

**SCALES OF COEXISTENCE:
TACKLING THE TENSION BETWEEN LEGAL AND CULTURAL
LANDSCAPES IN POST-*MABO* AUSTRALIA**

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Questions of coexistence are deeply geographical. They are about the challenges of being-together-in-place. My experience of working at some of the difficult interfaces between Indigenous¹ and non-Indigenous Australia – mining, infrastructure development, cross-cultural negotiations and self-government – has shown that there are few customs in common. Peoples' co-occupation of both space and time on the Australian continent has rarely produced deeply rooted commonality. In reflecting on this lack of commonality, this messy and discordant coexistence, I aim to be both provocative and constructive. I write explicitly from the vantage point of a professional geographer, not as a legal technician: I am a social scientist grappling with what I have come to think of as the fragile geographies of Australian coexistence, and the challenges of ontological pluralism in the places where Australians coexist.²

Australian landscapes are littered with the markers of divergent cultures and customs that witness the persistent construction of social and geographical imaginaries in which the presence of others produces a sense of place that is simultaneously of belonging and alienation.³ By Federation, non-Indigenous imaginaries claimed to have reconfigured those landscapes as empty and this thinking was entrenched as a key foundational myth of Australian property and

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¹ Throughout this paper, 'Indigenous' refers to persons or peoples native to Australia (including the Torres Strait Islands) in their entirety or generality. The term 'Aborigine' and its derivatives is used to describe specific Aboriginal domains to avoid conflating those domains with a wider sense of indigenous politics.

² See eg, R Howitt and S Suchet-Pearson, 'Ontological Pluralism in Contested Cultural Landscapes' in K Anderson, M Domosh, S Pile and N Thrift, *Handbook of Cultural Geography* (2003) 557.

³ Gelder and Jacobs usefully refer to this juxtaposition using the Freudian notion of the 'uncanny' to explore the intrusion of discourses of Aboriginal sacredness into the profane landscapes of non-Aboriginal society. See eg, K Gelder and J M Jacobs, 'Uncanny Australia' (1995) 2(2) *Ecumene* 171 and K Gelder and J Jacobs, *Uncanny Australia: Sacredness and Identity in a Postcolonial Nation* (1998).

resource law. Judicial recognition of the capacity of Indigenous presence to persist long after such claims were entrenched in the popular imagination of Australian society has presented Australian legal, political and social authorities with significant challenges since the *Mabo* decision.⁴

The evolution and operation of the native title system holds important opportunities for a national conversation (and multiple local conversations) about the place of strangers, outsiders and others in the Australian imaginaries of home, belonging and possession. This paper explores these opportunities and argues that an understanding of the relational nature of geographical scale⁵ and a working literacy in the scaled politics of coexistence and social and legal pluralism offer a better understanding and way of addressing tensions between the legal and cultural landscapes of post-*Mabo* Australia. The analytical window provided by a scaled political view is of value precisely because it allows an Indigenous-centric critique of the limitations of the law as a framework for enabling Indigenous self-determination in Australia.⁶

In the colonial era, geographers were complicit in the colonial project of possessing the continent (and dispossessing its previous occupants, who were rarely acknowledged as 'owners').⁷ More recent work in geography has explicitly acknowledged and engaged with the persistent presence of Indigenous peoples in Australian cultural landscapes.⁸ Rather than engaging with Aboriginal and Torres Strait Islander peoples as relict reflections of a pre-contact past, geographers have explored the experience of Indigenous groups in many settings, reflecting on the political, intellectual and legal implications arising from the practices of coexistence, the co-occupation of common landscapes. This body of work provides

⁴ *Mabo and Others v Queensland (No 2)* (1992) 175 CLR 1.

⁵ For a summary of recent debates about scale in geography see eg, R Howitt, 'Scale' in J Agnew, K Mitchell and G Toal, *A Companion to Political Geography* (2003) 138. For an exploration of relational ideas of scale see R Howitt, 'Scale as Relation: Musical Metaphors of Geographical Scale' (1998) 30(1) *Area* 49.

⁶ I am conscious, as one reviewer pointed out, that there are inherent limitations in the law as a framework for determining rights, but I also think we need to recognize that in many circumstances legal process preempts Indigenous politics in the pursuit of rights by arguing the preeminence of the law as the battleground for Indigenous advancement. My view is that the pursuit of law and legal process in practice actually subverts Indigenous self-determination.

⁷ See eg, R Howitt and S Jackson, 'Some Things Do Change: Indigenous Rights, Geographers and Geography in Australia' (1998) 29(2) *Australian Geographer* 153, 155.

⁸ We might commence a historiography of 'modern' geographers working in Indigenous issues with the work of the late Elspeth Young, Janice Monk and Fay Gale, each of whose early work is characterised by a deliberate engagement with the Aboriginal presence in the landscape, rather than an effort to recover what had been there, but was now seen as absent – an approach that often characterised the salvage or recovery orientation of many field anthropologists. See eg, Elspeth Young, *Third World in the First: Development and Indigenous Peoples* (1995). For the work of Jan Monk, whose PhD provided an important foundation for the coverage of NSW in the work of Charles Rowley, see eg, Charles D Rowley, *Outcasts in White Australia: Aboriginal Policy and Practice Volume II* (1971). For a discussion of the influence of Fay Gale, see eg, K Anderson, 'Making a Difference: A Geographer's View from the Top – An Interview with Fay Gale' (1998) 22(3) *Journal of Geography in Higher Education* 363.

some valuable insights for the discussion of law, custom, memory and shared futures.

