

# The Doctrine of Discovery



*... and its continuing impact on the  
Indigenous peoples of Australia*

**National Indigenous Policy and Dialogue Conference  
19 November 2011**



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# Acknowledgement of Traditional Owners

We respectfully acknowledge and thank the  
traditional owners of the Euora Nations,  
the Gadigal and Dharawal Peoples  
and the Koori Peoples  
for allowing us to meet on their land.

We acknowledge all owners past and present.



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# Preparation for UNPFII 2010

*This seminar has been developed to provoke thought and consideration of the Doctrine of Discovery and its application to Australia and Articles 28 and 37 of the Declaration of the Rights of Indigenous Peoples in preparation for UNPFII 2012.*

## Outline:

1. Global Context – UN Permanent Forum on Indigenous Issues
2. What is the Doctrine of Discovery?
3. Application in Australia
4. Overturning of the Doctrines
5. The continuing legacy of the Doctrines
6. Preparation for UNPFII 2012



# Global Context

- 1982 Working Group on Indigenous Populations
- 1993 International Year of the World's Indigenous Peoples
- 1995 International Decade of the World's Indigenous Peoples (1995 –2004)
- 1996 Working Group 'on the Draft Declaration on the Rights of Indigenous Peoples'
- 2000 Durban Declaration and Programme of Action
- 2001 Special Rapporteur on the Rights of Indigenous Peoples
- 2002 Permanent Forum on Indigenous Issues
- 2005 2nd International Decade of the World's Indigenous Peoples (2005-2014)
- 2006 Human Rights Council adopts the Declaration on the Rights of Indigenous Peoples
- 2007 Declaration on the Rights of Indigenous Peoples
- 2008 Expert Mechanism on the Rights of Indigenous Peoples



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# Global Context (Cont.)

## **Universal Standard**

Declaration on the Rights of Indigenous Peoples

## **Programmes of Action**

Durban Declaration and Programme of Action

2nd International Decade of the World's Indigenous Peoples (2005-2014)

## **Mechanisms for Investigations including abuses of indigenous rights**

Special Rapporteur on the Rights of Indigenous Peoples

## **UN Bodies considering Indigenous Issues**

Permanent Forum on Indigenous Issues

Expert Mechanism on the Rights of Indigenous Peoples



# 2003 Permanent Forum

## 2003 Indigenous Children and Youth



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# 2004 Permanent Forum

## 2004 Indigenous Women



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# 2005 Permanent Forum

2005 Millennium Development Goals and Indigenous Peoples with a focus on

Goal 1 to Eradicate Poverty and Extreme Hunger, and  
Goal 2 to Achieve universal primary education



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# 2006 Permanent Forum

2006 The Millennium Development Goals and indigenous peoples: Re-defining the Millennium Development Goals



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# 2007 Permanent Forum

## 2007 Territories, Lands and Natural Resources



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# 2008 Permanent Forum

2008 Climate change, bio-cultural diversity and livelihoods: the stewardship role of indigenous peoples and new challenges



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# 2009 Permanent Forum

- **2009** General comments to the follow-up to the recommendations of the Permanent Forum on Indigenous Issues on implementation of the United Nations Declaration on the Rights of Indigenous Peoples and on dialogue with the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples and other special rapporteurs “Article 42 of the United Nations Declaration on the Rights of Indigenous Peoples” (Article 42 as basis for a new function).
- The Forum shall promote not only respect for but also “full application” of the Declaration. This implies that the Forum shall work to promote the incorporation of the Declaration into national legislation as well as its application in the national courts and administrative decisions of the various countries.
- The Forum shall follow up “the effectiveness” of the Declaration, that is, to see whether the realities (“law in action”) are in conformity with the written law and decisions (“law in books”), and if not, take necessary actions to close the implementation gap.



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# 2010 Permanent Forum

2010 Indigenous peoples: development with culture and identity; articles 3 and 32 of the United Nations Declaration on the Rights of Indigenous Peoples



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# Recommendation from UNPFII 2010

- **UNPFII 2010 Rec 127:** The information and material presented in the preliminary study of the international construct known as the Doctrine of Discovery indicates the need for further study and review and for a more comprehensive assessment and exploration of the issues raised therein on violations of indigenous peoples' inherent rights, particularly as recognised in the United Nations Declaration on the Rights of Indigenous Peoples.
- **UNPFII 2010 Rec 128:** The Permanent Forum decides that the special theme for its eleventh session, in 2012, will be “The Doctrine of Discovery: its enduring impact on indigenous peoples and the right to redress for past conquests (articles 28 and 37 of the UN Declaration on the Rights of Indigenous Peoples)”.



