

# Being/Nothing:

## Native Title and Fantasy Fulfilment

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*This paper proceeds from the idea that the nation is a fantasy, an imaginary zone through which identity, belonging and control are mediated. I explore the consequences of imagining the nation in this way by reading the formative Australian cases through which Native title jurisprudence developed in this country. Those cases—Mabo, Wik and Yorta Yorta—and the public discourses surrounding them reveal the competing national fantasies at stake in disputes over property, recognition and co-existence.*

*Using the theoretical writing of psychoanalytic scholars Slavoj Žižek and Julia Kristeva, and the critique of nationalist practices from the work of Benedict Anderson and Ghassan Hage, I interrogate what it means to possess the nation.*

### I INTRODUCTION: NATION, HOME AND NATIVE TITLE

The nation is a fantasy. In the nation, we—the nation’s subjects—invest all of the qualities that give our lives meaning and value. Our nation is comprised of real spaces that, when subjected to our fantasies, become national spaces—“Australian” land—necessary to claiming a national identity that is “Australian.” The nation makes *us* Australians; to call ourselves “Australians” is to be national practitioners. What we see in the nation is the zone we call “home.” To call a space “home” is to assert a form of managerialism over that space. “Homely” management requires the performance of practices that demonstrate the power of the manager. To be a national manager is to determine who we welcome and who we exclude; the national manager decides what types of behaviour we tolerate at home and proscribes the conduct that is intolerable. These forms of national management articulate the claim that this is *our* home, not yours. *You* are a guest, whether welcome or not, always temporary and always dependant

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upon our willingness to tolerate you. Being in charge of the nation gives us pleasure. It empowers us to pursue the fulfilment of our national fantasies and to possess the nation. But we always face an obstacle.

One obstacle to the Australian national fantasy is the Aboriginal “Other” and her claim to Native title. This Other interferes with the colonial project of being at home in Australia because the Other has a prior claim to this space that constitutes a form of belonging that challenges colonial claims to possession. Despite all of our homely acts of violence—murder, infection, exclusion and legislation—the Aborigine still obstructs the fulfilment of the national fantasy. And in the role of obstacle, the Aborigine simultaneously signals the illegitimacy of the colonial fantasy and provides a motive for continued acts of colonialist dispossession. For as long as there is an Other, we are never unconditionally at home and in charge.

In this article, I focus on Native title as the arena in which national space is contested. Using the discourse of psychoanalysis, I examine psychoanalytic theorist Slavoj Žižek’s claim that the Nation is a Thing. I consider how the colonizer and the Aborigine perform their respective roles in the national fantasy, staged in disputes over Native title.

Psychoanalysis offers a helpful theoretical framework and vocabulary for approaching an area of legal discourse such as Native title, which contains at its heart conflicting claims about identity. Freudian psychoanalysis assumes that we—individual subjects—are split into conscious and unconscious parts. We are divided because our unconscious part has been repressed, and this repression prevents us from being complete. It is the perpetual desire of the individual to achieve her own completeness.

Completeness, of course, is impossible. The subject can only imagine herself to be whole by reference to something outside of herself: the Other. The Other is a fiction we construct to give meaning to ourselves. We believe that the Other possesses the piece of ourselves that we lack. While that piece is missing, we experience trauma. That piece is what we desire, whether we believe we once possessed it and lost it, or whether we never had it, but need it. We most commonly exist between lack and desire. It is the pursuit of desire, not its fulfilment, that gives us meaning. When we cease pursuing our desire, we acknowledge that we have lost what we lacked—the loss of loss. When we lose our desire, or get too close to it, we experience anxiety. It is when trauma and anxiety erupt that we become susceptible to analysis. In this article, “we” are the national subject, the colonial citizen. Native title and the eruptions of national trauma and anxiety that attend it can be read through the psychoanalytic frame of fantasy and desire, disclosing the mendacity of fantasy fulfilment as a nationalist practice.

For Žižek, the Thing is that which we most ardently desire; something we believe will make us whole. All of our endeavours are in pursuit of what we have lost: our Thing. Pursuing our Thing gives us meaning and purpose, but the meaning and purpose are themselves part of our fantasy. The Thing exists in a fantasy space. This is Žižek’s theory of the nation as a Thing. For Žižek, the

nation is a Thing because it is *something more* than what it consists of; the “more” is what gives plenitude to our lives.<sup>1</sup> In nationalist terms, it is the struggle over possession of the nation that gives us plenitude. We struggle with someone whom we imagine is trying to steal our Thing: the Other. The Other is the obstacle to our fantasy of becoming complete. They have our Thing. If only we can eliminate the Other, we can get our Thing back.

*Strangers to Ourselves* is a book about nationalism and citizenship written by the psychoanalyst Julia Kristeva.<sup>2</sup> Here she writes that the “strangeness” that characterizes the Other—the Other’s foreignness—is the displacement of our anxiety about our incompleteness. For Kristeva, the strangeness of the Other is the strangeness of the self. The citizen-individual discovers her own “incoherences and abysses” and recognizes that she is incomplete and divided.<sup>3</sup> It is in this moment of recognition that we become complete human subjects, accommodating the strangeness within ourselves. These concepts of recognition and accommodation are key aspects of Native title jurisprudence.

However, the colonialist project proceeds only when we disavow our own otherness and insist that the Other is foreign, an intruder in our fantasy space. The anthropologist Ghassan Hage, in his book *White Nation*, describes fantasies of “nation” as dependent upon our experiencing both a sense of control and of belonging. Being in charge (control) presumes a claim of being at home (belonging). But Hage locates Aborigines as the problematic obstacle to the colonist’s sense of national belonging.<sup>4</sup> The Aborigine poses both a moral and a manifest obstacle to the attainment of our fantasy: moral, because the Indigene interferes with the legitimacy of colonial sovereignty; manifest, because in contests over the ownership of land, the Aborigine is *there*, on the land, caught in the act of possessing it and belonging to it while counter-claimants invent new strategies of dispossession. A troubling division becomes apparent, where possession and belonging are split. It may be possible to possess the national space by force, but this does not resolve the problem that the colonist nevertheless does not belong to that space. Being in charge without being at home is an illegitimate position. What becomes necessary in the colonial project is the performance of power that appears not to be illegitimate or oppressive, but instead, the confident hospitality of the host at home.

