(xxvi). In 1971 Aboriginal and Torres Strait Islanders were counted for the first time as citizens in the Australian census.
3. As a belt-and-braces guarantee, s 25 of the *Constitution* stipulated that 'if all persons of any race are disqualified from voting at elections ... in reckoning the number of the people of the state or of the Commonwealth, persons of that race in that state shall not be counted'. In 1900 in all colonies Indigenous people were excluded from state franchises. Further, s 4 of the *Commonwealth Franchise Act* 1902 stated that 'no aboriginal native shall be entitled to have his name placed on the Electoral Roll'. 'Non-persons' had no voice in the democratic process. Exclusion from the Commonwealth franchise persisted until 1949. In 1949 the *Commonwealth Electoral Act* 1918 (Cth) was amended to specifically grant Aboriginal people a Commonwealth vote if they were entitled to a state vote and/or had completed military service. In 1962 the *Commonwealth Electoral Act* was amended to grant all Aboriginal people the Commonwealth vote. The last states to enfranchise Indigenous peoples were Western Australia (1962) and Queensland (1965).

### III THE HUMAN CONSEQUENCES OF PLACELESSNESS

#### A *Place, Placelessness and Anomie*

Space-conquering modernisation rendered Indigenous people placeless *homines sacri*. The ideology of *terra nullius* legitimated abrogation of their economic, ecological and spiritual duties to their country and their exclusion from it. The ideology of scientific racism based on eugenics legitimated their infantilisation under the Crown's 'protection' and explicit denial of their political rights, and

hence their exclusion from citizenship in the Australian body politic.<sup>61</sup> As *homines sacri* Australia's Indigenous people were intentionally disposed of into a zone of exception upon which genocidal processes continue to converge.

Many of Australia's Indigenous peoples were made spiritually and/or physically placeless. This placelessness has fundamentally undermined their ontology, which is based on spiritual and physical connectedness to their land and sea country.<sup>62</sup> Indigenous leader Patrick Dodson explains:

Land gives you the essence of who you are. It relates you to the country, to the other people who were born and bred there. It is like a great mosaic or jigsaw puzzle, various parts contributing to an intelligible whole. Dreaming tracks and sacred sites are part of the law and part of day-to-day living. The spirit you have is related to that and relates back to the land.<sup>63</sup>

Modernisation's space-conquering imperatives collide with place-based peoples. Place-based societies were organised around spatiality configured by the unmediated capacities of human bodies.<sup>64</sup> Giddens observes that in pre-modern societies place and space coincide, whereas in modern societies space tears away from place.<sup>65</sup> The creation of space through deliberate rupture of place from space results in instability and reflects the assertion of power.<sup>66</sup>

Modernisation requires the conversion of place into commodified and controlled space to effect order building and growth. The human consequences of space-conquering ontologies colliding with place-based ontologies have been of interest to sociologists of industrialisation since the nineteenth century. Ferdinand Tönnies contrasted the place-based community (*Gemeinschaft*) based on tradition with the impersonal contractualist (*Gesellschaft*) forms of social association brought by industrial modernity<sup>67</sup> – and now manifest in the modernisation of modernisation that Ulrich Beck describes as risk society (*Risikogesellschaft*).<sup>68</sup>

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<sup>61</sup> Andrew Markus, *From the Barrel of a Gun – The Oppression of the Aborigines 1860-1900* (1974); Keith McConnochie, David Hollinsworth and Jan Pettman, *Race and Racism in Australia* (1998).

<sup>62</sup> Deborah Rose Bird, *Nourishing Terrains: Australian Aboriginal Views of Landscape and Wilderness* (1996); see also classic works on this uncontroverted connection and the consequences of placelessness: T G H Strehlow, *Aranda Traditions* (1947); M Heppell (ed), *A Black Reality: Aboriginal Camps and Housing in Remote Australia* (1979); Rowley, above n 23.

<sup>63</sup> Patrick Dodson, *The Age* (Melbourne), 3 November 1987, reprinted in Stephen Torre (ed), *Macquarie Dictionary of Australian Quotations* (1990) 5.

<sup>64</sup> Timothy W Luke, 'Identity, Meaning and Globalization: Detraditionalization in Postmodern Space – Time Compression' in Paul Heelas, Scott Lash and Paul Morris (eds), *Detraditionalization: Critical Reflections on Authority and Identity* (1996) 109.

<sup>65</sup> Giddens, *Consequences of Modernity*, above n 38, 18.

<sup>66</sup> Michel de Certeau, *The Practice of Everyday Life* (1988) 117.

<sup>67</sup> Ferdinand Tönnies, *Community and Association* (C P Loomis trans, 1955 ed) [trans of *Gemeinschaft und Gesellschaft*]; see David Gross, *The Past in Ruins: Tradition and the Critique of Modernity* (1992).

<sup>68</sup> Ulrich Beck, *Risk Society: Towards a New Modernity* (1992).

