



Bauxite and boundaries: 50 years since *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141

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*This year 2021 marks the 50th anniversary of Blackburn J's decision in **Milirrpum v Nabalco Pty Ltd** (1971) 17 FLR 141. Though it is imprecisely remembered as the first time that the fiction of terra nullius was contested by Indigenous Australians in an Anglo-Australian Court, the case stands as an early attempt to reconcile claims of Indigenous sovereignty and land rights with the colonists' common law of property rights. A half-century later, the authors reflect on the importance of the case. Beyond discrete questions of common law doctrine, the case demonstrates the fundamental tension between the dominant dephysicalised model of Anglo-Australian property law and *The Rom* — the Yolŋu model of property law that connects human and non-human life in and through Country. Valuable lessons can be learned from a comparative analysis of the two models. The enduring authority, intellectual integrity and practical success of *The Rom* hinge on its capacity to prescribe adequately and regulate viable human land use and ownership within locally specific conditions and limits over the long-term. It is time to take up the opportunity to recognise the Yolŋu model of property not simply as disruptive, but as educative in the task of adapting Anglo-Australian property law to the land itself.*

When the British came, they didn't see, or they ignored or refused to see, the songspirals, the Law, the culture that is here. And they claimed the land. They had only been here for the shortest time and they claimed it. But the land was already claimed. We have boundaries, clan boundaries, we have Law, culture and language. We know which clan belongs to which land.

— Gay'Wu Group of Women¹

On the 27th of April 1971, the judgment of Blackburn J in *Milirrpum v Nabalco Pty Ltd*² ('*Milirrpum*') was delivered in Alice Springs, Supreme Court of the Northern Territory. The case heard a claim 'by a number of Australian aboriginals ... that their interests in certain land in the Northern Territory [had] been unlawfully invaded by the defendants'.³ (Wrongly) renowned as the 'first case in which Indigenous peoples presented evidence to challenge the notion that the continent was without law',⁴ Blackburn J upheld

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¹ Gay'Wu Group of Women, *Song Spirals: Sharing Women's Wisdom of Country through Songlines* (Allen and Unwin, 2019) x ('Gay'Wu Group of Women, *Song Spirals*').

² (1971) 17 FLR 141 ('*Milirrpum*').

³ *Ibid* 146 (Blackburn J).

⁴ Lisa Strelein, *Compromised Jurisprudence: Native Title Cases since Mabo* (Aboriginal

the decision of the Privy Council in *Cooper v Stuart*⁵ that ‘enlarge[d] the concept of “settled” territories to include those “practically unoccupied, without settled inhabitants or settled law”’.⁶ By treating ‘the question of whether the colony was settled as a matter of law, not of fact’,⁷ Blackburn J thereby rejected the existence of the doctrine of communal native title in Australia. As time would later tell, even this doctrine provided only a constrained and Eurocentric framing of the land laws of First Nations.

A half-century later, the authors reflect on the significance of this case to the development of statutory and common law land rights for Aboriginal and Torres Strait Islander Peoples in Anglo-Australian law, and the perpetuation of historical land injustice wrought by the anthroparchic model of property underpinning Western imperial legal cultures. Drawing from a range of legal and scholarly literature, including the landowners’ account of Yolŋu law, they critique the dominant model by foregrounding The Rom, the Yolŋu Law⁸ from which the case arose, which long pre-dates Anglo-Australian law. The Rom institutionalised a successful relational and place-based model of land law which connects human and non-human life in and through Country. The *Milirrpum* case illustrates the profound differences between Indigenous and non-Indigenous property regimes in Australia and offers an opportunity to review the concept of ‘recognition’ underpinning contemporary articulations of the relationship between them.