Benedict Anderson in *Imagined Communities*, his landmark work on nationalism, claims that “the nation is always conceived as a deep, horizontal comradeship,” with all the strategies of exclusion and violence that accompany the imagination of a national community.<sup>5</sup> For Žižek, the nation is a fantasy space that stages *our* desire; the nation is *our* Thing. This suggests a kind of

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1. Cited in G. Hage, *White Nation: Fantasies of White Supremacy in a Multicultural Society* (Annandale: Pluto Press Australia, 1998) at 72.
  2. J. Kristeva, *Strangers to Ourselves*, trans. L.S. Roudiez (New York: Columbia University Press, 1991).
  3. *Ibid.* at 181.
  4. Hage, *supra* note 1 at 57.
  5. B. Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism*, rev. ed. (London: Verso, 1991) at 7.

compulsory adversarialism, wherein the Thing can only ever be in one place and can only ever be in the possession of one owner. For all of the rhetoric of co-existence that accompanies the jurisprudence of Native title, any analysis of the decisions that followed *Mabo*<sup>6</sup> makes it apparent that the nation can only ever be exclusively possessed. What this means for Australia is the occupation or colonization of the national space, the designation of it as the white man's home, and the management of that space and those who move around in it. The role of the Aborigine here is as overborne Other. Simultaneously conquered, dispossessed and erased, the Aborigine is the "being" and the "nothing" of Australian identity.<sup>7</sup> As obstacle to—and agent of—legitimacy, Aboriginality is the impossible kernel at the heart of the nation.

Native title acquired legal recognition in Australia in 1992 in the High Court decision of *Mabo v. Queensland [No. 2]*.<sup>8</sup> *Mabo* held that the colonial acquisition of sovereignty over Australia by settlement—using the doctrine of *terra nullius*—was a legal fiction. Settlement, conquest and cession were the three bases for colonial occupation under international customary law during the period of imperial expansion. *Terra nullius* had two possible legal interpretations. Its narrower meaning was literal: a land without people, an uninhabited place. Such land could be legally "settled" on the basis of discovery. The broader meaning referred to a land inhabited by a people without a government or system of laws. *Terra nullius* could thus be used as the basis for lawful "settlement" even though the land was already occupied. This broad interpretation of *terra nullius* had long been controversial and it was definitively overturned by the International Court of Justice in the *Advisory Opinion on Western Sahara*,<sup>9</sup> a decision that the High Court of Australia relied upon in *Mabo*.

While the *Mabo* court upheld the sovereignty of the British Crown, it decided that in certain limited circumstances Indigenous interests in land survived the acquisition of sovereignty and described this form of Indigenous ownership as "Native title." Native title under *Mabo* was only recognized over Crown land that had never been sold or leased, and only where Indigenous people could demonstrate continuing and traditional connection with that land. Despite the very narrow basis for recognition, the *Mabo* decision aroused unprecedented panic about land ownership in public debates that were manipulated and fueled by powerful political and industrial colonialist interests.<sup>10</sup>

Following the decision, the federal *Native Title Act 1993* (Cth) was enacted to provide mechanisms for the decision to be implemented and to expand the scope for further Native title claims. In 1996, the High Court handed down *Wik*

6. *Mabo v. Queensland [No. 2]* (1992), 175 C.L.R. 1 (H.C. Aus.) [hereinafter *Mabo [No. 2]*].

7. I. McLean, "Being and Nothing: Figuring Aboriginality in Australian Art History" in T. Smith, ed., *First Peoples, Second Chance* (Canberra: Australian Academy of Humanities, 1999) at 114.

8. *Mabo [No. 2]*, *supra* note 6.

9. (1975), 1 I.C.J.R. 12.

10. See especially A. Markus, "Between Mabo and a Hard Place: Race and the Contradictions of Conservatism" in B. Attwood, ed., *In the Age of Mabo: History, Aborigines and Australia* (St. Leonards: Allen & Unwin, 1996) [hereinafter *Age of Mabo*].

*Peoples v. Queensland*,<sup>11</sup> further broadening the basis upon which claims could be made. Under *Wik*, claims could be made over land subject to pastoral leases, which are leases created by statute usually over vast tracts of land. Native title could be recognized over pastoral lease holdings only where the applicants were able to demonstrate a continuing and traditional connection with the land, and where their use of the land would not be inconsistent with the use, or the terms, of the pastoral lease. *Wik* coincided with a change of federal government. The new government passed the *Native Title Amendment Act* (1998) which made dramatic incursions into whatever limited gains had been made under the High Court decisions and the original 1993 *Native Title Act*.

## II CONTEST AND CONFLICT IN AUSTRALIAN NATIONAL FANTASIES

When stripped of its fantasy components, the Thing is an empty space. For Žižek, the “transubstantiation” that makes an ordinary object into a Thing is the embodiment of “materialized Nothingness.”<sup>12</sup> This “nothingness” is the nation, and it is appropriate to imagine it either as *something in the possession of someone else*, or as *nothing belonging to no one*. In either construction, the Aboriginal Other is the ideal opponent against whom we compete for the nation. When the Other possesses the space, it is either in the wrong hands (entitling us to wrestle it back), or it is *terra nullius* (entitling us to seize it). Whereas the doctrine of *terra nullius* projects nothingness onto the Other on the assumption that there is nobody (or, at most, no legal body) there, Native title replaces the doctrine with an “inconsistency” test. Under the test, the Native title claimant *appears* solely to determine the range of competing interests that will trump her claim and render her invisible again.