Emile Durkheim identified the human consequences of modernisation as ‘*anomie*’. The early meaning of this word was ‘to be without law or norms’ – shades of the state of *homo sacer*. Durkheim used it to describe the disintegration of the traditional normative basis of a society caused by modernisation. He counted *anomie* amongst the ‘suicidogenic currents’ affecting sections of societies undergoing radical ‘*déclassment*’ that had thrust them into a situation inferior to the one they occupied before.<sup>69</sup> For Indigenous people this involves placelessness and thus rupture of the place-identity nexus so basic to their ontological security.<sup>70</sup>

In the suicide and transcultural psychiatry literature, ‘*anomie*’ denotes the condition of individuals who have lost their traditional moorings and are prone to psychic disorder.<sup>71</sup> The concept helps explain the suicidogenic and lifechance-taking impact of modernisation on placeless Indigenous people after two centuries of violence against them.<sup>72</sup> It is well known that the psychological impact of such violence, displacement and social dislocation is loss of resilience, coping mechanisms and social cohesion, and exacerbated levels of anxiety, depression and addiction which might be cumulatively analogous to chronic post-traumatic stress disorder (PTSD).<sup>73</sup>

### B *Placelessness and Suicide*

Tatz noted that Aboriginal suicide rates were two to three times higher than those of the general population and that ‘Aboriginal suicide has unique social and political contexts, and must be seen as a distinct phenomenon’.<sup>74</sup> Fifty percent of the deaths

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<sup>69</sup> Steve Lukes, *Emile Durkheim: His Life and Work: a Historical and Critical Study* (1973) 205-7; Emile Durkheim, *Suicide* (trans 1952).

<sup>70</sup> John Dixon and Kevin Durrheim, ‘Displacing Place Identity: a Discursive Approach to Locating the Self and Other’ (2000) 39 *British Journal of Social Psychology* 27.

<sup>71</sup> J E Cawte, *Cruel, Poor and Brutal Nations* (1972); J E Cawte, ‘The Devil’s Dozen: 13 Aboriginal Depressions’ (1988) 12(2) *Aboriginal Health Worker*; D J Spencer, ‘Anomie and Demoralization in Transitional Cultures: The Australian Aboriginal Model’ (2000) 37 *Transcultural Psychiatry* 5; Wolfgang Jilek, ‘Cultural Factors in Psychiatric Disorders’ (paper presented at the 26<sup>th</sup> Congress of the World Federation for Mental Health, Vancouver, Canada, 22-27 July 2001) <<http://www.mentalhealth.com/mag1/wolfgang.html>> at 17 June 2005; Laurence J Kirmayer, Mary Ellen MacDonald and Gregory M Brass (eds), *The Mental Health of Indigenous Peoples*, Culture and Mental Health Research Unit Report 10, Division of Social and Transcultural Psychiatry, McGill University (2001).

<sup>72</sup> See the article by Aboriginal magistrate Pat O’Shane, ‘The Psychological Impact of White Colonisation on Aboriginal People’ (1995) 3 *Australasian Psychiatry* 149; W E H Stanner, *White Man Got No Dreaming: Essays 1938-1973* (1979); P Swan and B Raphael, *Ways Forward: National Consultancy Report on Aboriginal And Torres Strait Islander Mental Health Policy* (1995).

<sup>73</sup> Duncan Pederson, ‘Surviving Amerindian Nations: the Impact of Political Violence and Wars’ (paper presented at the Fifth Summer Course of Social and Transcultural Psychiatry, McGill University, Montreal, Canada, 1999); D Summerfield, ‘The Social Experience of War and Some Issues for the Humanitarian Field’ in Patrick J Bracken and Celia Petty (eds), *Rethinking the Trauma of War* (1998) 9.

<sup>74</sup> Tatz, above n 45, 10 - though he queries the full utility of ‘anomic suicide’ as an explanation

investigated by the Royal Commission into Aboriginal Deaths in Custody (RCIADIC) were of people who had been taken from their families as children.<sup>75</sup> Between 1990 and 1995 the suicide rate for Indigenous people in Queensland was 23.6 per 100,000 compared with the non-Indigenous rate of 14.5 per 100,000; for young Indigenous men aged 12-24, the largest group of suicides, the rate was 122.5 per 100,000!<sup>76</sup> These indicators show that modernisation continues to have genocidal consequences.