I THE IMAGINARY OF ABSENCE

In contrast to the pervasive myths of ‘dispossession’, Indigenous Australians have *never* been absent from the cultural landscapes of Australia. Even while the dominant society represented Indigenous Australians’ relationships with their traditional territories in terms of ‘dispossession’, Aboriginal and Torres Strait Islander peoples have actually been a concrete, and often locally unsettling presence haunting many aspects of Australian social and cultural relations. This has been a presence in the landscape that has quietly mocked and parodied the dominant culture’s aggressive claims to uncontested ‘possession’ of the continent that 18th century imperial arrogance imagined into being as *terra nullius*.

Despite its celebrated acknowledgement of the need to reject *terra nullius* as the legal foundation of Australia, in *Mabo v Queensland (No 2)* (1992) 175 CLR 1 (*Mabo*) the Australian High Court used a sleight-of-hand to tackle this paradox. First, native title was defined as a fragile and incomplete title. Rather than recognising and creating a robust legal version of the interests and responsibilities created by customary law to authorise the complex relationships among people and between people and their country (native title), the High Court constructed native title as a highly circumscribed recognition space⁹ – a limited set of artefacts of customary law and aboriginal title that the British (and subsequently Australian) common law was able and obliged to recognise as ‘property’. Having reduced the robust and ancient jurisdictions¹⁰ of the Dreaming to the fragility of ‘native title’, the High Court introduced a slippery notion of ‘co-existence’. This notion was not an acknowledgement of the co-existence of Indigenous and non-Indigenous interests in particular places, but an abstract conceptualisation of legal interests in property that could exist together. It was this abstract conceptualisation which was used to address the persistent presence of Aboriginal people in cultural landscapes that were now possessed by new owners whose title was predicated on the imaginary of *terra nullius*.

Political responses to the decision sought to maintain the *status quo* – the dominance of the dominant culture – by asserting that remnant native title could co-exist with competing western tenures because native title was subject to unequivocal extinguishment to the extent of any inconsistency with the titles constructed by the colonisers’ legal system. So, no matter how persistent the ancient jurisdictions of customary law were in creating and recreating continuing interests in and responsibilities to territory, society and cosmos, the *Mabo* decision created a

⁹ Noel Pearson, ‘The Concept of Native Title at Common Law’ in G Yunupingu, *Our Land Is Our Life: Land Rights – Past, Present and Future* (1997) 150.

¹⁰ Marcia Langton, ‘Dominion and Dishonour: A Treaty Between our Nations?’ (2001) 4(1) *Postcolonial Studies* 13.

legal landscape in which aboriginal titles were rendered effectively absent by any grant of an inconsistent title by the Crown or its agents.¹¹

As a solution to the persistent ‘whispering in our hearts’ arising from the injustices meted out to Indigenous Australians,¹² native title hardly delivers justice to Indigenous Australians. It delivers neither recognition of Indigenous peoples’ continued possession or presence nor displacement of the aggressive representation of indigeneity-as-absence. Instead, the highly-politicised native title system that has evolved out of the High Court’s extension of judicial recognition of persistent Indigenous presence in the continent’s cultural landscapes has created a legal imaginary in which the test for such presence is a matter for hotly contested technical legal investigation rather than social engagement with the messy hybridities of embodied geographies, emplaced polities and visceral coexistences.

II THE REALITY OF CO-EXISTENCE

Unlike the imaginaries of the legal landscapes created in judicial and legislative procedures, the realities of uncomfortable co-existences are created in the messy overlaps between Indigenous and non-Indigenous Australians. This reality, and the capacity of the dominant culture to render Indigenous peoples’ presence in the landscape invisible and irrelevant was exemplified during a social impact study of the Alice Springs to Darwin Railway. In conducting this study, my colleague Sue Jackson and I confronted a bureaucratic and engineering view of the area north of Tennant Creek as ‘empty’. This view mirrored the technical study for a 1984 route proposal which characterised the same region, the traditional countries of the Warlpiri, Warlunpa, Mudbura and Warumungu people as:

... large tracts of flat, almost featureless terrain ... Over large portions of the route there is little if any obvious sign of man’s presence.¹³

¹¹ Clearly, this is an oversimplification of a complex legal ruling. There are some technical constraints and limitations on the power of the Crown to alienate land and other territories from traditional tenures (see eg, P G McHugh, ‘The Legal and Constitutional Position of the Crown in Resource Management’ in R Howitt, J Connell and P Hirsch, *Resources, Nations and Indigenous Peoples: Case Studies from Australasia, Melanesia and Southeast Asia* (1996) 300). Nonetheless, the dominant legal system has consistently placed the onus on Indigenous claimants to establish their continuing presence in the landscape in technical legal terms, rendering their continuing presence in the real cultural landscapes of contemporary Australia irrelevant to the legal interpretation of cultural landscapes – unless they can meet the legislatively-defined criteria for ‘continuing connection’. I acknowledge the commentary of one of the journal’s anonymous reviewers, who felt this simplification should be presented in terms that are more ‘legally accurate’. My point in responding to the social implications of the practical operations of the native title system is precisely *not* to render the issue in technical legal terms but to insist on its consideration in socially and culturally contextual terms.