The Thing creates something out of nothing. It is absence that shapes our identity. Our identity is always incomplete, always in the process of becoming, always described by what is missing. In psychoanalytic discourse, this lack is imagined as loss; something we once possessed but which has been taken from us. As Australians, it is our lost sense of belonging, our inability to feel *at home* here, that simultaneously forms and troubles our identity. It is the imagined loss of the Thing—our fantasy nation—and our attempts to get it back that give our lives plenitude and significance.

As we pursue our national desire to make something from nothing, we achieve other—smaller—desires; for Lacan and Žižek these are the *objets petit a*, the little “others,” banal or ordinary things that we invest with value, making them Žižek’s “hidden treasure.”<sup>13</sup> In the case of Native title, we encounter a plethora of them: property, precedent, acts of parliament, the negotiation table. The English common law replicates the symbolic order of Freudian psychoanalysis in which every element has its place and its role. Law, for

11. (1996), 134 A.L.R. 637 (H.C. Aus.) [hereinafter *Wik*].

12. S. Žižek, *Looking Awry: An Introduction to Jacques Lacan through Popular Culture* (Cambridge, Mass.: MIT Press, 1992) at 83 [hereinafter *Looking Awry*].

13. *Ibid.* at 77.

instance, anticipates transgression. Law and transgression give meaning to each other. Without transgression, law is unknowable and unimaginable. The symbolic order depends for its stability upon the perpetual repression of elements that genuinely threaten it. This is why it is possible to imagine the Aborigine as residing in the common law's unconscious: always there but always repressed. When a repressed element leaks out, the symbolic order ruptures and is unable to control the escaped element. The psychoanalytic term for this is "*jouissance*"; it resists the classifying capacity of law and of the symbolic order that keeps things in their place.

The *jouissance* of Native title escapes when we concede the legitimacy of the prior Aboriginal claim to the land. It is apparent when we conclude that *terra nullius*—at the foundation of all colonial claims to possession—is a fiction. After the High Court's decision in *Mabo v. Queensland [No. 2]*,<sup>14</sup> a destabilizing eruption occurred in white colonial mythology. The *Mabo* judgment was met with a nation-wide moral panic. Political leaders appeared on television wielding maps of Australia filled almost-entirely in black, symbolizing the feared encroachment of Aboriginal land claims. Citizens were warned that their backyards were threatened by Indigenous claims.<sup>15</sup> Our national fantasies of tolerance, equality and a fair go were suddenly exposed as practices of national violence, wherein Australia was only tolerant, equal and fair so long as Aboriginal people were kept in their place. To restabilize the national order, the leakage of perceived uncontrolled Indigeneity needed to be constrained. As soon as the High Court claimed it possessed a power to "recognize" the existence of the Other, it reserved several corollary powers for the colonists: to refuse to recognize, to exclude from recognition, to dispossess, to disentitle, and to extinguish. This is the seamless violence of the common law, where Indigenous people are "recognized" only when the colonist can always opt not to see them. The Aborigine, as the obstacle to the fantasy nation, needs to be moved, contained, erased, imagined and forgotten. Law is employed to shift the obstacle; law becomes the agent of fantasy-fulfilment.

The Aboriginal Other is simultaneously the being and the nothing of the fantasy nation. In Native title discourse, the Aborigine needs to be visible in, *and missing from*, the national imagination. Terry Threadgold, in her work on Native title discourse, describes Native title as "legal witchcraft,"<sup>16</sup> an apt phrase demonstrating how Indigenous people can be both there and not there. Prior to *Mabo*, the key Australian judicial decision on Aboriginal land rights was *Milirrpum v. Nabalco Pty Ltd.*<sup>17</sup> That case upheld the extant authority of the

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14. *Mabo [No. 2]*, *supra* note 6.

15. Public reactions to *Mabo* are analyzed in B. Attwood, "Mabo, Australia and the End of History" in *Age of Mabo*, *supra* note 10.

16. T. Threadgold, "Legal Witchcraft and the Craft of Fiction: *Wik* and its Literary Precedents" in A. Bartlett, R. Dixon & C. Lee, eds., *Australian Literature and the Public Sphere: Refereed Proceedings of the 1998 Conference* (Toowoomba, Queensland: Association for the Study of Australian Literature, 1998).

17. (1971), 17 F.L.R.141 (N.T.S.C.) [hereinafter *Milirrpum*].

Privy Council in *Cooper v. Stuart*,<sup>18</sup> which had held that the colonial status of Australia—a colony by settlement on the basis of *terra nullius*—was settled law. Even though the decision could not be supported by historical evidence, the court refused to interfere with the legal principle that rested upon an evidentiary vacuum.

Blackburn J. in *Milirrpum* identified the Aboriginal claimants as *there* (in fact), *there* (in Aboriginal law), and *absent* (in common law). He wrote, “If ever a system could be called ‘a government of laws, and not of men,’ it is that shown in the evidence before me.”<sup>19</sup> Nevertheless, he dismissed their claim:

*Whether or not* Australian [A]boriginals living in any part of New South Wales had in 1788 a system of law which was beyond the powers of the settlers at that time to perceive or comprehend, it is beyond the power of this Court to decide otherwise than that New South Wales came into the category of a settled or occupied colony.<sup>20</sup>

Faced with this precedent, Brennan J. in *Mabo* wrote, “It would be a curious doctrine to propound today that, when the benefit of the common law was first extended to Her Majesty’s [I]ndigenous subjects in the Antipodes, its first fruits were to strip them of their right to occupy their ancestral lands.”<sup>21</sup> In *Wik Peoples v. Queensland*,<sup>22</sup> Toohey J. pondered how, in a claim brought by Indigenous people, extinguishment of their interests in land is a tenable outcome: “There is something curious in the notion that Native title can somehow suddenly cease to exist.”<sup>23</sup> The point made by all three judges here is that Aboriginal identity, in the moment it is recognized by the common law, is *nothing*. Aborigines, when the law sees them, are *not there*.

