Terra nullius and the ‘history wars’

By Lorenzo Veracini

Following the publication of Michael Connor’s *The Invention of Terra Nullius* the Australian history wars have reignited. Once again, the press was responsive to an argument ostensibly attacking the left, the 1980s, the historical profession, and Henry Reynolds. May be it is because of the Australian Day season: everyone knows a cheap farce into historical polemic could score you a few points. John Howard, in the meantime, has attacked the way history is being taught.

Connor departed from terra nullius’ remarkable currency in a number of public discourses and searched for it in 18th and 19th century sources. He did not find it, and outlining terra nullus’ career in legal and more general understandings, has concluded that it has been fabricated from the 1970s and in later debates. He especially attacks Henry Reynolds and his *The Law of the Land* for claiming that terra nullus had existed at a time when the record consistently does not register it. However, while he does notfabricates his evidence, perhaps he does not understand it.

Terra nullius has a history – it should be historicised. It has had very different applications at different times and in a variety of locales (relating to sovereignty, tenure, access rights, and other issues). But the fact it did not enter public discourses and was not legally specified until later only means that its application had gone without saying for a long time. There is no mention of Aboriginal dispossession as terra nullius in the sources explored by Connor, not because dispossession was not enforced without recognition of Indigenous title, but because no Aboriginal plaintiff could bring his or her case to the courts. And they could not demand recognition of their proprietary rights because a cluster of versions of terra nullius that may have been recognisable according to a different terminology were operative. Terra nullus was not tested because its legality was not in doubt: this is one proof of its existence, not the contrary. Ironically, Connor’s research actually confirms terra nullus’ pervasive application.

One characteristic of terra nullus (whether it had been codified and discussed in legal terms or not) that The Invention of Terra Nullius ignores is that in its operative logic and by definition terra nullus covers its tracks. Indeed, Connor proves how terra nullus successfully roofed native title and itself out of the record.

Connor exhaustively shows how terra nullus was legally resurrected through and by way of native title detection at a much later stage: but this is because native title constitutes its dialectical counterpart. Connor collapses the historical process of native title resurrection with the “fabrication” of terra nullus because he misunderstands both and their intimate and mutually constituent relationship. Put another way: terra nullus is one of those things that the more it is effective, the less you see it. It must be frustrating: Connor believes he was demonstrating absence of evidence while, really, he put forward compelling proof of an evidence of absence. This absence, again, ultimately proves the very opposite of what he intended.

When one speculates about erasures, lack of evidence might itself be quite solid evidence. At the same time, Connor’s research decisively underscores the ways in which terra nullus works. Terra nullus has the remarkable characteristic of denying itself ex post facto by its very being operative. It could therefore be detected and legally assessed only by way of recovering native title - as it has been done - also ex post facto. As a result of this process, the fact that native title was resurrected only at a much painfully later stage has determined the practical ways in which terra nullus was also recovered. This dialectics of reciprocal recognition between native title and its denial need to be understood if we want to make sense of the issues Connor raises.

Terra nullus and native title are not mutually exclusive. A commonly received narrative has it that first one had native title (pre-1788), second, after terra nullus became established, that native title ceased, and ultimately, after native title was re-enacted (post-Mabo) one has no more terra nullus. While this narrative is in many ways unsatisfactory and should be integrated by a better understanding of the dynamics of settler colonial practices, it should be emphasised how terra nullus and native title are mutually constitutive and how they necessarily emerge and disappear from the record together and at the same time: in their contemporary form between the 1970s and early 1990s and, according to a different nomenclature, throughout the history of Australia’s colonisation.

In the past, many, including Patrick Wolfe (in “Nation and Miscegenation: Discursive Continuity in the Post-Mabo Era”, *Social Analysis*, 36, 1994), have noted that Mabo, contrary to other interpretations, actually constituted a peak in the logic of terra nullus as well as its partial demise. Paradoxically, as a consequence of its inner functioning, it was only at the moment of this legally endorsed partial termination that terra nullus could be properly articulated. Terra nullus and native title are so dialectically interrelated that they conceptually need each other, while terra nullus identifies native title so that it can be denied, native title establishes terra nullus so that it can be discontinued. There is no fabrication here - it’s dialectics. This is no postmodern uncertainty - it’s solid Western rationalism.

Reynolds called terra nullus what would only later be fully articulated as such. He could have made that explicit more than he did, but he was certainly right in detecting a shift from an ambiguous recognition to an absolute denial of native title to land (ultimately the very object of his research), and in explaining that it may have been illegal. Yet again, by emphasising that terra nullus is slippery, and until recently quite uncertain as a legal category, Connor unwittingly excuses Reynolds for his deliberately unspecific use of the term. Reynolds was also ultimately right - in response to Windschute - in detecting symptoms of its return as a category of intellectual inquiry. (See Henry Reynolds, “Terra Nullus Reborn”, in Robert Manne (ed.), *Whitewash: On Keith Windschute’s Fabrication of Aboriginal History*, Melbourne: Black Inc., 2003.)

I shouldn’t really need to point this out, but this poemic ultimately proves how disturbing it is for some Australians that Aboriginal dispossession should happen and that someone should mention it. Connor perhaps thinks that if terra nullus is proven to be a fabrication Aboriginal dispossession would also disappear as well as its purported rights - a conditional recognition of some customary rights we call native title.

This is odd - like expecting a corpse to disappear if we prove that the weapon that was used actually had no name or that that name had not been uttered when the murder was executed. This is also odd because one should remember that the book he specifically attacks actually showed how terra nullus had not been imperial policy and that there had been oscillations in its relevance (in another chapter of the history wars, Lyndall Ryan was accused of outlawing a history of the genocide of the Tasmanian Aborigines while her book had actually set out to prove that a genocide had not happened and that they had survived. One wonder). Is Connor sure that a description of the colonisation of Australia as non-negotiated “occupation” rather than informed by terra nullus would be preferable for Australia’s “national honour”?

If we abolish terra nullus from the public agenda - indeed if we ensure that one of its versions becomes again fully operative and that one of its specific characteristics, its insubility, becomes reintroduced - we will still need to face a lot of nowes and unlawful dispossession in Australian history and, for lack of a better term and despite Connor’s efforts, we may end up calling it terra nullus after all. Because people don’t like to be reminded that Aboriginal dispossession is one foundation of Australian history. Connor and his enthusiastic reviewers intend to consume the terminology that underpinned it. By doing so, not only they prove that terra nullus did exist; they also indicate that it persists. We live in a settler society; some like it and some - perhaps seeing that other settler countries moved on and the sky did not fall - would rather get going.

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