¹² Henry Reynolds, *This Whispering in our Hearts* (1998). The title quote was made by a colonial observer. The book itself is an account of Australian dissent from the unjust treatment of Indigenous peoples since colonial times.

¹³ Dames and Moore, *Alice Springs – Darwin Railway: Final Environmental Impact Statement* (1984) 77.

Against that dominant trope of emptiness, absence and blankness, we argued strongly that:

The railway should not be planned as if it were being built through the empty spaces that earlier generations of planners and settlers imagined. In Aboriginal terms, the landscape is already 'full' and Aboriginal people have worked hard to ... find a way to 'fit the railway in'.¹⁴

Similarly, in many of the dominant culture's heroic development narratives of resource projects in remote Australia, Aboriginal people have been simplistically reduced to disposable, movable elements of a logistical puzzle. The absurdity of this idea for Aboriginal people has been argued well by Corn and Gumbula,¹⁵ amongst many others. As they put it:

... Australian governments have repeatedly dismissed Yolngu calls for the comprehensive recognition of their political rights and legal jurisdiction over northeast Arnhem Land on the grounds that their rights were somehow extinguished when British troops took possession of the entire continent in 1788 more than 130 years before Yolngu leaders were first informed of this event by missionaries and government representatives in the early twentieth century.¹⁶

The Australian systems of property and resource rights, which were constructed as if Aboriginal peoples' interests were simply absent from the landscape, continue to frame the processes of coexistence in many places around Australia. In northeast Arnhem Land, the current holder of mining and processing rights, Alcan, is currently constructing a major refinery expansion that will increase the rate of mining of Yolngu lands and intensify the non-Yolngu presence in the region.¹⁷ Significantly, this expansion relies on rights that were created by a Federal Government that had neglected its responsibilities to the affected community¹⁸ and which were contested by the Yolngu in the *Gove Land Rights* case.¹⁹ In responding to the social impact assessment of the refinery expansion, the Yolngu have required a reconsideration of the nature of the mining operation's coexistence with their ancient jurisdiction.

Similarly, in negotiating and implementing Comalco's innovative Western Cape Communities Coexistence Agreement around the Weipa bauxite mine, Aboriginal

¹⁴ R Howitt and S Jackson, 'Social Impact Assessment and Linear Projects' in L R Goldman (ed), *Social Impact Analysis: An Applied Anthropology Manual* (2000) 257, 264.

¹⁵ A Corn and N Gumbula, 'Now Balanda Say We Lost our Land in 1788: Challenges to the recognition of Yolngu law in contemporary Australia' in M Langton, M Teehan, L Palmer and K Shain (eds), *Honour Among Nations? Treaties and Agreements with Indigenous People* (2004) 101.

¹⁶ Ibid 113-114.

¹⁷ See 'Investing in Australia's Future' (undated) Alcan Gove <<http://www.alcangove.com.au/home/content.asp?PageID=312>> 15 August 2006.

¹⁸ House of Representatives Standing Committee on Aboriginal Affairs, *Report on the Present Conditions of Yirrkala People* (1974).

¹⁹ *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141.

groups sought not just compensation, but also recognition. They sought this recognition despite the *Wik* High Court's confirmation that their native title had been legally extinguished by the *Commonwealth Aluminium Corporation Pty Ltd Agreement Act 1957 (Qld) (Comalco Act)*,²⁰ and even though that legislation ignored the obligations of the state to protect the interests of those under its direct protection and control.

III THE SCALE(S) OF DENIAL

The legal imaginary of *terra nullius* established a political framework for thinking about the nature of property in the Australian landscape – the governance of resources, the development, settlement and planning of land use – as if Indigenous peoples' rights did not exist. As a result, the systems for governing space within the Australian colonies and in the post-Federation nation evolved as if Aboriginal and Torres Strait Islander peoples were absent from those spaces. National, state, territory and local systems of government were constructed as geographical scales – integrated structures of social, political, economic and administrative organisation in and of space.

The spatiality of these structures of governance intruded into the everyday life of Indigenous Australians in many guises. The production of a multiplicity of overlapping, extinguishing and co-existing land titles imposed a new spatial organisation on the traditional estates of Indigenous peoples. Fences (often built with Indigenous labour) and property boundaries reorganised spaces that were previously governed unequivocally by the Dreaming. Local council and other administrative boundaries shaped the connectivity between places that had previously been linked by patterns of movement, trade and culture. Industries built upon property relations that denied Indigenous existence reconfigured the social, environmental and cultural capital of Indigenous societies as the interest-free capital input for national development. Publicly funded transport and communications infrastructure changed the nature of remoteness and isolation in the landscape. Various missionaries, protectors and other 'saviours' disciplined the Aboriginal and Torres Strait Islander presence in the landscape in ways that 'opened up' country for development. Simultaneously, the development of an intrusive, largely hostile and deeply racist 'native affairs' administration imposed an unprecedented level of social control on Indigenous people at the micro-scale of everyday life, governing where people could reside, for whom they could work, how they could organise themselves, what they could own, who they might marry, and whether their children could stay in their families.²¹

²⁰ *Wik Peoples v State of Queensland; Thayorre Peoples v State of Queensland* [1996] HCA 40.