The legal theorist Peter Rush describes Native title as the perfect vehicle for asserting the spectral presence of the Aboriginal Other in the national fantasy:

Like all phantoms, the uncanny structure of “land belonging to no one” is that it has plural places of attachment for the legal subject, the subject can enter the doctrine by way of “belonging” or be captivated by “no one.” Thus, the doctrine has been and can always be interpreted in two ways: land *belonging* to no one and land belonging to *no one*.<sup>24</sup>

*Terra nullius* enables the paradox of being and nothing to operate smoothly in pursuit of the national Thing, where “inconsistency,” discussed further below, becomes a source of power and a guarantee of possession.

The then-Prime Minister Paul Keating made a speech to Parliament in response to the *Mabo* judgment, pre-empting the introduction of the first *Native Title Act* in 1993. In his speech, Keating identified Aboriginality as the object of

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18. (1889), 14 AC 286.

19. *Milirrpum*, *supra* note 17 at 96.

20. *Ibid.* [emphasis added].

21. *Mabo [No. 2]*, *supra* note 6 at 39.

22. *Wik*, *supra* note 11.

23. *Ibid.* at 102, Toohey J.

24. P. Rush, “An Altered Jurisdiction: Corporeal Traces of Law” (1997) 6 Griffith L. Rev. 144 at 156.

national desire while also the location of national anxiety. Continued Aboriginal occupation of the land, he claimed, was the “most remarkable fact about Australia,” where “appalling brutality” was directed against “this oldest continuous civilization on earth.”<sup>25</sup> He went on to state that “[t]here is much in Australian history of which we can be tremendously proud, for here in Australia we have created a modern, tolerant, free, prosperous and democratic society.”<sup>26</sup> But this creation, this source of our tremendous pride, is imaginable only through disavowing, dispossessing and erasing the Aboriginal Other.

Keating asked, “How could we say that we stand for a fair go if we were to wipe away a title to land which lasted through thousands of years of occupation of the continent and two hundred years of European settlement? How could we explain it to Aboriginal Australians? How could we explain it to the world?”<sup>27</sup> Here, it appears that he imagined a conversation with the Other, an open gesture towards the obstacle, glimpsing the possibility that the fantasy nation—*someone’s* fantasy nation—might actually materialize. In the following minutes, however, it became apparent that he was speaking to a discrete audience: “We must maintain a system of land management in Australia which provides clear and predictable rules; security and certainty for people who hold land.”<sup>28</sup> He was addressing the possessive white landholder, the recipient of “security” and “certainty,” for whom the proposed legislation offered clarity and predictability. When he referred to “people who hold land,” he did not acknowledge Indigenous people as *already* possessing land. “We” were suddenly terrified by our illegitimacy and the Prime Minister reassured “us” that “no one who owns a home, a farm, a mine, a tourist operation—no one—need have concern about their tenure.” His *no one* is law’s everybody, the title-holding, non-Indigenous occupant of the fantasy space. Law’s *nobody*, on the other hand, is the Aboriginal Other.

Keating promised “a fair and predictable set of rules which everyone can work with” so that, after “the challenge of *Mabo* [is] effectively met ... we can move on.”<sup>29</sup> Keating’s speech is a strategy of fantasy projection where “we” are speaking to each other, “we” determine when enough is enough and “we” are ready to move on. “They” must be satisfied that “we” have heard their challenge and will conditionally give them what is left over.

It is useful to imagine Native title as that which is left over from our fantasy. *Mabo*, in its application to inadequately-annexed Crown land, and *Wik*, applying to vast and remote pastoral leases long-abandoned by their tenants, offer to Aboriginal claimants the excess, the surplus to our fantasy nation. These are the pieces of land that we can do without; our fantasy does not depend upon them.

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25. P. Keating, “Implementing *Mabo*” in M. Ryan, ed., *Advancing Australia: Speeches of Paul Keating* (Sydney: Big Picture Publications, 1995) at 232.

26. *Ibid.* at 233.

27. *Ibid.* at 234.

28. *Ibid.*

29. *Ibid.* at 235.

An alternate reading informed by Žižek suggests that we only concede those lands we never truly possessed. Žižek writes:

What we conceal by imputing to the other the theft of enjoyment is the traumatic fact that we never possessed what was allegedly stolen from us; the lack ('castration') is originary, enjoyment constitutes itself as "stolen," or, to quote Hegel's precise formulation from his *Science of Logic*, it "only comes to be by being left behind."<sup>30</sup>

In the same moment that the colonist surrenders her surplus space to the Other—space that was likely always already possessed by the Other—she also reserves for herself the power to repossess that space. The act of giving becomes an assertion of managerial power, as it contains the potential *not* to give. As Brennan J. held in *Mabo*, "their [N]ative title is effective as against the State of Queensland and as against the whole world *unless* the State ... extinguishes the title."<sup>31</sup>

Further, the act of giving is made conditional upon the conduct of the recipient. Native title claimants for land subject to pastoral leases must demonstrate—through evidence admissible in the courts—that their use of the land is not inconsistent with the rights conferred upon, and the actual use practiced by, the leaseholder. For Kirby J., the terminology used to interpret the leases—"exclusive possession" or "exclusive occupation"—has an "unreal quality."<sup>32</sup> This is because, as the historian of colonial race relations, Henry Reynolds, argued in a pre-*Wik* article, pastoral leaseholders and traditional owners existed in a state of mutual dependency: "Success of the station was dependent on the presence of traditional owners, not their absence .... Traditional owners could be depended upon because they wanted to stay on their land—they were a labour pool sunk deeply and permanently in the country."<sup>33</sup> The High Court nevertheless pursued a test based on "inconsistency," holding that any inconsistency between the interests would extinguish an Indigenous claim. Aborigines were required to work for pastoralists in order to maintain a connection with their traditional lands. This conduct is later scrutinized by courts to determine whether it is "inconsistent" with pastoral interests.

In pursuing an understanding of property that rests upon the notion of exclusive possession, the practices of mutual reliance and co-existence that describe much colonial occupation of land are rendered legally invisible. The *Wik* judgment reinforced law's reliance on a contest between opponents: self and Other. The self and the Other must be adversaries; as soon as they begin to appear compatible, some necessary inconsistency must be manufactured. Our identity depends upon our being in opposition to the Other. We may be reflected in the Other; we may recognize the Other; we may accommodate the Other. What becomes impossible is the unconditional gesture that invites the Other to

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30. Žižek, cited in Hage, *supra* note 1 at 74.