The RCIADIC report<sup>77</sup> and *Bringing Them Home*, the report on the stolen generations,<sup>78</sup> both acknowledge the gross disparity between the life chances of Indigenous and non-Indigenous people. These reports – bright beacons of official acknowledgment shining through the dense fog of official and cultural denial – stress the social and historical causes of the gross disadvantage Indigenous people continue to suffer.<sup>79</sup>

Yet processes of ‘rationalization, trivialization and denial’<sup>80</sup> have served to stall implementation of many of remedial recommendations made by the reports which might close the gap between Indigenous disadvantage and white advantage and which might do reconciliatory justice or social justice in both practical and symbolic terms.<sup>81</sup> In 1997 Prime Minister John Howard declined to say ‘sorry’ for the stolen generation process, and three years later the Howard Government made a submission to the Senate committee reviewing *Bringing Them Home* that there had never been a ‘stolen generation’.<sup>82</sup> In 2005 the Aboriginal and Torres Strait Islander Commission (ATSIC) was abolished. The Commission, established by the Hawke Labor Government in 1989 to give Indigenous people a degree of self-government, had been elected by Indigenous people and was intended to be accountable to them. The Howard Government abolished ATSIC in the name of mainstreaming – its

used in strictly Durkheimian terms: 65.

<sup>75</sup> Jane H McKendrick, ‘The Legacy of the “Stolen Generations”’: Chronic Depression, Cultural Alienation and Disruption of Individuals, Families and Communities’ in Kirmayer et al, above n 71, 75.

<sup>76</sup> Ernest Hunter, ‘An Overview of Suicide in Indigenous Australia’ in Kirmayer et al, above n 71, 88.

<sup>77</sup> Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991), <<http://www.austlii.edu.au/au/special/rsjproject/rsjlibrary/rciadic/#national>>.

<sup>78</sup> Human Rights and Equal Opportunity Commission, *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families* (1997) (*Bringing Them Home*), <[http://www.hreoc.gov.au/social\\_justice/stolen\\_children/index.html](http://www.hreoc.gov.au/social_justice/stolen_children/index.html)>.

<sup>79</sup> Tatz, above n 45, 31-3, citing RCIADIC and *Bringing Them Home*, above nn 77, 78.

<sup>80</sup> Ernest Hunter, “‘The Deep Sleep of Forgetfulness’”: Reflections on Disremembering’ in Kirmayer et al, above n 71, 55; Ian T Ring and Ngaire Brown, ‘Indigenous Health: Chronically Inadequate Responses to Damning Statistics’ (2002) 177 *Medical Journal of Australia* 629.

<sup>81</sup> Jon Altman and Boyd Hunter, ‘Monitoring “Practical” Reconciliation: Evidence from the Reconciliation Decade 1991-2001’ (Centre for Aboriginal Economic Policy Research Discussion Paper No 254, 2003).

<sup>82</sup> John Howard, Opening Ceremony Speeches (speech delivered at the Reconciliation Convention, Melbourne, 26 May 1997); Commonwealth, *Submission to the Senate Legal and Constitutional Reference Committee Inquiry into the Stolen Generations* (2000) ii–iii.

‘practical’ reconciliation program. An appointed National Indigenous Council is now government’s link with Australia’s Indigenous people. Larissa Behrendt characterises ‘practical’ reconciliation as ‘Indigenous disempowerment’.<sup>83</sup> Indigenous affairs are now administered by the same Department of Immigration and Multicultural Affairs (DIMA) that is responsible for the detention program for another *homo sacer* group, asylum seekers.

Evidence of the impact of the state’s displacement of Indigenous peoples into alien space is readily available in official statistics. These reveal how the loss of connection with place, related loss of identity, spiritual placelessness and deep intergenerational ontological insecurity<sup>84</sup> continue to waste lives.<sup>85</sup>

### 1 *Placelessness and Prison*

Indigenous people accounted for 14.3 per cent of the prison population in 1992 and in spite of the RCIADIC report in 1991 they were 20 per cent in 2001.

Indigenous women were incarcerated at 19.3 times the rate of non-Indigenous women in June 2003.

Indigenous people accounted for 20 per cent of deaths in custody for the year 2002–03.

In the states with remote expanses of country and high percentage of Indigenous people, the Indigenous rate of imprisonment per 100,000 in 2003 was:

State	Number incarcerated (per 100 000)	Percentage increase over previous year
Northern Territory	1768	33
Queensland	1710	3
Western Australia	2846	12

### 2 *Placelessness and Life Expectancy*

In the 2001 census data the proportion of the Indigenous and non-Indigenous population in specific age groups reveals a large discrepancy in life chances:

	Age in years

<sup>83</sup> Larissa Behrendt, ‘Blood from a Stone’ (2002) August-September 60 *Arena Magazine* <[http://www.arena.org.au/ARCHIVES/Mag%20Archive/Issue%2060/features\\_60\\_2.htm](http://www.arena.org.au/ARCHIVES/Mag%20Archive/Issue%2060/features_60_2.htm)> at 17 June 2005.

<sup>84</sup> Anthony Giddens, *Modernity and Self-Identity: Self and Society in the Late Modern Age* (1991).

<sup>85</sup> Human Rights and Equal Opportunity Commission, *A Statistical Overview of Aboriginal and Torres Strait Islander Peoples in Australia*, <[http://www.hreoc.gov.au/social\\_justice/statistics](http://www.hreoc.gov.au/social_justice/statistics)> at 17 December 2004.