# Declaration on the Rights of Indigenous Peoples

- **Article 28: Restitution:** Indigenous peoples have the right to the return of their land and resources when taken without their consent. Where this is not possible, they shall receive fair compensation in the form of land and resources, or money.
- **Article 37: Treaties and Agreements:** Governments shall respect treaties and agreements entered into by Indigenous peoples.



# 2012 Permanent Forum

2012 (Special Theme)

The Doctrine of Discovery: its enduring impact on indigenous peoples and the right to redress for past conquests

Articles 28 and 37 of the United Nations Declaration on the Rights of Indigenous Peoples



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# Expert Mechanism on the Rights of Indigenous Peoples (EMRIP)

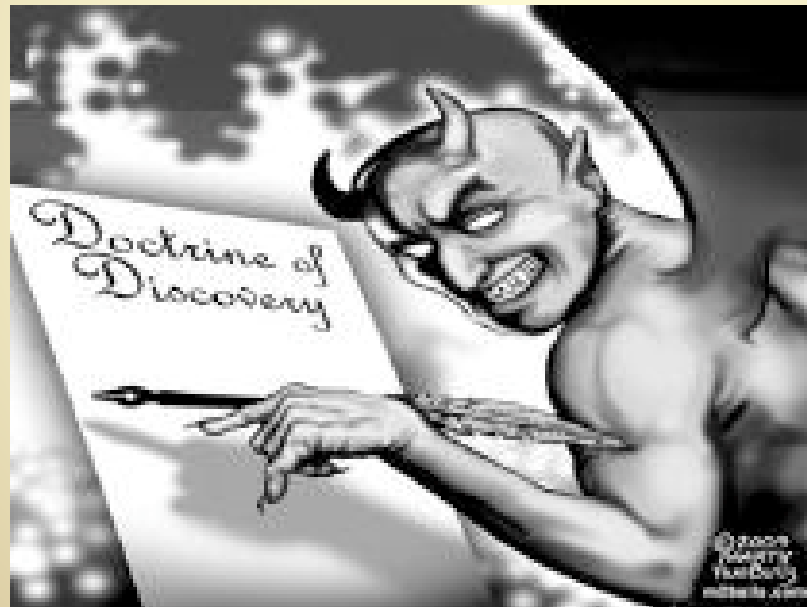
- 2008 Study on lessons learned and challenges to achieve the implementation of the right of indigenous peoples to education
- 2009 Expert Mechanism Advice No. 1 on the right of indigenous peoples to education.
- 2010 Study on Indigenous peoples and the right to participate in decision making.



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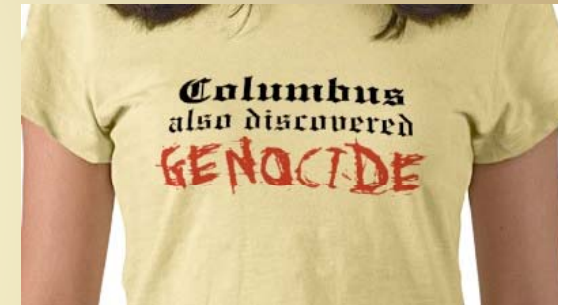


# What is the Doctrine of Discovery?



# Early Christian Origins

- 1452 Papal document issued to King of Portugal declaring war against all non-Christians and sanctioning colonisation and exploitation of non-Christian nations.
- Acting on this Portugal trafficked Africans and claimed land along the West Coast of Africa.
- 1492 Columbus authorised to take possession of any lands he discovered “not under the dominion of any Christian rulers”.
- *Inter Cetera* bulls of 1493: Spain also given permission to take possession of Americas causing rivalry between the two monarchs, so it was split in two.
- Papal documents and Christian “Law of Nations” used to justify brutal system of colonisation as a divine right.