31. *Mabo [No. 2]*, *supra* note 6 at 43, Brennan J. [emphasis added]. The principles pertaining to extinguishment are now governed by legislation.

32. *Wik*, *supra* note 11 at 274.

33. H. Reynolds, "Native Title and Pastoral Leases" (1996) 85 *Aboriginal L. Bulletin* 3.

share our fantasy nation or to concede that the Other is entitled to their own fantasy, one which may depend upon our own erasure.

For Kristeva, the journey we embark upon to meet the Other is “undertaken only to return to oneself and one’s home.”<sup>34</sup> We stage the encounter with the Other for the sole purpose of encountering ourselves. Whether the judicial consideration of Native title claims and legislative reforms to address Native title have any value whatsoever for Aboriginal claimants, their dominant value is to the possessive non-Indigenous counter-claimant. In stating that *this* is what we give to the Other, it also states that there is *nothing more* to be given. Everything else we reserve for ourselves. We have kept all the elements we need to regenerate our fantasy.

This process of continuous differentiation is what Kristeva terms a “strategy of strangeness.”<sup>35</sup> In manufacturing the fantasy nation, the colonist attributes to the Native qualities that are either “inherent,” “magical” and “blood”<sup>36</sup> or else criminal, deviant and delinquent. In the former, the Native is rendered *not at all like us*. In the latter, he or she becomes *our image in reverse*, our dark doppelgänger. The otherness of the Native continually shifts. Whenever the Native becomes more “like” the colonizer, the colonial narrative must distinguish and denigrate him or her in some new way.

For the theorist of postcolonialism Homi Bhabha, this perpetual mutation means that “the trace of what is disavowed is not repressed but repeated as something *different*.”<sup>37</sup> Nevertheless, there remains an irresistible colonial impulse to enfold ourselves around the Native; to assimilate and yet to differentiate; to see what the Native looks like adorned in the familiar regalia of imperialism, but in the spirit of fancy-dress rather than camouflage. In the early Native title litigation discussed in this article, the Indigenous claimant always needed to articulate her claim in a manner that conformed with the principles and doctrines of the British common law. In *Mabo*, while the High Court acknowledged that Indigenous interests in land were *sui generis* from the perspective of English property law, the claimants nonetheless had to describe their land ownership system by analogy with the usufruct, an arcane Roman law possessory right that the common law could comprehend. In *Wik*, the claimants had to show that their land use was simultaneously “customary” under Aboriginal law as well as “consistent” with the terms of a statutory contract. The Native title claimant must speak to us in our own language while we exercise our prerogative not to listen or not to understand. Colonial authority is here terrorized by “the *ruse* of recognition, its mimicry, its mockery.”<sup>38</sup> Bhabha notes the “*ambivalence* of mimicry (almost the same, *but not quite*)” wherein mimicry is

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34. Kristeva, *supra* note 2 at 133.

35. *Ibid.* at 137.

36. A.R. JanMohammed, “The Economy of Manichean Allegory: The Function of Racial Difference in Colonialist Literature” in H.L. Gates Jr., ed., “Race,” *Writing and Difference* (Chicago: University of Chicago Press, 1985) at 86.

37. H.K. Bhabha, “Signs Taken For Wonders” in Gates, *ibid.* at 172.

38. *Ibid.* at 176.

“at once resemblance and menace.”<sup>39</sup> We are disarmed by the claimant’s command of the law; we cannot dispute her existence, her prior claim or our own historical refusal to acknowledge her. Thus, the Native is absorbed into a framework in which he or she becomes readable, knowable, and yet also liminal, prohibitive. Bhabha recognizes this as the moment in which we realize that “*something is beyond control, but it is not beyond accommodation.*”<sup>40</sup>

This is the unhomely moment, identified by Freud in his writings on the “*unheimlich*” or “uncanny.” Something becomes unhomely when it falls out of its place. A signifier becomes detached from what it signifies and becomes strange or terrifying. An unhomely sensation is experienced when something familiar suddenly acquires a supplementary meaning, loading “homely” spaces with a sense of horror. The colonial fantasy anticipates these moments where we lose control of the Native; resistance, rampage and claims upon land provide the necessary motives for colonial repression. We devise endlessly modifying ways of accommodating the Other, confining her to a position that does not threaten our legitimacy and concealing unhomely sensations. We derive enormous pleasure from asserting our authority. The thousands of pages in which Native title claims are considered, detailed, limited and rejected suggest a fascination with exquisite detail, a leisurely and contemplative tone, a magnanimous gesture of consideration. A certain amount of accommodation and tolerance is necessary to feel at home. Without it, there is no Other; we become hosts only to ourselves.

The unhomely sensations emerge in the recognition that the *heimlich* (familiar and congenial) and the *unheimlich* (concealed and kept out of sight) are co-dependent.<sup>41</sup> For Kristeva, the “immanence of the strange within the familiar” lies within Freud’s assertion that “the uncanny is that class of the frightening which leads back to what is known of old and long familiar.”<sup>42</sup> The unhomely challenge posed by the Other is at once anticipated and impossible. Kristeva describes what we hear from the foreigner: “A drastic challenge: ‘I am not like you.’ An intrusion: ‘Behave with me as you would among yourselves.’ A call for love: ‘Recognize me.’”<sup>43</sup>

Recognition is the fantasy of the Native title claimant, and so it is the colonial strategy *par excellence* to withhold it from the Other. Recognition is the only thing that the possessive non-Indigenous landholder genuinely has to give to the Other and—in the very spot where our fantasies compete—we entrench ourselves, steadfastly *not seeing* the Other who is already there.