I *Milirrpum* as the first agitation of native title recognition

Though often maligned,⁹ Blackburn J’s decision in *Milirrpum* has sustained lasting scholarly discussion for half a century. Indeed, the accuracy of his Honour’s reliance on precedents from across the common law world in his rejection of the doctrine of communal native title motivated academic debate almost immediately.¹⁰ At the outset, however, it is worth remembering that the

Studies Press, 2nd ed, 2009) 3. Irrespective of its truth in a public law context, the question of Indigenous ‘sovereignty’ had arisen fairly early in colonial criminal law. See, eg, *R v Barrett* (1828) NSW Sel Cas (Dowling) 2; *R v Murrell* (1836) 1 Legge 72, 73; Bruce Kercher, ‘Recognition of Indigenous Legal Autonomy in Nineteenth Century New South Wales’ (1998) 4(13) *Indigenous Law Bulletin* 7; Kent McNeil, ‘A Question of Title: Has the Common Law Been Misapplied to Dispossess the Aboriginals?’ (1990) 16(1) *Monash University Law Review* 91.

5 (1889) 14 App Cas 286, 291 (Lord Watson) (*Cooper*), cited in *Milirrpum* (n 2) 249 (Blackburn J).

6 Richard H Bartlett, *Native Title in Australia* (LexisNexis Butterworths, 4th ed, 2020) 4, quoting *Cooper* (n 5) 291 (Lord Watson).

7 Strelein (n 4) 3.

8 Bawaka Country et al, ‘Co-Becoming Bawaka: Towards a Relational Understanding of Place/Space’ (2016) 40(4) *Progress in Human Geography* 455.

9 Bartlett (n 6) 12; Geoffrey Lester and Graham Parker, ‘Land Rights: The Australian Aborigines Have Lost a Legal Battle, But ...’ (1973) 11(2) *Alberta Law Review* 189, 196–200; Henry Reynolds, ‘200 Years of Terra Nullius’ (1991) 2(53) *Aboriginal Law Bulletin* 11, 11.

10 In particular, John Hookey and LJ Priestley, counsel for Nabalco, went tit for tat over the correctness of Blackburn J’s interpretation of a certain US decision, *Johnson v McIntosh* 21 US 543 (1823). See LJ Priestley, ‘Communal Native Title and the Common Law: Further

Yolŋu People's claim to their ancestral lands at Yirrkala¹¹ need not have ended in litigation. Yolŋu leaders first sought to reach a political resolution to the passage of an expropriative Ordinance in 1953,¹² the grant of various mineral leases (removing 300 square kms of land from the Arnhem Land Reserve) to extract bauxite ore from Yolŋu Countries,¹³ and the sudden appearance of mining apparatus. The Yolŋu leaders presented two petitions to the Commonwealth Parliament written and illustrated on a product of the earth,¹⁴ requesting their consultation, as the people to whom the land belonged.¹⁵ The first petition, presented on the 14th of August 1963, fell upon deaf ears, with then-Minister for the Territories, Paul Hasluck, commenting that it ostensibly contained only the 'views of [its] 12 signatories'¹⁶ rather than any universal concern among the Yolŋu People. The second petition, presented some 15 days later,¹⁷ led to an inquiry that was similarly fruitless.¹⁸

By 1968, the situation had changed. Following the grant of a 42-year lease of the subject land to Nabalco for bauxite extraction,¹⁹ the Yolŋu People's leaders, along with their enthusiastic counsel,²⁰ approached the Supreme Court of the Northern Territory for relief. In form, their claim was quite unremarkable: it relied partly on impugning the Crown's putative acquisition of bauxite under the 1953 Ordinance on the ground that just compensation

Thoughts on the Gove Land Rights Case' (1974) 6(1) *Federal Law Review* 150, 150–1; John Hookey, 'Chief Justice Marshall and the English Oak: A Comment' (1974) 6(1) *Federal Law Review* 174.

11 For a brief introduction to Yolŋu settlement and stewardship of the subject land see *Milirrpum* (n 2) 146–9 (Blackburn J).

12 *Minerals (Acquisition) Ordinance 1953* (NT) ('1953 Ordinance').

13 See *Milirrpum* (n 2) 148–9 (Blackburn J).

14 For the Yirrkala bark petitions themselves see 'Yirrkala Bark Petitions', *National Museum of Australia* (Web Page) <<https://www.nma.gov.au/defining-moments/resources/yirrkala-bark-petitions>>.

