



# *Terra Nullius*, Legal Sovereignty, and the Effect of British Attitudes on Indigenous People

## Introduction

This resource outlines what the doctrine of *terra nullius* means and how this fiction came to describe British rule in Australia. It also outlines how the British legally claimed sovereignty over Australia via occupation and its effect on the Indigenous people. Lastly, we look at *Mabo (No 2)* - the 'native title case' - and the overturning of the *terra nullius* doctrine.



## What is Terra Nullius?

The term *terra nullius* means 'nobody's land' or 'land belonging to nobody.' In legal jargon, *terra nullius* means 'land over which no previous sovereignty has been exercised.'

It wasn't until the late 20th century that the term *terra nullius* was used in connection to the colonisation of Australia. This term was used in a way which described ideas regarding sovereignty that were already in existence from colonisation.

## Legal Sovereignty

During the 18th century, Europeans could 'legally' gain sovereignty of a country in three distinct ways:

1. **By conquest:** sovereignty by way of force, such as through military force.
2. **By cession:** sovereignty by means of a treaty, whereby the previous government gives power to the new government.
3. **By occupation:** sovereignty by acquisition of a land currently ruled by no government or sovereign power (ie *terra nullius*).



## So, how did the British gain sovereignty by occupation in 1788, when the Indigenous people inhabited Australia and had their own customs and lores\*?

When setting out on his journey to 'New Holland' (today's Australia), Captain James Cook was given instructions from the British Government to only take possession of the land with the consent of the natives or if it was uninhabited.

Similarly, when Governor Phillip landed in Australia, he was required by King George III to 'endeavour by every possible means to open an intercourse with the natives, and to conciliate their affections...and if any of our subjects shall wantonly destroy them, or give them unnecessary interruption...it is our will and pleasure that you do cause such offenders to be brought into punishment according to the degree of the offence.'

The intentions of the British Government and what subsequently unfolded in the new colony were starkly different.

**\*Lore = the customs and stories the Indigenous people learned from the Dreamtime, and the traditional knowledge they have passed down through generations.**

This contrast can only be understood by looking through the lens of 18th century British attitudes that assumed the land was unclaimed and unowned because:

### 1. Agricultural Practices

England had been subject to rigorous agricultural farming and techniques for centuries, and therefore the British attitude held cultivation skills as a hallmark of an established society. They also believed that engaging in agriculture and farming gave property rights to landowners.

When the British landed in Australia, they saw a lack of evidence of farming and inhabitants who were primarily hunters and gatherers, not farmers. Therefore, the British believed that the Indigenous people were not agriculturally advanced, nor had they laid claim to the land through established agricultural practices.

### 2. 'Thinly inhabited'

When arriving in Botany Bay, Captain Cook noted a sparsely inhabited land. Coming from the highly dense and populated England (much smaller than the expanse of Australia), Captain Cook wrote in his diary that he viewed the new colony as 'thinly inhabited.'

Captain Cook and his accompanying botanist, Joseph Banks, also imagined that, due to the presumed lack of food or fresh water to sustain anyone successfully in such a harsh environment, the remainder of the land must be 'totally uninhabited.'



### 3. Indigenous Lore

During the 18th century in England, the British people had a recognised and well-known legal system with an established hierarchy of courts. English society had a number of highly influential and powerful leaders and an entrenched system of punishment and authority.

Therefore, when the British landed in Australia, the long-established unwritten customs and lores of the Indigenous people were largely ignored or disregarded as not constituting 'valid' law. Due to the assumption that there was no form of Indigenous government, the British believed there was no 'valid' way to make a treaty with the Indigenous Australians.

So, the British took legal sovereignty over Australia by occupation largely due to their own British attitudes about what an established territory under the control of a sovereign power was meant to look like.



## Effect of British Attitudes and Colonisation on Indigenous People

Part of the system of governance, which came with the First Fleet, was the concept of the Rule of Law. Under which the British laws applied together with the ideal that every person should have access to the protections provided by the law.

These new laws, brought by strange 'white' invaders from another country, differed significantly from the traditional law that Indigenous people were accustomed to.

The Indigenous people did not understand the law and did not know the law at all, and therefore they did not believe it to be good law to follow. This new law was entirely inaccessible to them, and Indigenous people could therefore not seek redress or justice through the British justice system.

The British believed that they were allowing the Indigenous Australians to have protections under the law. However, the way in which it was enacted did not allow for equality before the law for all people, and actually further discriminated against and distanced the Indigenous Australians from the new legal system.

Although the Governors were urged by the British Government to treat the native people with goodwill and kindness, 'tolerance' of the Indigenous people grew weary and the British failed to afford the Indigenous people with proper respect.



Property rights were established and brutally enforced. Powerful British leaders of the colonies decided the location of their new land and how much they chose to claim for themselves. Inevitably, Indigenous people would cross newly acquired settler's property, which was now considered unlawful. The crime of trespassing resulted in severe disciplinary action.

Many Indigenous people were also killed because murder was considered a rightful action by the new British convicts while defending their land rights.

Colonial governments established a large police force, consisting of military men and convicts, to split up Indigenous groups and move them on to other places to avoid conflict. The law was inconsistently enforced across the colony- especially where the frontiers were constantly expanding.

Soon, many Indigenous people came to occupy the prisons in the new colony alongside the convicts.

With the influx of British people, came diseases and illnesses such as smallpox and viral infections which spread throughout the new colony. Many Indigenous people died from these unknown diseases and the Indigenous population numbers suffered greatly.

## Overtuning the Doctrine of Terra Nullius and Native Title Act 1993 (Cth)

As of today the doctrine of terra nullius, and the notion that Australia was uninhabited at the time of English colonisation, has been overturned.

*Mabo (No 2)* was the 1992 High Court case which legally overturned the terra nullius fiction and recognised the past and continuing connection that Indigenous people have to the land. *Mabo (No 2)* also led to the creation of the *Native Title Act 1993* (Cth) ('*Native Title Act*') in Parliament.

Overall, the *Native Title Act* 'sets out processes for native title groups to negotiate agreements with other parties in relation to the use of land and waters.' The preamble to the *Native Title Act* expressly states that:

'The people whose descendants are now known as Aboriginal peoples and Torres Strait Islanders were the inhabitants of Australia before European settlement.'

...

The High Court has:

(a) rejected the doctrine that Australia was terra nullius (land belonging to no-one) at the time of European settlement.

...'