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USE HEADINGS AND CORRECT CITATION! DEFINE TERMINOLOGY – Overturn, Overrule, distinguish or analogise from case history -

Indigenous Law Essay Scaffold

The Impact of Law on Indigenous Peoples & Indigenous Concepts of Law — Vines, Law and Justice in Australia (2013)

Overarching argument: Australian law has systematically failed to recognise Indigenous peoples as holders of a distinct, sophisticated legal system. From the fiction of *terra nullius* to the narrow application of native title, the common law has treated Indigenous law as an obstacle rather than a coexisting framework, producing enduring dispossession, cultural destruction, and ongoing inequality.

Argument:			
Question emphasises "impact of law" Focus: state power, harm, dispossession	[redacted]	[redacted]	
Lead with: The law has operated as an instrument of colonial power, actively denying Indigenous peoples sovereignty, land, and cultural identity. Cases such as *Trevorrow* (state liability for stolen generations) and *Mabo No 2* (overturning terra nullius) bookend a history of legal harm followed by only partial legal remedy. **Arc:** Terra nullius doctrine → denial of land rights → control of persons (Namatjira) → stolen generations (Trevorrow) → belated but qualified recognition (Mabo → Yorta Yorta rollback).	[redacted]	[redacted]	

	[redacted]		
Themes			
Theme 2: Indigenous customary law is a legitimate legal system — denied, not absent Use when: question concerns Indigenous concepts of law or recognition	**Theme 3:** Law as a tool of control — infantilisation and wardship Use when: question concerns colonial attitudes or personal control	[redacted]	[redacted]
Argument: Blackburn J in Milirrpum paradoxically acknowledged that Aboriginal law constituted "a government of laws, and not of men" — yet still denied it generated proprietary interests. The WALRC 2006 found the existence of Aboriginal customary law in WA "beyond doubt," governing "all aspects of Aboriginal life." The problem was never the absence of Indigenous law but the common law's refusal to recognise it. **Cases:** Milirrpum v Nabalco (Blackburn J's acknowledgment) → Mabo No 2 (custodial property recognised)	**Argument:** Beyond land dispossession, colonial law regulated every aspect of Aboriginal life — who they could speak to, where they could travel, whether they could drink alcohol. The wardship system in Namatjira v Raabe exemplifies what Vines calls "infantilisation": treating adults as children requiring state supervision. Even an exempted citizen like Namatjira could not escape the system's reach. **Cases:** Namatjira v Raabe → legislation (Aboriginals Ordinance 1918 NT; Welfare Ordinance 1953)	[redacted]	[redacted]
[redacted]	[redacted]		

[redacted]	[redacted]		
[redacted]	[redacted]		
Sub Argument:			
1. The Eighteenth-Century European Framework In the 1700s, international law regarding native populations was primarily an agreement among European nations that allowed them to annexe or "collect" territory. This framework established three methods for a sovereign to acquire new territory: **conquest**, **cession** (treaty), or **settlement**.	[redacted]	**Law as international law's student** Brennan J in Mabo Common law need not follow international law, but it was impermissible to maintain a doctrine that international consensus had rejected. The international recognition of native populations shifted dramatically in the twentieth	[redacted]

• **The Concept of Terra Nullius**: Territory was legally considered "settled" if it was *terra nullius* (belonging to no one). International law expanded this definition to include inhabited land if the indigenous people were not organized in a society "united permanently for political action" or were categorized as "backward peoples".	[redacted]	century, most notably with the **Advisory Opinion on Western Sahara (1975)** by the International Court of Justice. **Rejection of Terra Nullius**: The ICJ unanimously ruled that Western Sahara was **not** *terra nullius* at the time of Spanish colonisation because it was occupied by people who had a social and political organization, even though they were nomadic. **Decolonisation and Human Rights**: This ruling reflected a broader global movement toward recognizing the rights of indigenous people as "universal human rights"	
[redacted]	[redacted]	[redacted]	[redacted]
Cases			

Cooper v Stuart (1889) 14 App Cas 286 LAND RIGHTS - X **Privy Council · terra nullius foundation**	[redacted]	R v Wedge [1976] 1 NSWLR 581 AUTONOMY - X **SC NSW · Rath J · British law applies to all**	[redacted]
Key holding: Lord Watson described NSW as "a tract of territory practically unoccupied, without settled inhabitants or settled law" — the foundational statement of terra nullius doctrine. **Link to customary law:** By declaring the colony "settled," English law automatically became the law of the territory. Indigenous law was rendered legally invisible by definitional exclusion, not factual inquiry. **Critical use:** Cited and relied on in both *R v Wedge* and *Mabo No 2* (Brennan J later called this "discriminatory denigration"). Use to establish the origin of the problem. **Theorist link:** Brennan J in *Mabo* characterised the theory as "false in fact and unacceptable in our society."	[redacted]	**Facts:** Wedge, an Aboriginal man, argued the court had no jurisdiction over him because he should be dealt with under customary law. **Key holding**: Rath J rejected the plea. Relying on *Cooper v Stuart*, the court held that because NSW was a "settled" colony, English law extended to all inhabitants equally — including Aboriginal people. There was no separate sovereign jurisdiction for customary law. **Essay use:** Demonstrates how the settled colony fiction had direct, concrete consequences for Aboriginal people — they were subjected to English law without any recognition of their own. Argument pair: Use alongside *Milirrpum* — both cases in the same decade illustrate total denial of Aboriginal legal standing, both on land and in criminal matters. **A 1976 court was bound by a 1889 Privy Council decision —** 87 years of law separating them. Rath J could not distinguish Cooper v	[redacted]