15 Miranda Johnson, *The Land Is Our History: Indigeneity, Law, and the Settler State* (Oxford University Press, 2016) 38–9; Errin Walker, 'Yirrkala Bark Petitions' (2013) 8(7) *Indigenous Law Bulletin* 33, 34.

16 'Second Bark Petition on Tribal Land', *The Sydney Morning Herald* (Sydney, 29 August 1963) 7.

17 *Ibid.*

18 The Inquiry Report did little to halt the grant of Nabalco's mineral lease. See Select Committee, Parliament of Australia, *Inquiry into Grievances of Yirrkala Aborigines Arnhem Land Reserve Part I — Reports and Minutes of Proceedings* (Report No 101, September 1963); Johnson (n 15) 39.

19 *Mining (Gove Peninsula Nabalco Agreement) Ordinance 1968* (NT); *Milirrpum* (n 2) 149 (Blackburn J). From 2007 onwards, Rio Tinto has continued Nabalco's mining operations on traditional Yolŋu Country (under a Special Purpose Lease). The mine is named 'Gove'. During 2020, it extracted 12.3 million tonnes of bauxite, valued at AUD548 million. See 'Gove', *Rio Tinto* (Web Page) <<https://www.riotinto.com/Operations/australia/gove>>; Northern Territory Government, 'Statement on the Future of the Gove Peninsula' (Media Release, May 2019) 1–2; Northern Territory Government, 'Bauxite', *Resourcing the Territory* (Web Page, 15 July 2021) <<https://resourcingtheterritory.nt.gov.au/minerals/mineral-commodities/bauxite>>.

20 AE Woodward, *Three Wigs and Five Hats* (Northern Territory Library Service, 1990) 5.

therefore had not been given.²¹ In substance, however, the Yolŋu had raised, for the first time,²² a crucial anterior question: whether Australia's First Nations Peoples had recognisable proprietary interests *at all* in their Countries. This question formed the focal point of the case: whether the common law recognised a doctrine of communal native title.²³ At this juncture it should be noted that, given exhaustive treatment of the judgment itself in *Milirrpum*,²⁴ we do not propose to discuss it at length here.

The thrust of Blackburn J's adjudication of the Yolŋu People's claim, though strictly only amounting to obiter dicta,²⁵ was whether the common law recognised native title as a fount of enforceable proprietary rights.²⁶ In this respect, the Yolŋu's argument failed at the first hurdle: the common law, it was held, knew no such doctrine,²⁷ irrespective of whether foreign territory was settled or conquered.²⁸ As we note above, the accuracy of this conclusion, particularly in so far as it relies on foreign precedent, has been critiqued extensively,²⁹ most notably by David Ritter, who remarked:

His Honour ... was faced with the difficulty that elsewhere in the common law world, including New Zealand, Canada and the United States, native title had indeed been recognised and there seemed to be no judicial precedent which explicitly explained why Australia was the exception ... the judge attempted rather courageously (and as it turns out, wholly wrongly) to explain the anomaly by reference to different modes of acquisition of sovereignty ...³⁰

Even on the assumption that the doctrine did exist, however, his Honour held that the interest propounded by the Yolŋu was nevertheless incapable of recognition at law as *proprietary* in nature.³¹ Instead, the inability of any claimant Clan to exclude others from its (self-admittedly porous)³² territory or to alienate its interest therein was held to be fatal again to the Yolŋu People's

21 With the result that any subsequent mineral lease was void. See *Australian Constitution* s 51(xxxi); Bartlett (n 6) 12. See also *1953 Ordinance* (n 12).

22 Cf McNeil (n 4) 94–103.

23 *Milirrpum* (n 2) 150–1 (Blackburn J).

24 See, eg, Johnson (n 15) 43–9; Bartlett (n 6) 12–15; 'Current Topics' (1971) 45(7) *Australian Law Journal* 333, 333–5; John Hookey, 'The Gove Land Rights Case: A Judicial Dispensation for the Taking of Aboriginal Lands in Australia?' (1972) 5(1) *Federal Law Review* 85, 86–8; Daniel Lavery, "'Not Purely of Law" — The Doctrine of Backward Peoples in *Milirrpum*' (2017) 23 *James Cook University Law Review* 53, 56–72.