²¹ See eg, R Kidd, *Black Lives, Government Lies* (2000); B Rosser, *Dreamtime Nightmares* (1987). On the 'stolen generations' and the relationship between those policies and the dominant culture of denial see eg, M Fraser, 'The Past We Need to Understand' (Vincent Lingiari Memorial Lecture, Darwin, August 1992). This speech is available at AUSTLII <<http://www.austlii.edu.au/au/other/IndigLRes/car/2000/2408.html>> 15 August 2006; Human Rights and Equal Opportunity Commission (HREOC) Report, *Bringing Them Home: National*

It is relatively easy to recognise in such mechanisms of social control and governance the processes of possession and occupation of ‘new’ territories. It is equally clear that such practices construct new scales of governance and spatial structure that constrain Indigenous peoples. What is less obvious, however, is the fate of the spatialities of Aboriginal and Torres Strait Islander self-governance in these processes. Erasure of those spatialities, those scales of governance, underpins the Crown’s claims to possession. Erasure of the scales at which Indigenous peoples’ relationships with each other and with their country are constructed is a direct consequence of non-Indigenous possession through the imaginary of *terra nullius*. Indeed, as the legal landscape constructed in the *Gove Land Rights* case²² confirms, this erasure, more than physical dispossession, effects the so-called ‘dispossession’ of Indigenous Australians whose lands were never actually possessed by the colonial other.

What can be seen here is the construction of a politics of denial which privileges a legal landscape of absence and dispossession built upon the imaginary of *terra nullius* over the cultural landscapes and the physical realities of continuing Aboriginal and Torres Strait Islander presence in and possession of their traditional countries. This is unambiguously a *scaled* politics. It is simultaneously a politics of erasure and of counter claim, in which Australian governments commissioned actions that purported to dispose of Indigenous peoples’ key assets through grants of land, provision of mining and forestry rights, and the establishment of key resources (such as water, fisheries and minerals) as properties of the Crown.

It is precisely this scale politics of erasure and denial that is hidden within the dominant culture’s heroic narratives of possession, settlement and development. It is this scale politics that is at the core of the ‘deep colonising’ processes of the ostensibly benign construction of welfare dependence, the paternalistic policies of social supervision and micro-management, and the continuing orientation of ‘capacity building’ for Indigenous Australians around issues of work readiness rather than self-government.²³ Much academic and political attention has been focussed on the impact of these policies at the scale of the individual and the family, in the process representing Indigenous societies as less coherent, even less governable than they actually are. Such approaches risk rendering the ultimate policy solution in terms of more government intervention, more support and more welfare – leaving quite invisible the issue of self-governance. In the process it is not only certain policy options that are made more or less inaccessible, but the scales at

Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families (1997); R Manne, ‘In Denial: the Stolen Generations and the Right’ (2001) 1 *Australian Quarterly Essay* 1.

²² *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141.

²³ See Deborah B Rose, ‘Indigenous Ecologies and an Ethic of Connection’ in N Low (ed), *Global Ethics and Environment* (1999) 175.

which Indigenous peoples themselves might organise or act to achieve different outcomes are also treated as non-existent.²⁴

In creating the settler nation's mythical *patria nullius*,²⁵ however, it was not only the construction and institutionalisation of the new scales of state administration and federalism that were critical. Erasure of the geographical scales that reflected, reinforced and witnessed Aboriginal and Torres Strait Islander peoples' possession, presence and emplacement was also necessary. When the landscape was emptied, it was not simply the removal of people, but also the erasure of their institutional traces that created the colonists' cadastral *tabula rasa* – the empty spaces onto which the colonial and post-colonial projects of governance, development and possession could be inscribed. Australia's dominant culture is neither simply a culture of stoical silence against the injustices of environmental conditions in empty physical landscapes that were hostile to European imaginaries of development and prosperity, nor a matter of simply forgetting.

... [I]nattention on such a scale cannot possibly be explained as absent-mindedness. It is a structural matter, a view from a window that has been carefully placed to exclude a whole quadrant of the landscape. What may well have begun as a simple forgetting ... turned under habit and over time into something like a cult of forgetfulness practised on a national scale.²⁶

As the re-emergence of the political construction of ignorance and fear of both the Indigenous and alien other in Australia since the mid-1990s reminds us, the dominant culture in Australia still reflects a firmly entrenched hostility towards Indigenous Australians. It is this tendency to operationalise a deep-seated fear of the Indigenous presence that Stanner targeted when he wrote that

[a]ll land in Australia is held in consequence of an assumption so large, grand and remote from actuality that it had best be called royal, which is exactly what it was.²⁷

It is this tendency that nurtures a culture of erasure and denial in which genocidal intent, and its spatial partner, ethnic cleansing, have been close companions of benign neglect and racially targeted patronage, in the form of welfarism with limited rights, of Indigenous peoples and their rights.

²⁴ I am deeply grateful to my doctoral student Sherrie Cross, whose unpublished and ongoing work on the scale politics of the Australian reconciliation process has been a major factor in much of my thinking on this issue and the source of the idea of an erasure of scales of Indigenous governance as a product of existing policy settings.

²⁵ Despite my poor Latin, I intend this to conjure the image of an empty fatherland, open to settlement and development by the settler society.

²⁶ W E H Stanner, *After The Dreaming: Black and White Australians – An Anthropologist's View* (1969) 25.

²⁷ Ibid 26. Stanner goes on to foreshadow the unsettling of the mythical landscape of Australian property law by native title, 27.