Percentage of people in age group	0-4	44-64	65+
Indigenous people	13.1	11.8	2.9
Non-Indigenous people	6.4	23.4	12.8

Life expectation for Indigenous males during 1999-2001 was similar to that for the total adult male population in 1901-1910. In 2001 Indigenous males could expect to live 20.7 years less, and Indigenous females 19.6 years less, than the general population. The median death age for Aboriginal women in the Northern Territory was 53 compared with 82 in the general population nationwide.

### 3 *Placelessness and Birth Weight*

The rate of low birth weight Aboriginal and Torres Strait Islander babies per thousand births between 1994 and 2000 was 12.4. This was higher than figures for poor developing countries like Ethiopia, Senegal and Tanzania, and compared with a rate of 6.5 in the non-Indigenous Australian population.

### 4 *Placelessness and Homelessness*

Placelessness ought not to be equated with homelessness, though homelessness is symptomatic of placelessness. Indigenous people are over-represented among the homeless. The 2001 census identified almost 100,000 Australians as homeless as defined in the *Supported Accommodation Assistance Program Act 1994 (Cth)*.<sup>86</sup> Of the 100,000 homeless, 14,200 were 'sleeping rough'. Two percent self-identified as Indigenous and 19 per cent of those 'sleeping rough' were Indigenous. 'Sleeping rough' generally means using public space 'inappropriately'.

The census fails to capture continuing patterns of displacement reflected in Indigenous coerced and voluntary mobility. Coerced mobility is a symptom of placelessness that leads Indigenous people to move outside their country to chase work opportunities and to access health, welfare and education services. Indigenous people's voluntary and traditional mobility is place-based mobility. For many Indigenous people, country is constituted by places separated by considerable distances with which connection might be irregular and fleeting. Place-based mobility was, and for some remains, intrinsic to their survival culturally as Indigenous people. Indigenous people's survival was based in a political ecology of hunting and gathering for use and exchange. Mobility between ecological systems was essential. Inextricably connected to such mobility for hunting and gathering were cultural and knowledge systems. Obligations to places had to be maintained by regular visits to serve as custodians, of spiritual places such as sacred sites as well as of ecological systems and habitats. Mobility was also essential for visiting

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<sup>86</sup> Section 4 defines a person as homeless, and therefore deemed eligible for the services and amenities provided under the SAAP, if they have inadequate access to safe and secure housing and if that damages their health and/or has the effect of marginalising them through absence of the personal amenities or supports that a home affords.

to sustain social cohesion amongst far-flung kin groups.<sup>87</sup> Many Indigenous people who identify with an area as their country are not there on the census day and are under-counted<sup>88</sup>; many placeless people are not counted at all or, in terms of their actual country, are miscounted.<sup>89</sup> Thus the numbers of placeless Indigenous people remain ‘deniable’, miscounted and discounted.

The ‘deniability’ of Indigenous placelessness can also be manipulated by construing ‘walkabout’ forms of voluntary mobility pejoratively as evidence of idleness and absence of connectedness to place<sup>90</sup> rather than as resistance to order keepers of capitalism. Understanding place-based mobility as a quintessential attribute of the Indigenous ontology makes population management too hard and contradicts ideas about real property too fundamentally. Native title application and determination procedures set rigorous tests of unbroken connectedness to place that reflect a denial of place-based cultural mobility patterns as well as of colonial coerced ‘mobility’ displacement. Place-based mobility patterns were actively destroyed to eliminate the culture and the place-based ontology of Indigenous people.<sup>91</sup>

The Supported Accommodation Assistance Program (SAAP), a joint state and Commonwealth venture, is a residual program to save people from eternally wandering as the placeless excluded in the wasteland of public space. The program offers Indigenous and non-Indigenous people with no visible means of support and no house – ie none of the markers of market citizenship – a temporary haven. Giving people who are in a housing crisis temporary housing is intended to mainstream them: to enable them to enter the workforce, join the ranks of the working and be included as potential market citizens. SAAP facilities thus provide supervised holding tanks for surplus population. SAAP-based homelessness data offers one crude measure of the impact of the exclusion of Indigenous peoples from their country and the destruction of their place-based society. For instance, data<sup>92</sup> collected on census night 2001 in Queensland and the Northern Territory indicates their overwhelming over-representation in the homeless figures:

State/Territory	Aboriginal People and Torres Strait Islanders as a percentage of the total	Aboriginal People and Torres Strait Islanders as a percentage of
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<sup>87</sup> Paul Memmott, ‘Queensland Aboriginal Cultures and the Deaths in Custody Victims’ in Queensland, *Regional Report of Inquiry in Queensland, Royal Commission into Aboriginal Deaths in Custody* (1991) Appendix 2.

<sup>88</sup> Peter Read (ed), *Settlement: a History of Australian Indigenous Housing* (2000); Paul Memmott et al, *Between Places: Indigenous Mobility in Remote and Rural Australia* (2004) 5-6.