Unhomely moments erupt to threaten the legitimacy of our fantasy. Legitimacy is a colonial strategy that we simultaneously practice and disavow, while always wanting it to appear natural, organic and necessary. The project of achieving colonial legitimacy may involve invasion, occupation and violence,

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39. H.K. Bhabha, *The Location of Culture* (London: Routledge, 1994) at 86.

40. *Ibid.* at 12.

41. S. Freud, “The Uncanny” [1919] in S. Freud, *Collected Papers*, vol. 4 (London: Hogarth Press, 1953) at 375.

42. Kristeva, *supra* note 2 at 182. Freud, *ibid.* at 369-370.

43. Kristeva, *ibid.* at 42.

but equally we may achieve it through law, the most compelling of legitimacies and, following Jacques Derrida, itself a violence.<sup>44</sup> In this quest for legitimacy, it becomes expedient for us to imagine ourselves as fringe dwellers or victims. When we occupy locations of contested legitimacy—seized spaces—we legislate our legitimacy, disguising the manoeuvres through which we have acquired our centrality, preferring instead to believe in our own peripherality, alienation and victimization in the face of law. The colonial identity becomes an identity defined around the refusal to assume responsibility for colonial strategies; it is an identity of self-denial. Being *at home* among these strategies involves contortions whereby we perform the role of the host and manager, but in such a way that we imagine our home is perpetually under threat. We become hosts besieged and this justifies our taking occasional extraordinary measures to assert our authority.

For Bhabha, “[t]o be unhomed is not to be homeless .... The unhomely moment creeps up on you stealthily as your own shadow and suddenly you find yourself ... taking the measure of your dwelling in a state of ‘incredulous terror.’”<sup>45</sup> We experience the unhomely moment as an eruption. For Freud, the *unheimlich* is “the name for everything that ought to have remained ... secret and hidden but has come to light.”<sup>46</sup> The unhomely moment does not destabilize the symbolic order; it is necessary to the perpetuation of the order. It sets a new limit and requires new ways of bending and stretching to accommodate it. The unhomely is the moment when we realize that something has gone awry, it is uncanny, *not quite right*. And the reassertion of homeliness, the managerial capacity, the resumption of our *legitimate* duties as host, returns things to right. In Native title discourse, this becomes apparent when we acknowledge that we *already know* historical facts that legitimize the Indigenous claim to possession of the land and we *already know* that the declaration of *terra nullius* in Australian colonization is a legal fiction. We already know, and yet Eddie Mabo’s claim terrified us. We respond to our terror by imagining that the common law, described by former National Native Title Tribunal member Michael McDaniel as “whitefella magic,”<sup>47</sup> already contains strategies of counter-terror.

The panic of the unhomely moment is rarely in evidence in the texts of the Native title judgments. They confidently and calmly re-assert our managerial prerogative and resume the control that we have lost. The judgments mask the terror that underlies the common law itself. The common law in Australia is always already known (instinctive, intrinsic, predictable), but also endlessly mysterious. When a precedent is overturned, or a long-standing principle is discarded, we are stunned by the seamlessness with which the common law weaves its violence. So even though we already know that the High Court will not dispossess all of colonialism’s beneficiaries in upholding the Indigenous

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44. J. Derrida, “Force of Law: The Mystical Foundation of Authority” (1990) 11 *Cardozo L. Rev.* 919.

45. Bhabha, *supra* note 39 at 9.

46. Cited in *ibid.* at 10.

47. M. McDaniel, “Native Title and Memory” (Remembering/Forgetting: A Transforming Cultures Symposium, University of Technology, Sydney, 5 July 2001) [unpublished].

claim, we are terrified by its necessity to reach into a dark and unknown place—Freud’s “locked cupboard of history”<sup>48</sup>—to locate and seize the principles it will apply. We know what the common law is, and yet we do not know what it is capable of. It is the source of our anxiety, “something repressed which *recurs*.”<sup>49</sup> In Peter Rush’s reading of Native title, “[a]nxiety arises when the subject of law is confronted with the desire of the other *and* does not know what object it is for that desire.”<sup>50</sup> What follows is self-examination (“Am I legal?”) with terrifying consequences (“Probably not”).

Momentarily we lose sight of our fantasy nation. Our lost control is necessary to the maintenance of our colonial authority. Our loss is crucial. As Žižek writes, once we lose our loss, “we lose the fascinating dimension of loss as that which captivates our desire.”<sup>51</sup> Our sense of loss is at the heart of these judgments; we experienced the sense of loss in the moment that Eddie Mabo and his co-plaintiffs lodged their Statement of Claim. We experienced it again when the *Queensland Coast Islands Declaration Act* (1985), a failed attempt at wholesale blanket extinguishment by statute, was invalidated by the High Court in the first *Mabo* decision.<sup>52</sup> We experienced it again when the doctrine of *terra nullius* was overturned in the second *Mabo* decision, and once again in *Wik* when the Holroyd and Mitchellton leases were held not to have extinguished Native title over massive tracts of land in Queensland. In these moments of loss, we confront the potential for our own elimination, but we know that the confrontation is simply a performative gesture in which nothing we truly value is actually at stake. We accommodate our loss; we set a boundary around it, limiting its destabilizing potential. As Brennan J. stated, we cannot fracture “the skeleton of principle which gives the body of our law its shape and internal consistency.”<sup>53</sup> The nation is imagined, in Benedict Anderson’s analysis, as a “totalizing classificatory grid” in which everything has its place: “it was this, not that; it belonged here, not there.”<sup>54</sup> In our construction of the fantasy nation, it is always complete and always within its own boundaries. In this manner, we protect our fantasy from violation and we never leave the pleasurable position from which we perform our fantasies of loss, desire and national management.

In *Strangers to Ourselves*, Kristeva takes the self/other dichotomy and renames it “native/foreigner.” The “native,” in her analysis, is the person who is at home here, someone in her “own and proper” place. The “foreigner” is the invader who “reveals a buried passion within those who are entrenched: the passion to kill the *other*, who had first been feared or despised, then promoted from the ranks of dregs to the status of powerful persecutor against whom a “we” solidifies in order to take revenge.”<sup>55</sup> The first point of interest here is that the

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48. Freud, cited in McLean, *supra* note 7.