25 *Milirrpum* (n 2) 151 (Blackburn J).

26 The examination thereof was posterior to a finding that, on the expert anthropological evidence adduced by the Yolŋu it could not be said that the Yolŋu had maintained a continuous identical relationship with the subject land from 1788–1971. This, on its own, was regarded as sufficient to dismiss the Yolŋu's case. See *ibid* 198 (Blackburn J).

27 In this regard, and as was implicitly acknowledged by Blackburn J, the case did not turn strictly on the doctrine of terra nullius. See *ibid* 207 (Blackburn J). Cf Robert van Krieken, 'From *Milirrpum* to *Mabo*: The High Court, Terra Nullius and Moral Entrepreneurship' (2000) 23(1) *University of New South Wales Law Journal* 63, 67.

28 *Milirrpum* (n 2) 206–7 (Blackburn J); Lavery (n 24) 68–72.

29 See, eg, Bartlett (n 6) 12–5; Lester and Parker (n 9) 200–5, 221–32; Hookey (n 24) 88–102.

30 David Ritter, *Contesting Native Title: From Controversy to Consensus in the Struggle over Indigenous Land Rights* (Allen and Unwin, 2009) 3.

31 *Milirrpum* (n 2) 273 (Blackburn J).

32 *Ibid* 179 (Blackburn J).

case:³³ their interest was characterised, at its highest, as a mere usufruct.³⁴ Yet, despite a slew of adverse findings, the case did not fail entirely. In rejection of an argument advanced by the Commonwealth — that the Yolŋu could not be said to have had a system of law *at all*³⁵ — Blackburn J aphoristically conceded that:

The evidence shows a subtle and elaborate system highly adapted to the country in which people led their lives, which provided a stable order of society and was remarkably free from the vagaries of personal whim or influence. If ever a system could be called ‘a government of laws, and not of men’, it is that shown in the evidence before me.³⁶

Despite the doctrinal novelty of their case and the limited acknowledgment of the existence of their legal system, the Yolŋu People’s contest before the Northern Territory Supreme Court was another instance of dispossession underlining the continuum of historical land injustice from the outset of the British colonisation of Australia. Public discourse following the judgment offers some evidence of this. ‘Tribes Lose Land Claim’³⁷ headlined *The Sydney Morning Herald*; ‘Yirrkalas Should Get Sacred Lands’³⁸ *The Canberra Times*. Politicians in Canberra scrambled to mount a response. Their initial efforts were marked by confusion.³⁹ One suggestion was the grant of long-term leaseholds to the Yolŋu,⁴⁰ though Sir Richard Blackburn, in an extra-curial capacity, opined that this would create more problems than it would solve.⁴¹ Governmental trepidation spurred protest of powerful and enduring significance: on 26 January 1972, from the first members of the Aboriginal Tent Embassy,⁴² situated directly across from Federal Parliament.

Shortly after Gough Whitlam’s election as Prime Minister in December 1972, the Woodward Royal Commission was instituted to inquire into Indigenous land rights.⁴³ Several noteworthy recommendations were

33 Ibid 272–3 (Blackburn J).

34 Ibid 266 (Blackburn J). Admittedly, the tendency of earlier decisions to label the rights of First Nations Peoples in their lands as merely usufructuary, as distinct from proprietary, is somewhat odd (though perhaps less so in the context of *numerus clausus*). In Roman law, the *usufructus*, a personal servitude, was theorised as a *ius in re aliena*. See Justinian, *Institutes* 2.4.

35 This argument was characterised by his Honour as overly reliant on the problematic Austinian definition of law as ‘the command of a sovereign’. See *Milirrpum* (n 2) 266 (Blackburn J).

36 Ibid 267 (Blackburn J). Counsel for the Yolŋu would later reminisce that this finding was too precious to risk on appeal to a rather conservative High Court Bench. See Woodward (n 20) 6.