<sup>89</sup> D Martin et al, *Making Sense of the Census: Observations of the 2001 Enumeration in Remote Aboriginal Australia* (2002); E Young and K Doohan, *Mobility Patterns for Survival: a Process Analysis of Aboriginal Population Movement in Central Australia* (1989).

<sup>90</sup> Nicholas Peterson, ‘Myth of “Walkabout”’: Movement in the Aboriginal Domain’ in J Taylor and M Bell (eds), *Population Mobility and Indigenous Peoples in Australasia and North America* (2004).

<sup>91</sup> Memmott et al, above n 88, 13-14.

<sup>92</sup> Australian Federation of Homelessness Organisations, *Facts and Stats*, <[http://afho.org.au/facts/stats/archives/2002\\_03/2002\\_2003.htm](http://afho.org.au/facts/stats/archives/2002_03/2002_2003.htm)> at 4 November 2004.

	population	SAAP clientele
Queensland	3.1	24
Northern Territory	28.8	55.7

SAAP's intent is assimilationist, therapeutic and productivist. Its methods and assumptions deny the reality of the long-term Indigenous homeless and the history of their displacement. The SAAP agenda ignores the place-based ontology of Indigenous people and the deep trauma associated with loss of country.

More fine-grained data have been assembled in the Queensland Government's *Safer Places Newer Opportunities* (2003) report about Indigenous homelessness (based on the SAAP definition) specific to three north Queensland urban centres. The report is couched in terms of the 'third way' discourse of rights and responsibilities of, inter alios, Indigenous peoples.<sup>93</sup> Indigenous homelessness is perceived to be a serious, intractable 'parkie' (vagrants, itinerants) problem by citizens and local authorities in these cities. The figures were as follows:

Local authority	Number of homeless	Number of sites and camps in public space
Townsville & Thuringowa	98	12
Cairns	74	9
Mount Isa	19	4

Indigenous homeless people in Townsville came from the Northern Territory, the Torres Strait, Mornington Island, Domadgee, Cherbourg, Palm Island, and Brisbane.<sup>94</sup> The SAAP, the Australian Bureau of Statistics (ABS) and the Department of Aboriginal and Torres Strait Islander Policy (DATSIP) all reproduce the same discounting processes, so – however benignly intended this data-gathering may be – the data still contribute to the deniability of placelessness and its impacts.

### 5 *Placelessness and Vagrancy*

Agamben says the state of exception is a legal form of that which cannot take a legal form.<sup>95</sup> In today's world the discourse of human rights does not permit the construction of placelessness to be formally legislated. Instead the *indistinction* between citizen and *homo sacer* is perpetuated by practices of exclusion in the name of inclusion and above all security for citizens. Crude 'law and order' approaches exemplify the oldest and most blatant 'lawful' response to securing

<sup>93</sup> Paul Havemann, 'Third Way and Global Human Rights Perspectives on Citizenship' (2001) 9 *Waikato Law Review* 75.

<sup>94</sup> Department of Aboriginal and Torres Strait Islander Policy (DATSIP), *Safer Places with Newer Opportunities, Regional Homelessness Blueprint, Responsibilities and Rights of Indigenous in the Use of Public Spaces* (2003) 9-10 <<http://www.datsip.qld.gov.au/partnerships/homelessness.cfm>> at 11 November 2004.

<sup>95</sup> Ulrich Raulff, 'Book Review: Misery Knows no Law. Giorgio Agamben Thinks the State of Exception' (2004) 5(5) *German Law Journal – Special Edition*, <<http://www.germanlawjournal.com/article.php?id=438>> at 17 June 2005.

space against *homines sacri* or managing them in it. This space-ordering regime for lawfully policing the frontier is grounded in denial of the fact that, in most parts of the colonised world, such ‘public’ spaces represent the very places that constituted the home ‘country’ of original Indigenous place-based people prior to its transformation into the public space. In the name of providing public services, municipal authorities are normally designated the ‘custodians’ of its appropriate use and regulate and police it accordingly.

Modern life is city life. (Regional, rural and remote settler life is modelled on the city in microcosm.) Cities are made up of spaces rather than places. Indigenous people have no place or space in the city and hence in modern life. City life is lived in contradictory, interdictory and placeless spaces. The contradictions come from simultaneously living in forced togetherness with strangers while seeking safety in guarded fortresses – the gated estate, the retirement village and the middle class suburb – or in temples of consumption<sup>96</sup> bordered by public space.