So, while Indigenous customary law continues to create lived cultural landscapes in which human-human and human-nature relationships are unable to conceive of, let alone concede, dispossession as a reality, the legal landscape has made real an imaginary of Crown possession and Indigenous absence. Using the tools of their ancient jurisdictions, including the scales at which governance, territory (country) and accountability (law) were constructed, Indigenous peoples have negotiated their continuing presence in the cultural landscapes of the nation in many ways.²⁸ Indigenous Land Use Agreements, land rights legislation, co-management agreements over protected areas and direct political influence are just a few of the ways in which contemporary Indigenous governances²⁹ assert continuing presence in the cultural landscape.³⁰ This persistent presence continues to trouble the legal landscapes being constructed to ‘manage’ the unruly and unsettling intrusion of native title into the previously untroubled realities of Australian property and culture.

IV THE SCALE POLITICS OF GOVERNANCE

This erasure of the scales at which Indigenous governance is institutionalised within self-governing Indigenous polities has been a policy target for most Australian governments over the totality of Australian settlement history. This is not just a question of rendering some scales as invisible, or somehow leaving them missing from analyses.³¹ It has been – and continues to be – an *active* erasure that has been a crucial element in the scale politics of Indigenous rights in Australia. Despite its significance, however, it is not been subject to explicit consideration in academic commentary. And yet, like many elements of analysis which take scale seriously, once this issue is identified, it quickly becomes both obvious and powerful in terms of its relevance to strategic thinking about Indigenous rights.

In my experience, Indigenous sovereignty is not to be found like a pearl glistening in the archival documentation of whitefellas’ generally warped understanding of pre-contact societies – which they only rarely acknowledged as ancient jurisdictions with an exclusive entitlement to their territories. Whatever the great value of

²⁸ For a fine example of this, which challenges many iconic representations of dispossession and victimisation of Aboriginal people, see the currently unpublished work of another of my doctoral students, Kim Doohan. Doohan’s work on the Argyle Diamond Mine explores the messy hybridities generated by Indigenous efforts to transform relations between the mine and the traditional Aboriginal landowners through a range of cultural practices aimed at disciplining the company to conform to economic and social relationships governed by customary law.

²⁹ ‘Contemporary Indigenous governances’ is a term coined by Sherrie Cross to refer to the current relationships of leadership, accountability and resistance that organise the discourses of Indigenous presence in many settings. Sherrie Cross, *The Scale Politics of Reconciliation* (PhD thesis (in prep), Department of Human Geography, Macquarie University).

³⁰ Sherrie Cross, *The Scale Politics of Reconciliation* (PhD thesis (in prep), Department of Human Geography, Macquarie University).

³¹ Judd refers to ‘missing scales’ in her discussion of local governance in the USA. See D R Judd, ‘The Case of the Missing Scales: A Commentary on Cox’ (1998) 17(1) *Political Geography* 29.

historical research, it is not in demonstrating the prior sovereignty of Indigenous nations. Sovereignty, the capacity to exercise self-government, is rather to be established in the contemporary relationships of Indigenous governances as they meet the challenges of *acting* as sovereign peoples. Around Australia, we find that the dominant culture often enters negotiations with native title claimant groups on the basis that extinguishment of native title is a reasonable condition for finalising an agreement. In other settler nations, there are many examples of the conditional extension of recognition of some subset of Indigenous rights by governments – conditional upon surrender of some specific rights. For example, Canada's insistence on extinguishment of native title as a condition for signing modern treaties, or the United States' insistence on acceptance of formal status under federal legislation as a condition for receiving so-called self-government funding or protection of intellectual property rights of Indian artists.

Erasure of the institutional and cultural elements of customary law – including the relationships, values and behaviours that constitute the scales of Indigenous governance – is thus rendered an inevitable corollary of the ostensibly generous practices of so-called 'recognition' or 'reconciliation'. In the process, as Taiaike Alfred, an Indigenous Canadian commentator, points out, the foundations of Indigenous governance and difference are undermined:

The fact is that neither the state-sponsored modifications to the colonial-municipal model (imposed in Canada through the Indian Act and in the US through the Indian Reorganization Act) nor the corporate or public-government systems recently negotiated in the North [ie Nunavut] constitute indigenous governments at all. Potentially representing the final solution to the white society's Indian Problem, they use the cooperation of Native leaders in the design and implementation of such systems to legitimize the state's long-standing assimilationist goals for indigenous nations and lands.³²

One of the findings of Canada's Royal Commission on Aboriginal Peoples was that the requirement of extinguishment as a condition for concluding modern treaties was unnecessary to achieve the government's policy goals, and that that requirement placed an inequitable and unsustainable burden on First Nations. In other words, if we take the national policy goals at face value – the achievement of just, equitable and sustainable outcomes for Indigenous peoples within diverse, multicultural nations – erasure of the building blocks of cultural difference should not, and indeed cannot, be a legitimate requirement of policy implementation. In the Australian context, this suggests that the current Federal Government policy orientation towards so-called 'practical reconciliation' – in which mainstreaming of services to Indigenous groups, opposition to the principle of Indigenous self-determination, and disestablishment of key institutions of Indigenous dissent and response – is based on a rather shallow assimilationist view of race relations, cultural difference and social diversity.

³² T Alfred, *Peace, Power, Righteousness: An Indigenous Manifesto* (1999) 3.