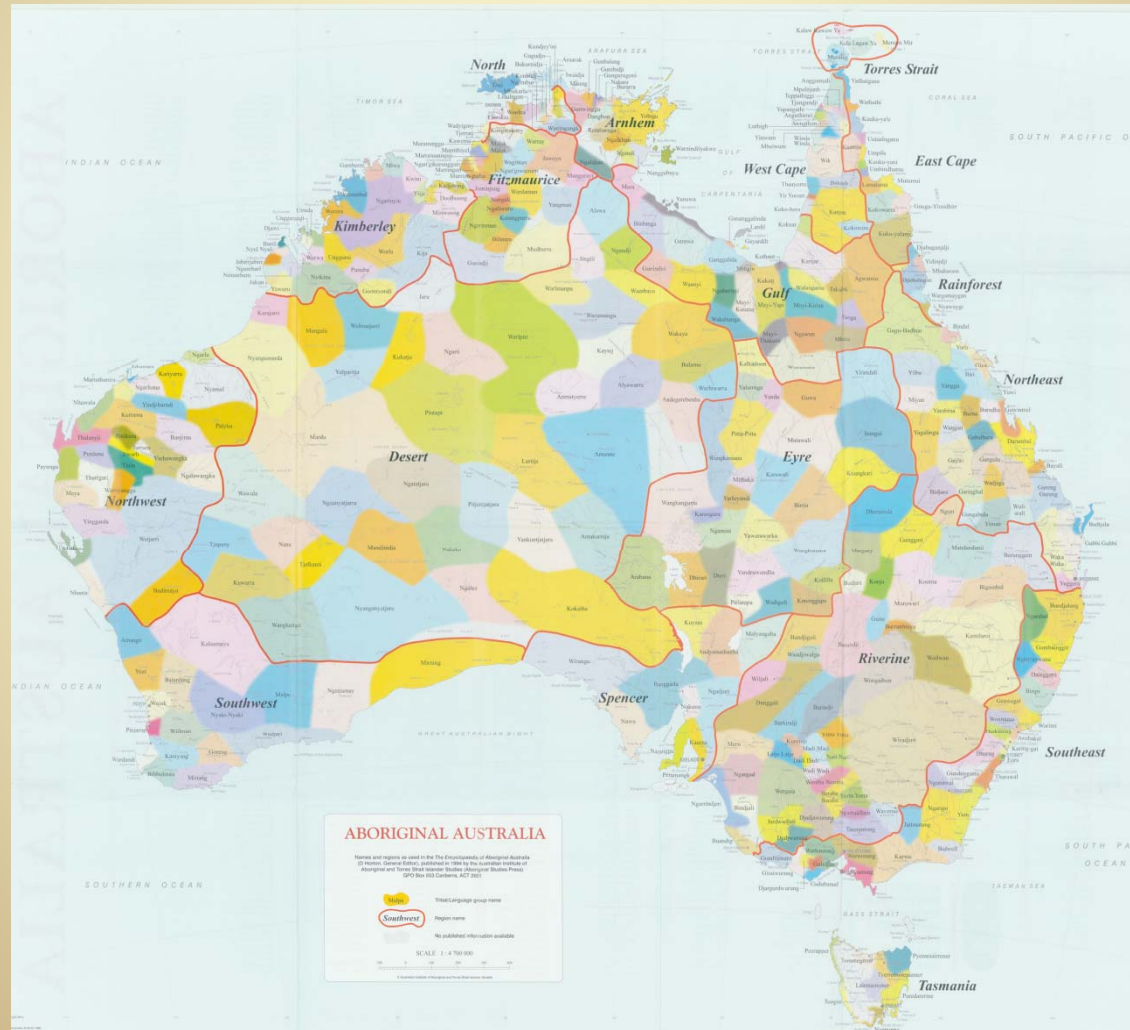
# Application to US Law

- 1823 – *Johnson v McIntosh* – Marshall CJ: Christian nations assumed ultimate dominion over Americas and upon “discovery” the American Indians lost “their rights to sovereignty, as independent nations”.
- Then when USA gained independence in 1776, it became a successor nation to the right of “discovery” against all other European nations.
- However, they had a right of occupancy but were “deemed incapable of transferring the absolute title to others”.
- Cited English charter of John Cabot to take possession “notwithstanding occupancy of the natives, who were heathens”, but at the same time admitting prior title of Christians.
- This recognition of Christianity ran counter to the stance USA took to keep Government and religion separate.
- Decision has not yet been overturned.





# Application to Australia



# The impact of *Johnson v McIntosh*

- Has influenced the definition of Indigenous rights in Australia, Canada and New Zealand
- 1846 – used to make invalid a purchase of 600,000 acres from Aboriginal peoples in Victoria
- 1840s – quoted by British settlers and Government officials in disputes concerning the annexation of New Zealand
- 1880s – used in litigation about Aboriginal title in Canada



# The Batman Treaty

- **1835:** Negotiated purchase of 600,000 acres of land in Melbourne for the Port Phillip Association by trading directly with Aboriginal peoples in return for various goods and a yearly rent. Done without Government sanction.
- **1835:** When NSW Governor Bourke learned of the transaction he officially proclaimed that “every such treaty, bargain and contract with Aboriginal natives ... is void and of no effect against the crown.”
- **1836:** Port Phillip Association sought the views of 4 eminent lawyers who all advised that private purchase from Aboriginals was invalid without the consent of the Crown. The detailed legal opinion of William Burge used *Johnson v McIntosh* as a precedent that it was an accepted principle of law “that the title which discovery conferred ... was that of the ultimate dominion in and sovereignty over the soil, even whilst it continued in the possession of the Aborigines.”
- **1836:** All private purchases of land from Aboriginal peoples declared void. According to Colonial Secretary, “such a concession would subvert the foundation on which all Proprietary rights in NSW at present rests.”