37 Alan Dearn, ‘Aborigines Fail to Stop \$310m Project: Tribes Lose Land Claim’, *The Sydney Morning Herald* (Sydney, 28 April 1971) 1.

38 ‘Yirrkalas Should Get Sacred Lands’, *The Canberra Times* (Canberra, 31 May 1971) 3.

39 Frank Brennan and Patricia Turner, *No Small Change: The Road to Recognition for Indigenous Australia* (University of Queensland Press, 2015) 130.

40 Ibid 132–6.

41 Ibid 138–9.

42 See Tobias Campbell, ‘“Ours Will Be a Tent”: The Meaning and Symbolism of the Early Aboriginal Tent Embassy’ (2019) 1 *ANU Historical Journal* II 57.

43 The Commission was established on 8 February 1973. Prime Minister Whitlam appointed Justice Edward Woodward, who had acted as counsel for the Yolŋu in *Milirrpum*, to chair the Commission.

returned, particularly: the institution of land trusts as the ‘basic landowning [entities]’⁴⁴ of traditional Indigenous Countries; the enactment of legislation to empower Indigenous Australians to veto the exploitation of their lands;⁴⁵ and the retention of the right to minerals in the Crown.⁴⁶ Woodward J described land rights legislation as the ‘doing of simple justice to a people who have been deprived of their land without their consent and without compensation’.⁴⁷ While the Commission provided a reassuring sign that the government was taking seriously the issues raised by *Milirrpum*, other consequences of Blackburn J’s decision unfolded away from the heightened public gaze. The Yolŋu’s katabases to Darwin, Canberra and Alice Springs,⁴⁸ saw the geneses of journeys of other Indigenous Peoples, who returned to their traditional Countries.⁴⁹ To this extent, the ‘Homeland Movement’, too, owes its existence to the agitation of Indigenous land rights and native title first contested in *Milirrpum*.

The Commission’s recommendations, generally, were embodied in the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth).⁵⁰ Under the Act, an inalienable estate in fee simple to existing Aboriginal Reserves⁵¹ was created, which had the potential also to extend to vacant Crown lands where Indigenous Clans were able to satisfy the requirements of demonstrating traditional ownership.⁵² Section 3(1) of the Act defined traditional ownership thus:

traditional Aboriginal owners, in relation to land, means a local descent group of Aboriginals who —

- (a) have common spiritual affiliations to a site on the land, being affiliations that place the group under a primary spiritual responsibility for that site and for the land; and
- (b) are entitled by Aboriginal tradition to forage as of right over the land.

The language of the statute, and particularly the definition of traditional Aboriginal landowners, ‘rested on anthropological ideas and advice of the time’.⁵³ In effect, though certainly not in rationale,⁵⁴ rights to land under the

44 *Aboriginal Land Rights Commission* (Second Report, April 1974) 71 (*‘Land Rights Commission’*).

45 *Ibid* 139. See also Bartlett (n 6) 15.

46 *Land Rights Commission* (n 44) 127.

47 *Ibid* 2.

48 As Woodward recounts, after the Yolŋu’s initial evidence was heard in Darwin, the case was conducted in Canberra. Judgment was delivered in Alice Springs. See Woodward (n 20) 7.

49 Sean Sexton, ‘Homeland Movement: High and Low Roads’ (1996) 3(83) *Aboriginal Law Bulletin* 4, 4–6. See also Jon Altman, ‘Raphael Lemkin in Remote Australia: The Logic of Cultural Genocide and Homelands’ (2018) 88(3) *Oceania* 336.

50 *Land Rights (Northern Territory) Act 1976* (Cth) (*‘Act’*).

51 *Ibid* sch 1.

52 See John Gardiner-Garden, ‘Aboriginality and Aboriginal Rights in Australia’ (Background Paper No 12, Parliamentary Research Service, June 1992) 20.