	[redacted]	Stuart: the facts were legally identical in the relevant sense (the settled colony classification). He could not overrule it (a SC judge cannot overrule the Privy Council). He could only follow it. This is the doctrine of stare decisis at its most visible — and most rigid. **The formalist/declaratory theory in action:** Rath J did not engage with whether Cooper v Stuart was correct or just. He applied it because it was binding.	[redacted]
Mabo v Queensland (No 2) (1992) 175 CLR 1 LAND - ✓ High Court · overturns terra nullius See bellow	[redacted]	[redacted]	[redacted]
	[redacted]	[redacted]	[redacted]

[redacted]	[redacted]	**"skeleton of principle"** • must be consistent with existing common law • The primary function of the "skeleton of principle" is to act as a limit on the power of judges to alter the common law. Brennan J argued that while courts have a duty to evolve the law to meet "contemporary notions of justice and human rights," they are not free to do so if the change would "fracture" this underlying skeletal structure **Radical Title** *"a title, adapted from feudal theory… a postulate of the doctrine of tenure and a concomitant of sovereignty"* It enables the Crown to grant land to others (creating a "tenure") or to take land for itself (becoming the "beneficial owner") [404–405]. **Beneficial Title** If land were truly *terra nullius* (unoccupied), the Crown would take *"an absolute beneficial title… because there would be no other proprietor"*	**9 Principles** **radical title –** **Beneficial title** **Tenure -** **1st Principle** The Crown's acquisition of sovereignty over the several parts of Australia cannot be challenged in an Australian municipal court. **2nd principle** On acquisition of sovereignty over a particular part of Australia, the Crown acquired a radical title to the land in that part. **3rd Principle** Native title to land survived the Crown's acquisition of sovereignty and radical title. The rights and privileges conferred by native title were unaffected by the Crown's acquisition of radical title but the acquisition of sovereignty exposed native title to extinguishment by a valid exercise of sovereign power inconsistent with the continued right to enjoy native title. **6th principle** It is immaterial that the laws and customs have undergone some change since the Crownacquired sovereignty provided the general

[redacted]	[redacted]	*"not a corollary of the crown's acquisition of a radical title… that the crown acquired absolute beneficial ownership… to the exclusion of the indigenous inhabitants"* **Tenure** *"The characteristic of feudalism 'is not tenere terram [to hold the land], but tenere terram de X [to hold the land of X]'… 'tenure' is used to signify the relationship between tenant and lord… not the relationship between tenant and land"* **Native title** *"possessed under the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants"* *"not an institution of the common law and is not alienable by the common law"*	nature of the connection between the Indigenous peopleand the land remains. Membership of the Indigenous people depends on biological descent from theIndigenous people and on mutual recognition of a particular person's membership by that personand by the elders or other persons enjoying traditional authority among those people. **7th Principle** Native title to an area of land which a clan or group is entitled to enjoy under the laws and customs of an Indigenous people is extinguished if the clan or group, by ceasing to acknowledge those laws,and (so far as practicable) observe those customs, loses its connection with the land or on the deathof the last of the members of the group or clan.
Theorists			
[redacted]	**Kevin Gilbert: Because a White Man will Never Do It (1973)** Academic — critique of Yorta Yorta	[redacted]	[redacted]
[redacted]	As land was not merely a source of sustenance but also a **living spiritual entity**, an inextricable part of the life of the tribe, the	[redacted]	[redacted]

[redacted]	question of transfer or barter could never arise, for this would have implied the bartering of the very soul sustenance, the **Dreaming**, which would have been tantamount to suicide for the tribe." “The inheritance of land was a **totally secure, neverending state of possession** that extended generation after generation to all those born within the material and spiritual boundaries of their tribal area." **Redfern park speech 1992 Paul Keating** "It begins, I think, with that act of recognition. Recognition that it was we who did the dispossessing". "We took the traditional lands and smashed the traditional way of life. We brought the diseases. The alcohol. We committed the	[redacted]	[redacted]