Defensible enclosure and selective access inform the design of urban space. Community is defined by closely guarded borders rather than by its social cohesion; hence the exclusion of public place dwellers. Temples of consumption, notably the malls, are hybrid private/pseudo-public spaces. A counterfeit community enjoys togetherness through consuming<sup>97</sup> or appearing to consume; public place dwellers sojourn here to get the air conditioning and be part of ‘life’ until business closes. Private and public space is made secure by designing it as ‘interdictory’ space, inhospitable to any but the briefest sojourners.<sup>98</sup> Interdictory spaces are constructed to be flowed through, as sites for viewing spectacles and being viewed. People may pause there but no one may stay – including, and especially, vagrants. Human agents of spatial hygiene – security guards and police – deliver active security, moving on and forcing out the lingerers lest they mistake any public or private spaces as potential places of abode. Interdictory spaces are ubiquitous aspects of modern suburban and urban design. Since the 1980s, crime prevention through environmental design (CPTED) has made strictly regulated public parks, stations without benches, overly lighted spaces, low and densely planted beds of shrubs, high walls, steep sides, spiked walls, pedestrian-forbidden roads and so on the ‘normal’ markers of such space.

In Queensland every local authority is empowered to make local by-laws to regulate when and how (and inferentially, by whom) public spaces/places such as parks can be used.<sup>99</sup> ‘Walking noisily with a big stick alongside’ municipal by-laws is the state law to regulate the use of public space. In Queensland ‘misuses’ of public

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<sup>96</sup> George Ritzer, *The MacDonalidization of Society* (1993).

<sup>97</sup> Bauman (2004), above n 8, 94-8.

<sup>98</sup> Steven Flusty, *Building Paranoia: the Proliferation of Interdictory Space and the Erosion of Spatial Justice* (1994).

<sup>99</sup> For instance Townsville/Thuringowa City Council Local Law under the *Local Authorities Acts* 1902 to 1926 (Qld) sch IV sub-div 50, cl 486, Parks Declared Public Places (for the purposes of the application of any Acts); cl 487, Time Parks Open; cl 488, Unlawful Entry on Parks.

space by Indigenous people are often subject to duplicate charges under two different Acts, the relatively new *Police Powers and Responsibilities Act 2000* (Qld) and the *Vagrancy, Gaming and Other Offences Act 1931* (Qld). The 1931 Act was especially amended in 2004 to add a broad and general offence of Public Nuisance under section 7A.

The *Police Powers and Responsibilities Act*, which consolidated a raft of 130 space-specific special Acts as well as some older general Acts, confers the so-called 'move on' powers to oust any person whom police suspect has committed or may commit an offence under the Act. The Act does not stipulate that suspicion must be reasonably founded.<sup>100</sup> The targets of these laws are itinerants condemned forever to 'move on' unless caught in the safety net of the jail, the clinic or the SAAP hostel.

Section 7 of the *Vagrancy, Gaming and Other Offences Act 1931* (Qld) states the objective of ensuring that 'members of the public may lawfully use and pass through public places without interference from unlawful acts of nuisance committed by others'. For the police to act, there is no need for a member of the public to formally complain. Protection is provided by deeming those who might interfere with the enjoyment of public space as vagrants. It is an unlawful act under s 4(1)(a) to be a vagrant. Vagrants are not market citizens and are easily recognisable as *homines sacri*. The ground for being deemed a 'vagrant' is having 'no visible lawful means of support' or 'insufficient lawful means of support'; s 4(1)(d) further extends the offending status to 'habitually consorting' with those convicted of having no visible means of support. The legitimate user of public space is the market citizen, whereas other users, for instance the homeless and placeless, are not recognised as lawful users as they are perceived as neither citizens nor consumers.<sup>101</sup>

#### 6 *Public Place Dwellers, Spiritual Homelessness: Overcoming Denial?*

Recent work by the team under Paul Memmott for the Australian Housing and Urban Research Institute, on categories of Indigenous homeless people and good-practice responses to their needs, aims to precipitate a shift in official discourse which would replace denial with acknowledgment. They suggest that the labels 'itinerants', 'vagrants' and 'homeless persons' should be replaced by 'public place dwellers', at least for some Indigenous people. Further, among this group, they propose that a category of 'the spiritually homeless'<sup>102</sup> become part of the official

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<sup>100</sup> Kevin Smith, *The Not So New Move On Powers* (2000), <[http://www.faira.org.au/lrq/archives/200010/stories/powers\\_move.html](http://www.faira.org.au/lrq/archives/200010/stories/powers_move.html)> at 17 June 2005.

<sup>101</sup> Anne Coleman, *Five Star Motels: Spaces, Places and Homelessness in Fortitude Valley, Brisbane* (PhD Thesis, University of Queensland, 2001) 14-15.