53 Peter Sutton, *Native Title in Australia: An Ethnographic Perspective* (Cambridge University Press, 2003) xiv. Such ideas, troublingly, placed ‘demands upon Indigenous minorities to demonstrate their traditionality.’ See Francesca Merlan, ‘Beyond Tradition’ (2006) 7(1) *Asia Pacific Journal of Anthropology* 85, 85, 89–91. See also Josh Berson, ‘The Dialectical Tribe and the Doctrine of Continuity’ (2014) 56(2) *Comparative Studies in Society and History* 381, 394–6.

Act foreshadowed later developments in the Australian common law of native title.⁵⁵ The Act also ‘established Land Councils to represent the claims and rights of the various Aboriginal communities and created the position of an Aboriginal Land Commissioner to hear and adjudicate claims’.⁵⁶ Twenty years after its introduction, Mr G Yunupingu, former Chairman of the Northern Land Council, remarked that under the legislation:

every land claim put forward by the Northern Territory Land Councils has been opposed by the NT Government ... the Government has spent millions of dollars in unsuccessful legal challenges designed to limit the amount of Aboriginal land granted. This has contributed to what has been a painfully slow process. Many claimants have died, heartbroken, after waiting more than a decade for the outcome of their land claim.⁵⁷

The conceptual reach of these statutory land rights is thus apparent well into the 21st century. The freehold land is held by the Northern Land Council and will be given to the Arnhem Land Aboriginal Land Trust when the mining leases terminate by or before 2053.⁵⁸ Even so, Yunupingu insists ‘getting the land back has been important because the land is part of us, we are one because of our relationship’.⁵⁹

II *Milirrpum* and the Anglo-Australian model of property

The evidence presented to the court and the judgment itself offer important insights into two profoundly different jurisdictions and models of property. This section considers what the case reveals about the Anglo-Australian model of property.

The Anglo-Australian model can be classified as a dephysicalised model of property.⁶⁰ In property theory, dephysicalisation refers to the removal of the physical ‘thing’ from the property relation and its replacement with an abstract ‘right’⁶¹ expressed as the shift from a person-thing model to a person-person

54 As David Ritter compellingly argues, the difference between the recognition of one’s proprietary rights at law and one’s right to claim an estate in land by statute ‘is the difference between a right and a favour’. See Ritter (n 30) 3.

55 In so far as alienated private property cannot be subjected to a claim either under the Act or at common law for native title recognition. See, eg, *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 68 (Brennan J).

56 Gardiner-Garden (n 52) 20.

57 G Yunupingu, ‘From the Bark Petition to Native Title’ in G Yunupingu (ed), *Our Land Is Our Life: Land Rights — Past, Present and Future* (University of Queensland Press, 1997) 1, 10.

58 ‘When the mining and related leases terminate or expire, the Traditional Owners of the Gove Peninsula will own all of the Gove Peninsula area.’ See Northern Territory Government, ‘Statement on the Future of the Gove Peninsula’ (n 19).

59 Yunupingu (n 57) 11.

60 Kenneth J Vandavelde, ‘The New Property of the Nineteenth Century: The Development of the Modern Concept of Property’ (1980) 29(2) *Buffalo Law Review* 325, 357–66.

61 Wesley Newcomb Hohfeld, ‘Some Fundamental Legal Conceptions as Applied in Judicial Reasoning’ (1913) 23(1) *Yale Law Journal* 16, 20–5. For a classic account of the nature of such rights see Wesley Newcomb Hohfeld, ‘Fundamental Legal Conceptions as Applied in Judicial Reasoning’ (1917) 26(8) *Yale Law Journal* 710.

model.⁶² Dephysicalised property, by design, is a theoretical model that is potentially applicable to any valuable right. It can facilitate the exchange of capital in whatever form it may take now and into the future. One of the earliest consequences of this versatility was the fragmentation of places into sets of separable resources. Solid, liquid and gaseous parts of landscapes were legally distinguished and then physically extracted and removed.⁶³

Historically, dephysicalisation corresponded with the gradual socio-economic transition from feudalism to capitalism in England and describes the change from land law, through which people held non-exclusive and inalienable interests in land,⁶⁴ to property law, through which a person owns an exclusive legal right to a commodifiable and alienable resource or asset (including, but not limited to, land). In practice, dephysicalisation (the transition from the thing-based (land-based) model to the person-based (rights-based) model) involved the dispossession of people of their lands, the rejection of their non-transplantable place-based property regimes and knowledges⁶⁵ and the disruption of long-established, complex reciprocal networks between people and their lands, through enclosure⁶⁶ and colonisation.⁶⁷ In *Milirrpum*, the dephysicalised nature of the Anglo-Australian model of property is evident in several ways.