In jurisdictions where there is a more sophisticated engagement with the challenges of Indigenous presence and cultural diversity than exists in Australian federal politics, a scaled analysis holds promise of a re-orientation of efforts towards a negotiation of the recognition of Indigenous rights and concomitant acceptance that Indigenous groups have a right to self-determination and self-governance.

V A NEW SCALE POLITICS OF CO-EXISTENCE? THE SOUTH AUSTRALIAN EXPERIENCE

This has certainly been my experience in working on statewide negotiations for recognition of native title in South Australia.³³ In these negotiations, South Australian native title claimant groups insisted that non-extinguishment of native title be a non-negotiable principle underpinning any negotiating position they developed. The South Australian Government entered into discussions with the Aboriginal Legal Rights Movement (ALRM) (the representative body of the native title interests) with an expectation that extinguishment was a necessary outcome of any negotiated settlement. Insistence on such a position, however, was clearly likely to produce (at best) a stalemate in negotiations and undermine chances for any cooperative and constructive long-term outcome.

Dealing with the details of the ongoing South Australian negotiations is beyond the scope of this paper.³⁴ It is worth noting, however, the process's requirement for an extraordinarily diverse group of Aboriginal people to come together to make decisions about how to negotiate, and what to negotiate – to decide how they would reconfigure the people-to-people and people-to-country relationships that reflected and embodied customary law³⁵ – to allow them to govern the negotiating process themselves. The claimant groups, organised separately as Native Title Management Committees (NTMCs) encompassed groups whose experience ranged from almost complete displacement from now-urbanised territories through to groups who

³³ I was employed as a consultant by the South Australian Aboriginal Legal Rights Movement in 1999, and have maintained a link to the processes in South Australia ever since. See eg, P Agius, J Davies, R Howitt and L Johns, *Negotiating Comprehensive Settlement of Native Title Issues: Building a New Scale of Justice in South Australia* (2002). Available online at Australian Institute of Aboriginal and Torres Strait Islander Studies <<http://ntru.aiatsis.gov.au/ntpapers/IP20v2.pdf>> January 2006.

³⁴ A detailed account of the first period of the negotiations was commissioned by the Aboriginal Legal Rights Movement. See J Morrison, *Uniting The Voices: Decision Making to Negotiate For Native Title in South Australia* (2000), available online at <http://www.iluasa.com/documents/ALRM_JMorrison_Uniting%20the%20Voices%20040601.pdf> January 2006. See also P Agius, J Davis, R Howitt, S Jarvis and R Williams, 'Comprehensive Native Title Negotiations in South Australia' in M Langton, M Teehan, L Palmer and K Shain (eds), *Honour Among Nations? Treaties and Agreements with Indigenous People* (2004) 203. My account in this paper draws heavily on published material that was co-authored with colleagues who have been instrumental in the development of the negotiations, particularly Parry Agius. This interpretation of the significance of the issues raised by the South Australian statewide process, is my own, rather than that of my colleagues.

³⁵ J von Sturmer, 'A Critique of the Fox Report' in AIAS, *Aborigines and Uranium: Consolidated Report on the Social Impact of Uranium Mining on the Aborigines of the Northern Territory* (1984).

maintain a wide range of traditional cultural practices and strong links to their traditional territories. There were also significant cultural differences within the various claimant groups. As my colleagues and I noted in a recent overview of the South Australian experience, there were many challenges to be met:

For ALRM there were particular challenges in establishing the negotiations because, unlike government and industry groups, native title claimants had no decision-making structure beyond the scale of their local group. How to facilitate consideration of the proposal to negotiate [at a whole-of-state scale] by a large group of native title claimants whose diverse members were scattered across the State and far beyond, and in some cases who had never previously met? How to present the 'bigger picture' – to excite claimants about the potential outcomes from negotiations – but also to encourage an appreciation of the practical realities involved in achieving such outcomes? How to build the required negotiating skills and how to facilitate informed decision-making?³⁶

Over several years, the claimant groups met in conference to grapple with these challenges. They ultimately developed a new organisational infrastructure – which they labelled a 'congress'. The congress – formally the Statewide South Australian Congress of Native Title Management Committees – was the space for the development of a new scale for making decisions. It embodied the 'united voice' of the individual NTMCs while allowing each NTMC to retain autonomy in its own decision making. It did this by using an opt-in process by NTMCs for decision making within the Congress, in which proposals, formulated from presentation and discussions, were put forward in plenary Congress forums. Each NTMC debated and reached its own decision as a small group, operating within its own decision making framework. Each NTMC then reported back to the Congress with its decision. The process, which also included language translations of many parts of the Congress, was a protracted one, but ultimately it seemed to produce a result understood and owned by all present. The process itself demonstrated effective self-determination and self-governance by such groups.

This demonstration was important as

[t]he governance capacity of native title groups is critically important in ensuring that their priorities and protocols are respected in the process of negotiating and in the issues that are negotiated. In reflecting on their experience in complex negotiations, Canadian First Nation leaders have said that they felt like they were negotiating the constitution of a new country ... To generate the required capacity for Indigenous self-governance in such negotiations, it is necessary to develop new competencies within the native title system, within the claimant community, and between Indigenous and non-Indigenous stakeholders.³⁷

The South Australian process has produced a genuinely new way of doing things, a new scale politics – at least in the context of Australian Indigenous experience.

³⁶ See Agius *et al*, above n 34, 209.