49. Freud, *supra* note 41 at 394.

50. Rush, *supra* note 24 at 149.

51. *Looking Awry*, *supra* note 12 at 86.

52. *Mabo v. Queensland [No. 1]* (1988), 166 C.L.R. 186 (H.C. Aus.).

53. *Mabo [No. 2]*, *supra* note 6 at 29, Brennan J.

54. Anderson, *supra* note 5 at 184.

55. Kristeva, *supra* note 2 at 20 [emphasis in original].

Native—the Aborigine—has already been displaced by the foreigner—the colonist. By the time that Native title discourse commences, the foreigner has assumed the position of the native, and the Native has become the stranger. Further, the fantasy depends upon the stranger being elevated to a powerful position in which we imagine that they persecute the natives in their own homes. Our fantasy functions because we imagine that the Native title claim has the power to annihilate us. By pretending to ourselves that the claim has this power, we justify to ourselves our acts of repression and violence. Of course, the claim—having been made under common law and in a jurisdiction that privileges the colonial position—has no legal capacity for annihilation. Its validity is reliant upon a language of custom and tradition that is foreign to the law: “Your speech, fascinating as it might be on account of its very strangeness, will be of no consequence, will have no effect, will cause no improvement in the image or reputation of those you are conversing with.”<sup>56</sup> The High Court will never decide to invalidate the very position from which it judges. The claim is only powerful in the fantasy space in which the Aborigine is imagined as dangerous, destructive and capable of dispossessing the colonist. Kristeva imagines the power exercised by the Other who confronts her nemesis. In the national fantasy space, the Other performs her unhomey act of resistance. “Within the crowd of foreigners ... a new form of individualism develops: ‘I belong to nothing, to no law, I circumvent the law, I make the law.’”<sup>57</sup> The Native title claim is powerful in spite of the law. And it is from this fantasy space that the Aborigine must be excluded, because this is where she exerts her most unsettling authority.

When the Aboriginal Other begins to speak in law’s language, our first impulse is ambivalence. As Ken Gelder and Jane Jacobs write in *Uncanny Australia*, their book on postcolonial Australian identity:

The nation becomes unfamiliar with itself precisely because of a postcolonial condition in which an [I]ndigenous population is increasingly able not just to “write back” but to produce a range of special effects which can be unsettling right across the board. To recall Julia Kristeva’s comment, we can wonder whether to “smile” or to “worry” in response to these unsettlements: should we celebrate them or see them as a cause of anxiety?<sup>58</sup>

We swiftly conclude that the uncanny persuasiveness of the Other’s speech must be repressed, and from the common law we must extract a principle that we imagine already anticipates—and excludes—the Other’s attempts to speak to the law. Native title claimants face two evidentiary hurdles: first, their claim must demonstrate traditional rights and interests that are valid according to Indigenous laws; second, that evidence must be tendered in a manner that is admissible under common law rules of evidence. While the rule against hearsay has been

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56. *Ibid.*

57. *Ibid.* at 103.

58. K. Gelder & J.M. Jacobs, *Uncanny Australia: Sacredness and Identity in a Postcolonial Nation* (Melbourne: Melbourne University Press, 1998) at 135.

waived in the National Native Title Tribunal, it remains a conceptual barrier in the courts. Peter Rush writes:

The rule against hearsay prohibits testimony which reports what the witness heard other people say .... The effect in this context is that the oral transmission of title is severed by the law of evidence from the inheritance of title. In short, the [I]ndigenous evidence is ejected at the same time as the demand to prove title is placed upon [I]ndigenous peoples. The Aborigine is caught in a double-bind between logic and history, form and procedure, law and fact.<sup>59</sup>

This strategy became the insurmountable obstacle encountered by the claimants in *Yorta Yorta Aboriginal Community v. Victoria*.<sup>60</sup> Olney J., dismissing the claim at first instance, held:

The oral testimony of the witnesses from the claimant group is a further source of evidence but being based upon oral tradition passed down through many generations extending over a period in excess of two hundred years, less weight should be accorded to it.<sup>61</sup>

Instead, Olney J. preferred written testimony of the “historical record,” admitting as evidence of the traditional practices of the Yorta Yorta the writings of Edward M. Curr, a pastoralist who recorded impressions of his contact with the group that were first published in the 1880s. Of this evidence, Olney J. wrote, “he clearly established a degree of rapport with the local Aboriginal people”<sup>62</sup> and his diary should be “accorded considerable weight.”<sup>63</sup> Supported by Curr’s evidence, which is not subject to cross-examination, Olney J. concluded:

It is clear that by 1881 those through whom the claimant group now seeks to establish [N]ative title were no longer in possession of their tribal lands and had ... ceased to observe those laws and customs which might otherwise have provided a basis for the present [N]ative title claim.<sup>64</sup>

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59. Rush, *supra* note 24 at 154-155.

60. [1998] FCA 1606 [hereinafter *Yorta Yorta*]. The Yorta Yorta community appealed to the full Federal Court. The Court held by majority (Branson and Katz JJ.) that although it was not necessary to apply a “frozen in time” test to Indigenous laws and customs, the Yorta Yorta people had, during the relevant time, ceased to exist as an identifiable Aboriginal community practicing law and customs. Black C.J., in dissent, argued that Olney J. had taken a too restrictive view of the meaning of “traditional” and would have remitted the case for re-hearing: *Yorta Yorta Aboriginal Community v. Victoria*, [2001] FCA 45. See especially paragraphs 144, 195, 201-205. The Yorta Yorta people made a final appeal to the High Court of Australia. The High Court majority (Gleeson C.J., Gummow, Hayne, McHugh and Callinan JJ.) disagreed with the findings of law in both of the lower courts, enunciating a different test, but held that the findings of fact would have led to the same result under that test. Gaudron and Kirby JJ. would have remitted the matter to Olney J. for re-trial: *Yorta Yorta Aboriginal Community v. Victoria*, [2002] HCA 58. See especially paragraphs 63-70, 83-84, 94-97.