First, land ownership is not contingent on a relationship between a person and a thing (the land), nor any attachment of a person to the land. It depends only on the relationship between persons as expressed in terms of rights and the priorities between them⁶⁸ (in this case between the state and the claimants, the coloniser and the colonised). By contrast, the Yolŋu model requires long-standing and continuing place-attachment and consequent place-based knowledge of law. The point of inconsistency between the two models here is the concept of the alienability of land, which is fundamental to Anglo-Australian property law but antithetical to Yolŋu property law.⁶⁹ As Blackburn J observed:

I think that property, in its many forms, generally implies the right to use or enjoy, the right to exclude others, and the right to alienate. I do not say that all these rights must co-exist ... or deny that each of them may be subject to qualifications. But by this standard I do not think that I can characterize the relationship of the clan to the land as proprietary.⁷⁰

62 Nicole Graham, *Lawscape: Property, Environment, Law* (Routledge, 2011).

63 Vandeveld (n 60) 356.

64 David Seipp, 'The Concept of Property in the Early Common Law' (1994) 12(1) *Law and History Review* 29.

65 Nicole Graham, 'Dephysicalised Property and Shadow Places' in Robyn Bartel and Jennifer Carter (eds), *Handbook on Space, Place and Law* (Edward Elgar, 2021) 281.

66 Jeanette Neeson, *Commoners: Common Right, Enclosure and Social Change in England, 1700–1820* (Cambridge University Press, 1993); Henry Jones, 'Property, Territory, and Colonialism: An International Legal History of Enclosure' (2019) 39(2) *Legal Studies* 187.

67 John Weaver, *The Great Land Rush and the Making of the Modern World, 1650–1900* (McGill-Queens University Press, 2003); Onur Ulas Ince, 'Between Equal Rights: Primitive Accumulation and Capital's Violence' (2018) 46(6) *Political Theory* 885.

68 Kevin Gray, 'Property in Thin Air' (1991) 50(2) *Cambridge Law Journal* 252.

69 Indeed, the Yolŋu 'expressly repudiated' any 'right to alienate' their traditional Countries. See *Milirrpum* (n 2) 272 (Blackburn J).

70 *Ibid.*

A closely related point of inconsistency between the two models is that place-based knowledge is integral to Yolŋu property law but is absent from Anglo-Australian property law. In the latter, there is no requirement for knowledge about or expertise in the subject land, nor regarding the suitability (or otherwise) of certain uses of a specific parcel of land: ‘owners are not required to be expert. They are not required to have good reason for their [land use] decision’.⁷¹ Knowledge of the risk of harm to the land presented by the development and operation of a bauxite mine might have been known to the landowner/lessor (the Crown) and the lessee (Nabalco)⁷² but was irrelevant to the existence and security of their proprietary interests and had no bearing on the question in *Milirrpum*.

Second, the place-attachment underpinning the Yolŋu model of property, articulated in the Act as ‘affiliation’⁷³ and in the later native title legislation as ‘connection’⁷⁴ to Country, give rise to legal obligations to land. The Act requires evidence of such obligations expressed as ‘primary spiritual responsibility for that site’.⁷⁵ The *Native Title Act* similarly requires evidence of such obligations expressed as, inter alia, ‘a connection with the land or waters’⁷⁶ sought to be claimed. The point of inconsistency between the two models here is the concept of proprietary responsibility, which is fundamental to Yolŋu property law but (again) absent from the Anglo-Australian model. Proprietary responsibility for the land follows from the place-based knowledge that underpins land ownership in Yolŋu law. The Anglo-Australian model of property expressed in *Milirrpum* (against which the Yolŋu People’s claim is measured) is attached neither to responsibility for land nor to the knowledge about the land or expertise in its various uses. Knowledge of and responsibility for land in Anglo-Australian law is expressed under laws disaggregated from property rights (for example, risk assessment under planning and environment laws).⁷⁷