³⁷ See Agius *et al*, above n 34, 210.

ALRM has consistently tried to work in ways that construct authority within the structures and institutions of customary law rather than requiring authorization of Aboriginal processes by non-Aboriginal agents. We have acted as if it is self-evident that Aboriginal peoples are self-authorizing. We have, in this sense, acted as if sovereignty on matters of governance and authority resided with the native title interests as principals rather than dealing with them as ‘clients’, ‘victims’ or ‘claimants at law’. In light of my earlier discussion about the erasure of the scales of Indigenous governance, it was perhaps inevitable that this required the native title claimant groups to build ‘a new scale for doing things’:³⁸

Through their action in setting up the Congress, the NTMCs have constructed two new scales for Aboriginal politics in South Australia. First, they have reasserted the primacy of their claim-based domains and organization. This is consistent with the basic principles of The Dreaming and ensures that local issues are dealt with locally. Local agreements, even if they are negotiated under principles and procedures which apply across the State, will still be negotiated by the locals for the locals.

Second, the NTMCs have constructed a new scale of Indigenous self-governance at the whole-of-state scale. This brings them into a negotiating relationship with the State and major industry groups in which they decide, they do the driving, and they see themselves as equals. This, it seems to us, is a unique situation in Australia. Elsewhere we see the notion of treaty negotiations as largely abstract, chaotic and legalistic, and as lacking accountability to country. The Congress provides a concrete arena for negotiation of the range of issues that any treaty-making process must address. It offers the framework of Indigenous cooperation that any treaty-making process must develop. It builds the understandings, knowledge and skills that claimants need to implement whatever is negotiated. It also tackles the key question of how The Dreaming, and not whitefella structures, should frame the whole process.³⁹

In tackling this task, recognising the scale politics that influenced the interplay of local concerns within and between claimant groups, the communities they were part of, their (sometimes competing) claims, and the drivers for various interests within the Aboriginal domain (as well as non-Aboriginal parties⁴⁰) became an important element in thinking about what we were doing.⁴¹ In discussions with the state

³⁸ See Agius *et al*, above n 33, 10.

³⁹ See Agius *et al*, above n 33, 11.

⁴⁰ The non-Aboriginal participants in the South Australian process were the South Australian Government, South Australian Chamber of Mines and Energy, South Australian Farmers Federation, South Australian Fishing Industry Council, Seafood Industry Council of South Australia, and the Local Government Association of South Australia. The National Native Title Tribunal has had official observer status in the process.

⁴¹ In referring to ‘we’ here, I mean the group of Aboriginal leaders and non-Aboriginal advisers who constituted the Technical Advisory Group and ALRM Statewide Secretariat. Andrew Collett provided legal advice, along with Mr Malcolm Gray, QC, a former South Australian Solicitor-General. Dr Mike Metcalf, who had been a senior advisor to a previous state Treasurer, provided political and financial advice. Ms Lesley Johns, a media consultant, provided media and communications advice, Rhian Williams provided advice on procedural matters, and Jo Fox and Venessa Kealy, young geographers from Macquarie University,

negotiators, we emphasised the realities of coexistence in the regions of South Australia – that legal extinguishment of native title would not remove the Indigenous presence in these places, and that legal defeat of the native title claims would, in fact, remove a valuable political trigger for addressing the challenges of social transformation arising from the acknowledgement that Indigenous people did have status as prior owners of the state. In this sense, we also sought to re-scale government and industry understanding of the problem, drawing them back to the scales at which the native title claimant groups constructed their interests, and the need to avoid assuming that Indigenous people would meet a statewide political or industry voice with a united voice of their own. In doing so, we confronted many of the hidden assumptions that arise from the taken-for-granted vantage point of the beneficiaries of colonisation and the consequences of the previous erasure of Indigenous scales in South Australia.

VI CONCLUSIONS

The South Australian experience has influenced my thinking about scale as a tool for informing and understanding Indigenous political process in post-*Mabo* Australia. No doubt my own thinking also influenced the way that the Indigenous parties to these negotiations thought about the scale politics in which they were involved.⁴² In seeking to develop processes that were accountable within the Aboriginal⁴³ domain, rather than imposing accountability to governments or establishing extinguishment of native title as a pre-condition for participating in the negotiations, we were always confronting the scale politics of the difference between Indigenous law's idea of the primacy of the local and governments' constructions of geographical equity. In this way we were able to meaningfully emphasise the need for 'solutions' which apply across the totality of the Indigenous territorial domains, regardless of internal diversity.

In this context, getting the scale which frames the relations within Indigenous politics correct became a central strategic challenge in the organization of the Indigenous response to the state government's proposal of a statewide negotiation.

It has generally been assumed that it will be appropriate to use existing Aboriginal and Torres Strait Islander organisations – even if they were the products of non-Indigenous legislation – or to create new alliances between existing organizations. In the first round of meetings in South Australia, we directly experienced the consequences of the historical erasure of the relationships, institutions and practices

provided research and administrative support. I led the strategic Technical Advisory Group. Additional expert reports and advice were commissioned on specific topics from a number of fields including environmental issues (Dr Jocelyn Davies, Geography, University of Adelaide), pastoral issues (Don Blesing) and others, but total consultancy costs were kept below 30% of total costs, including payment for both levels of technical advice.