<sup>102</sup> The term is attributed to Keys Young, *Homelessness in the Aboriginal and Torres Strait Islander Context and Its Possible Implications for the SAAP* (1998), <[http://www.facs.gov.au/internet/facsinternet.nsf/aboutfacs/programs/house-newsaaap\\_keys.htm](http://www.facs.gov.au/internet/facsinternet.nsf/aboutfacs/programs/house-newsaaap_keys.htm)> at 17 June 2005.

analysis of Indigenous homelessness and therefore of appropriate responses to it.<sup>103</sup> Spiritual homelessness is defined as:

A state arising from either (a) separation from traditional land, (b) separation from family and kinship networks, or (c) a crisis of personal identity wherein one's understanding or knowledge of how one relates to country, family and aboriginal identity systems is confused.<sup>104</sup>

This concept captures a state of *anomie* endemic to Indigenous populations experiencing modernisation and notably post-contact displacement – placelessness. The cost to spiritual health may be greatest amongst those whose connection to country is most tenuous in terms of how long ago displacement occurred and how difficult reconstructing a sense of connected self-identity is: a phenomenon well documented amongst the stolen generation by the *Bringing Them Home* report.<sup>105</sup> Memmott reports that the term 'spiritual homelessness' was widely endorsed at the National Indigenous Homelessness Forum in March 2004.<sup>106</sup>

'Re-placement', restoring Indigenous people to their country, is an ideal but unrealistic response. Native title processes are more degrading than they are restorative or reconciliatory. Agencies responding to the needs of Indigenous homeless people must therefore focus as much on their wellbeing as on their self-identity. Such agencies must therefore have philosophies of client interaction that recognise the reality and the causes of spiritual homelessness.<sup>107</sup> Further, appropriate responses must, for instance, incorporate holistic institutional design principles with these aims: to empower Indigenous public place dwellers through capacity building to participate in defining and running services in partnership with agencies; and to recognise that public place dwellers forge strong links with the public spaces they call their places.<sup>108</sup>

#### IV IN CONCLUSION: PLACE, SPACE AND MODERNITY

The conquest of spaces is fettered only by the limits of technologies. Space must be conquered to feed the modernising projects' voracious appetite for new land, labour and capital to grow the size of the private and public estates.<sup>109</sup> In Australia all these estates must perforce come from the terra aboriginalis estate. Indigenous peoples do not regard this estate as a commodity to be parcelled, packaged and sold. Colonisers only see land in a commodity form. To 'legalise' its commodification into owned

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<sup>103</sup> Paul Memmott et al, *Categories of Indigenous Homeless and Good Practice Responses to their Needs*, Australian Housing and Urban Research Institute Report (2003) 14-15.

<sup>104</sup> Ibid iii.

<sup>105</sup> Human Rights and Equal Opportunity Commission, above n 78.

<sup>106</sup> Memmott et al, above n 103, 14-5.

<sup>107</sup> Ibid 22-5.

<sup>108</sup> Ibid 28-9.

<sup>109</sup> Eg the agricultural estate, the real estate estate, the tourist estate, the mining estate and the development estate.

parcels this terra nullius has been surveyed and marked out by cadastral gridlines. Indigenous people have been segregated into the interstices of the grid or off the grid.<sup>110</sup> Placelessness is a consequence of being segregated to these 'zones of exception'. Under the modern order, Indigenous peoples' status is defined by their capacity to make claims on space. Hence under the NTA Indigenous people are challenged to rebut the presumption of *terra nullius* and reclaim their places disguised as a *sui generis* version of space. Native title does not connote the full exclusive possession associated with freehold but is carefully framed in terms of rights and interests. Below 'native title holders' in the hierarchy of claimants to space are those euphemistically known as 'traditional owners' who own nothing but have a claim to traditionally use their land or sea country.<sup>111</sup> Others in the hierarchy are bearers of statutory 'land rights' which are grants from the Crown.<sup>112</sup> These grants are special measures to overcome systemic discrimination;<sup>113</sup> and perhaps gestures to assuage guilt for dispossession. This hierarchy of claims to space is set into formal legal rules which do the ideological work of sustaining the integrity of the order builders' normative scheme – the law of rules. Under the NTA a small elite of place-based peoples are allowed space. The rest are spaceless and placeless and, often, homeless. The placeless employ collective self-descriptions such as 'parkies' and 'long grassers'. These labels tell us about their 'choice' of place<sup>114</sup> and perhaps their quest for a non-modern place-based life with kin in shared community defined by tradition.

Welfare states typically devised policies and programmes to ingest and dis-alienate the excluded. The ideological lynchpin of the Fordist class compromise, welfare state citizenship, offered universal and equal inclusion in the benefits of civil, political and social rights as citizens. Citizenship was, and still is, especially in the post-Fordist state, conditional on market participation. Programs for promoting inclusion wear the odd label 'social exclusion'. Inclusion for indigenous people perpetuates assimilation, mainstreaming and shared responsibility programs not full citizenship rights and thus amounts to de facto exclusion from any vestige of full yet differentiated citizenship.<sup>115</sup> The exclusion of Indigenous people is rationalised by denial of their plight notably marked by active refusal to acknowledge the

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<sup>110</sup> Denis Byrne, 'Landscapes and Segregation' (paper presented at the Australian Institute of Aboriginal and Torres Strait Islander Studies, Indigenous Studies Conference, Canberra, 18-20 September 2001), Symposium A session 5.