# The impact of the Batman Treaty

The doctrine of Terra Nullius can be traced back to Bourke's proclamation in 1835 which occurred after Batman's purchase. As William Wallace said:

*“Bourke articulated the legal principle of terra nullius or literally translated, “no earth”. The Proclamation created the legal fiction that no title in fee simple existed with any person prior to that date. The effect of this pronouncement was to create where it had not existed in fact, an opportunity for the Crown to claim title in fee to all of Australia based on the doctrine discovery.”*



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# Perpetuation of *Terra Nullius*

- 1889 – **Cooper v Stuart**: Privy Council affirmed terra nullius observing that NSW was “practically unoccupied, without settled inhabitants or settled law, at the time when it was peacefully annexed to British dominions.”
- From this time on the Doctrine of Terra Nullius, remained the cornerstone of Australian law until 1992 when it was finally overturned in the **Mabo decision**.
- Terra Nullius has been described as the most extreme version of doctrine of discovery. It was just that the Aboriginal peoples were considered heathens, lacking Christianity, to some extent, they were not considered human at all.



# Overturning of the Doctrines



# Inter Cetera bulls of 1493

- The Papal *Inter Cetera* bulls of 1493 have not been revoked by the Catholic Church.
- There have been calls for Pope John Paul II to revoke the bulls in the formal ceremony with Indigenous Peoples.



# Quote from the Bull 1493

“Among other works well pleasing to the Divine Majesty and cherished of our heart, this assuredly ranks highest, that in our times especially the Catholic faith and the Christian religion be exalted and be everywhere increased and spread, that the health of souls be cared for and that barbarous nations be overthrown and brought to the faith itself.”



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# The Doctrine of Discovery

- *Johnson v McIntosh* has yet to be overruled by US courts.
- We argue that *J v M* should be overruled by US courts because it continues to be relied upon around the world and it is now inconsistent with international law on the rights of Indigenous peoples.
- See Blake Watson in “*The Impact of the Doctrine of Discovery on Native Title Rights in Australia, Canada and New Zealand*” (2010).



# The Doctrine of Terra Nullius

- Unsuccessfully challenged in 1971 in *Milirrpum v Nabalco* and in 1979 in *Coe v Commonwealth*.
- Small win in 1985 case *Gerhardy v Brown* where Deane J said:

*“the common law of this land has still not reached the stage of retreat from injustice which the law ... had reached in 1823 when Marshall CJ ... in Johnson v McIntosh, accepted that ... the ‘original inhabitants’ should be recognised as having ‘a legal as well as just claim” to claim the occupancy of their traditional lands.*



# *Mabo v Queensland (No 2)*

- The Doctrine of Terra Nullius was finally overturned in 1992 in *Mabo v Queensland (No 2)*.
- Dean and Gaudron JJ acknowledged that: “the dispossession and oppression of the Aborigines was premised on legal fictions” that the continent in 1788 was not *terra nullius*.
- Arguably, legislative and policy changes since Mabo have in effect restored the Doctrine of Terra Nullius.



# The Continuing Legacy ...

- The legacy of Terra Nullius lives on in Australia with the Crown still retaining the underlying title to all land in Australia.
- Australian law still considers that Australian title is stronger than and can extinguish native title.
- *Johnson v McIntosh* continues to be cited in Australian cases e.g. the *Wik* decision, *Fejo v Northern Territory* and *Western Australia v Ward*.
- In Australia today we see Aboriginal peoples with epidemically low levels of freehold ownership and complicated and watered down native title rights.





# Unravelling the impact and preparation for UNPFII 2012



# Unravel and Prepare...

- IPO process – Australian delegation preparation
- Interventions and reports
- UNPFII Report for 2012 – focus on recommendations
- Dialogue with Australian Government

**Article 28: Restitution:** Indigenous peoples have the right to the return of their land and resources when taken without their consent. Where this is not possible, they shall receive fair compensation in the form of land and resources, or money.

**Article 37: Treaties and Agreements:** Governments shall respect treaties and agreements entered into by Indigenous peoples.