61. *Ibid.* at 106.

62. *Ibid.*

63. *Ibid.*

64. *Ibid.* at 121.

Valerie Kerruish and Colin Perrin, commenting on this judgment, argue that “the Yorta Yorta are admitted only to evidence their historical demise, and so to present their lack of authenticity.”<sup>65</sup> They write that, in rejecting the testimony of the claimants, “there would be no other evidence than that of colonialism.”<sup>66</sup>

The court’s practice here affirms the role of the Aboriginal Other as simultaneously present (to make the claim) and absent (their claims are inadmissible). Their only utterance that the law will admit is their silence. Furthermore, in determining whether or not their claims to land are legitimate, the court admitted the testimony of a pastoralist who conceded that he practiced dispossession. From Curr’s diary, Olney J. quoted: “I offered him on the spot, with the most serious face, a stick of tobacco for the fee simple of his patrimonial property which, after a short consultation with his elders, was accepted and paid.”<sup>67</sup> Here Curr practiced acts of explicit dispossession and was then held to be an authority for the failure of Aboriginal claims to possession.

While the language of Aboriginal possession is excluded—it becomes law’s *nothing*—it is replaced by new colonial strategies of dispossession. In the national fantasy after *Wik*, extinguishment becomes the object cause of desire, the *objet petit a* invested with surplus meaning, a source of pleasure. Gelder and Jacobs write:

[T]he coalition government began to talk about the “blanket extinguishments” of Aboriginal rights to leasehold land, reanimating the colonial fantasy of *terra nullius* that the earlier *Mabo* decision had overturned. But this colonial fantasy operated through the frame of a postcolonial racism whereby “extinguishments” was required though only in the context of the (mis)recognition that Aboriginal people now have “too much.”<sup>68</sup>

The Other is again positioned as the obstacle to the attainment of the national fantasy. In acquiring “too much” of the fantasy space, she is again held to be in possession of our Thing.

After *Wik*, the new government released the “Wik 10 Point Plan” in 1997 in anticipation of its amendments to the *Native Title Act*. The language of the new Prime Minister John Howard demonstrated an explicit attempt to seize possession back from the obstructive Other. He stated: “At all stages *I have been* candid and direct ...”; “From the very beginning, *I said* ...”; “Indigenous leaders have repeatedly been *told by me* ...”<sup>69</sup> Here he reasserts his managerial capacity to reclaim the fantasy space from the Indigenous Other who is “intemperate,” “inaccurate” and “did nothing for the cause of reconciliation.” Further, he said that Aborigines caused “fear of interference or hindrance” in pastoral leaseholders or farmers. For these reasons, he argued, the 10 point plan responds by “validating” certain acts, “extinguishing” potential Native title, introducing a

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65. *Ibid.*

66. *Ibid.* at 5 [emphasis in original].

67. Cited in *ibid.* at 111.

68. Gelder & Jacobs, *supra* note 58 at 136.

69. Prime Minister, Press Release, “Amended Wik 10 Point Plan” (8 May 1997) [emphasis added].

“higher registration test,” “no negotiations on exploration,” “only one right to negotiate” on other projects and a “sunset clause” on new claims, all in order to “put beyond doubt” the status of the Other in the white man’s fantasy.<sup>70</sup>

The key to Native title is that nothing is permitted to have changed in order for Native title to exist. There must be a continuous connection with the land in accordance with traditional law and custom. The sameness of this state of affairs may be interpreted widely (per Brennan J. in *Mabo*<sup>71</sup>) or narrowly (per Olney J. in *Yorta Yorta*<sup>72</sup>). Nevertheless, this sameness coexists with a moment of rupture, the unhomely moment. How is it possible that—all of a sudden—something that has always been this way becomes terrifying? What makes it erupt? Perhaps we have manufactured the eruption to provide a motive for our repressive response. Perhaps we manifest the eruption because of the pleasure we experience in extinguishing it.

We pursue our fantasy because it gives us pleasure; we experience additional pleasure when we realize that our pursuit is perpetual, as we will never fulfil our fantasy. And perhaps part of our pleasure is actually *jouissance*, what Žižek identifies as the “illegal enjoyment” experienced when the public law runs out.<sup>73</sup> As Gaudron and Deane JJ. so famously remarked in *Mabo*, actions to “dispossess, degrade and devastate the Aboriginal peoples ... leave a national legacy of unutterable shame.”<sup>74</sup> For Žižek, what unites the community is not law, but “*identification with a specific form of transgression of the law—of the law’s suspension* (in psychoanalytic terms, with a specific form of enjoyment).”<sup>75</sup> But, of course, what unites us in our national project is the *fantasy* that law has been suspended, the *fantasy* that Aboriginal dispossession is unutterable and secret. The truth is that our history is both known and lawful. The Aboriginal Other is heard and silenced, seen and hidden, acknowledged and repressed. Our enjoyment derives from our continued pursuit of a fantasy we have already achieved.

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70. *Ibid.*

71. “It is immaterial that the laws and customs have undergone some change since the Crown acquired sovereignty provided the general nature of the connexion between the [I]ndigenous people and the land remains”: *Mabo [No. 2]*, *supra* note 6 at 70, Brennan J.

72. *Supra* note 60 at 121:

No group or individual has been shown to occupy any part of the land in the sense that the original inhabitants can be said to have occupied it. The claimant group clearly fails Toohey J.’s test of occupation by a traditional society now and at the time of annexation (*Mabo (No. 2)* at 192) a state of affairs which has existed for over a century. Notwithstanding the genuine efforts of members of the claimant group to revive the lost culture of their ancestors, [N]ative title rights and interests once lost are not capable of revival.

73. S. Žižek, “Superego By Default” (1995) 17 *Cardozo L. Rev.* 925 [hereinafter “Superego”].

74. *Mabo [No. 2]*, *supra* note 6 at 50.

75. “Superego”, *supra* note 73 at 926.