<sup>111</sup> For example there are 70 groups of 'Traditional Owners' along the coastline of the Great Barrier Reef World Heritage Area recognised by the Great Barrier Reef Marine Park Authority, some of whom may get native title rights: see Paul Havemann, Dominique Thiriet, Helene Marsh and Craig Jones, 'Traditional Use of Marine Resources Agreements and Dugong Hunting in the Great Barrier Reef World Heritage Area', (2005) 22 *Environmental and Planning Law Journal* 258.

<sup>112</sup> For instance *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), *Aboriginal Land Act 1991* (Qld).

<sup>113</sup> *Racial Discrimination Act 1975* (Cth) s 8.

<sup>114</sup> Dillon and Savage Consultants, 'The Parkie Problem and Some Ideas for Strategies: a Discussion Paper about Displaced and Homeless Aboriginal and Torres Strait People in Cairns' (Warangesda Family Crisis Service and Cairns Displaced Persons Committee, 1994) 3.

<sup>115</sup> Havemann, above n 21, 468-75.

atrocities of the stolen generation. The application of law and order powers to combat vagrancy reveals the continual and unmitigated ‘othering’ of Indigenous people. Inclusion under Howard does not carry the imperative to address the plight of the Indigenous placeless since placelessness or spiritual homelessness is not a recognisable form of exclusion. Nor is the restoration of ‘place’ under the NTA regime an authentic technique for inclusion since it too is based on denial. The NTA, especially as amended in 1998 by the Howard Government, ought more properly to be styled the *Preservation of Ordinary Title Act*. So we have an elaborate legal scheme of denial constructed, reproduced and amplified by state law and policy.

My conclusion is that if we continue to deny the evidence prefigured in both past and current plight of Indigenous people we are all fated to be *homo sacer*.

Until we overcome denial by acknowledging the truth we can never get to ‘the place called reconciliation’.<sup>116</sup> Lederach offers a four-step path to reconciliation.<sup>117</sup> This resonates with the recommendations of the *Bringing Them Home* report, notably the Van Boven principles for a human rights-based reconciliation<sup>118</sup>; and the final (2002) report of the Council on Aboriginal Reconciliation. The steps are:

<b>Step 1: Telling the Truth</b> Acknowledgement of genocide by the state; apology; Assurances of non-repetition		<b>Step 2: Forgiving but not Forgetting</b> Acceptance by Indigenous people of the sincerity of the acknowledgement, apology and assurances
	<b>The ‘place’ called Reconciliation</b> Narrating a new and transformative story of national origin and shared destiny	
<b>Step 3: Doing Justice</b> Respect, restoration, restitution, reparation; right relationships on Indigenous people’s terms		<b>Step 4: Building Peace</b> Global citizenship based on a vision of coexistence fit for future generations

Steps towards telling the truth and doing some justice have been taken: the 1967 referendum amending the *Constitution*; the *Racial Discrimination Act* 1975 (Cth); the *Aboriginal Land Rights (Northern Territory) Act* 1976 (Cth); *Mabo (No 1)* (1988)<sup>119</sup>; the creation of ATSIC in 1989; the RCIADIC in 1991; *Mabo (No 2)*

<sup>116</sup> John Paul Lederach, *Building Peace: Sustainable Reconciliation in Divided Societies* (1997) 24-31.

<sup>117</sup> Ibid 30.

<sup>118</sup> Human Rights and Equal Opportunity Commission, above n 78, Appendix 8.

<sup>119</sup> 166 CLR 186.

(1992);<sup>120</sup> *Bringing Them Home*, 1996; and finally the work of the now defunct Council for Aboriginal Reconciliation in 1991.<sup>121</sup> The process appears to have stalled since the Howard Government took office in 1996.

The fate of Indigenous people during the last three centuries ought to act as a miner's canary for the risks all humankind must confront.<sup>122</sup> Indigenous peoples' fate prefigures our own dehumanisation as the modernisation of modernisation leads the Planet on the current ecocidal and conflict-ridden path. We have a duty to remember, to know, to intervene<sup>123</sup> and to emancipate ourselves reflexively out of our own denial of their fate. Acknowledgment is not just a gesture of casual recognition or of utopian altruism.

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<sup>120</sup> 175 CLR 1.

<sup>121</sup> *Council for Aboriginal Reconciliation Act 1991* (Cth).

<sup>122</sup> Paul Havemann and Helena Whall, 'The Miner's Canary: Indigenous Peoples and Sustainable Development in the Commonwealth' (Commonwealth Policy Studies Unit Memorandum to Commonwealth Heads of Government attending the World Summit on Sustainable Development, Johannesburg, South Africa, 26 August – September 4 2002), <<http://www.cpsu.org.uk/resource/publications.htm>>.

<sup>123</sup> *Ibid* 268.