⁴² My presence also influenced the thinking in the native title groups that I was working with, although I hasten to add that the conceptual framework that I have developed about scale was not discussed explicitly in presentations about the practicalities of negotiations.

⁴³ See n 1 above.

that constituted the scales of Aboriginal governance across the state – and the need to reconstruct the relationships that constitute the scales of Aboriginal governance as a basis for informed, contestable and accountable decision-making about important issues and opportunities. In my own presentations to the Aboriginal decision-makers in South Australia I talked about the need to realize that we were dealing with a situation in which the decisions made would reshape the future for many generations to come – and that all of us should act in ways that our grandchildren would be proud of in the future. Given the ever-present discourses of how previous leaders had betrayed the trust placed in them, or had been beguiled by tricky whitefella negotiators, the explicit discussion of long-term sustainability and inter-generational accountability gave many of the participants pause for thought.

In some meetings, internal disagreements arose. These disagreements became vehicles for reformulating self-authorized decision-making at the emerging scale of the whole-of-group, a scale which ultimately emerged as ‘the congress’. In these situations, there was no technical problem for resolution, just issues within the Aboriginal political domain for decision and questions about the political construction of process and procedure within the Aboriginal decision-making process. In ensuring that we did not repackage these issues as technical issues that could be resolved by reference to a lawyer or other non-Aboriginal expert, we sought to facilitate the development of an internally robust political process that could tolerate difference and dissent and was not constrained by a need to conform to an outsider’s view of ‘Aboriginal consensus decision-making’.

In contrast to this approach, the formal native title system has developed as a domain for experts, a domain from which many Aboriginal and Torres Strait Islander Australians are deeply alienated. In choosing either to ignore or endorse this, Australia risks wasting its ‘once-in-a-nation’s-lifetime opportunity to settle a question of fundamental grievance’⁴⁴ and reproducing the alienation and pauperisation of previous well-intentioned but catastrophic policy settings. In many jurisdictions, native title negotiations risk becoming another mechanism that facilitates the use of indigenous lands in resource development. Expert consultants employed by representative Aboriginal bodies do deals with experts from industry to deliver the benefits that they decide should be delivered to Indigenous people. The National Native Title Tribunal’s approach to mediation reinforces the notion that that process is aimed at meeting the needs of the *Native Title Act* rather than ensuring that the operation of the Act meets the needs of the participants in the native title system, or respects the sovereign, self-authorising autonomy of Indigenous peoples. Indeed, the legal logic of that approach is as impeccable as its social logic is absurd. Its implications will effectively see the native title system pre-empt, even usurp Indigenous Australians’ right to self-determination and self-governance. It will represent a new iteration of the scaled politics of erasure and denial of Indigenous rights in Australia.

⁴⁴ Noel Pearson, ‘Indigenous Australia: The Social and Cultural Predicament’ (The Fifth Annual Hawke Lecture, Adelaide Town Hall, 3 November 2002). This speech is available online at <www.unisa.edu.au/hawke/events/ahl/2002/ahl-pearson.asp>15 August 2006.

In the South Australian case, the need to meet the state's proposal to negotiate a comprehensive, statewide response to native title constantly pushed the Aboriginal participants to rescale their relationships with each other – to fit their 'local' concerns into a set of relationships and issues at a wider scale. In this sense, getting the scale right was not so much an abstract or analytical challenge as a practical political challenge. Similarly, overcoming the implications of the historical erasure of Aboriginal governance from South Australia's cultural landscapes became a practical necessity, not an idealized political or social theoretical ambition.

In this way, we were forced to grapple with the messy realities and scaled politics within and between claim groups and across the state as practical issues. On reflection, much of my professional life has sought to achieve exactly this. In the early 1990s I worked with Aboriginal people at Napranum to reshape their relationship with Comalco, the company that had been mining bauxite from their traditional lands since the late 1950s. Despite my best efforts to engage Comalco in shifting its relationship from one of paternalistic management to one of partnership,⁴⁵ the Aboriginal groups were ultimately compelled to take unilateral action to shift the relationship. Nearly fifteen years on, the implementation of the Western Cape Communities Coexistence Agreement suggests that coexistence is now deeply embedded in the perception of all parties on western Cape York Peninsula. But this coexistence is not the slippery legal concept produced by the High Court in the *Mabo* decision. The possibility for that was ruled out in the Court's decision in *Wik*,⁴⁶ where it was confirmed that the *Comalco Act 1957* had 'legally' extinguished native title, thus rendering the capacity for coexistence zero in legal sense. Once again, the legal imaginary was inconsistent with realities of the cultural landscape. In using the messy reality of coexistence in time and space to catalyse the negotiation of a sustainable and just recognition of peoples whose interests the law asserts have ceased to exist, the parties on western Cape York Peninsula have shifted away from a (very recent) history of erasure and denial. Again, the structures for the implementation of such agreements will construct new scales of engagement and governance for the affected groups. It is in these new scales, and in the scale politics of the negotiation of terms for the continuing Aboriginal and Torres Strait Islander presence in such settings, that we are likely to see the emergence of new scales of coexistence that reshape the national imaginaries and produce the cultural landscapes that we are led to dream of.

⁴⁵ See eg, R Howitt, *Developmentalism, Impact Assessment and Aborigines: Rethinking Regional Narratives at Weipa* (1995).

⁴⁶ *Wik Peoples v State of Queensland; Thayorre Peoples v State of Queensland* [1996] HCA 40.