The requirement of the alienability of land, the absence of the requirement of knowledge about and responsibility for land are consistent with the theoretical model and historical development of dephysicalised property. In Australia, this model functioned as the basis for rejecting the Yolŋu People’s claim to land ownership in *Milirrpum*, continuing ‘the ontological and

71 Larissa Katz, ‘Spite and Extortion: A Jurisdictional Principle of Abuse of Property Right’ (2013) 122(6) *Yale Law Journal* 1444, 1477.

72 One of the more observable environmental detriments accrued during the course of bauxite extraction has been the appearance of ‘red mud ponds’ around the Gove mine. These ponds are the hazardous by-products of alumina extraction from bauxite. Redressing the impacts of these ponds has proved to be a continuous challenge. See J Bernhard Wehr, Ian Fulton and Neal W Menzies, ‘Revegetation Strategies for Bauxite Refinery Residue: A Case Study of Alcan Gove in Northern Territory, Australia’ (2006) 37(3) *Environmental Management* 297.

73 The Act (n 50) s 3(1).

74 See, eg, *Native Title Act 1993* (Cth) s 223(1)(b) (*‘Native Title Act’*).

75 The Act (n 50) s 3(1)(a).

76 *Native Title Act* (n 74) s 223(1)(b). As to the curial interpretation of what ‘connection’ entails see Australian Law Reform Commission, *Connection to Country: Review of the Native Title Act 1993* (Cth) (Final Report No 126, April 2015) 177–9.

77 See Nicole Graham, ‘This Is Not a Thing: Land, Sustainability and Legal Education’ (2014) 26(3) *Journal of Environmental Law* 395, 400.

material harms of colonialism⁷⁸ well into the 20th century. The ongoing operation of the bauxite mine into the 21st century and continuing attendant economic benefits to the defendants following the decision in *Milirrpum* underline the connection between the Anglo-Australian model of property law and the ‘unjust gains [that] recirculate in the economy’.⁷⁹ The profitability of the mine arises directly from minerals taken from Aboriginal land. The case demonstrates Ambreena Manji’s thesis ‘that past and present cannot be neatly sealed off from each other, and that historical land wrongs bleed into and shape the present-day economy’.⁸⁰

The inconsistencies between Anglo-Australian and Yolŋu property models reveal two diametrically opposed approaches to the extricability of persons from places. Violent separation of person from place is a somatic effect of land’s alienability under the former model, and can be situated within a recurrent pattern throughout the Western legal tradition. The trauma of dispossession and the problem of extrication are apparent even in the writings of Western classical authors, themselves reflecting on the prevalence of dispossessions and ensuing violence present throughout ancient Western civilisations: from the Lacedaemonian elegist Tyrtaeus, whose native polis of Sparta dispossessed Messenian farmers in the 7th century BCE;⁸¹ to the great Roman poet Vergil, whose *Eclogues* refract the woes of those Italians affected by the triumviral land confiscations after the demise of Julius Caesar’s tyrannicides.⁸² Insofar as the latter is concerned, the Greek historian (and Roman citizen), Appian, records the reaction of those ejected from their ancestral lands as one of extreme emotional distress:

ἀλλὰ συνιόντες ἀνὰ μέρος ἐς τὴν Ῥώμην οἱ τε νέοι καὶ γέροντες ἢ αἱ γυναῖκες ἅμα τοῖς παιδίοις, ἐς τὴν ἀγορὰν ἢ τὰ ἱερά, ἐθρήνουν, οὐδὲν μὲν ἀδικῆσαι λέγοντες, Ἰταλιῶται δὲ ὄντες ἀνίστασθαι γῆς τε καὶ ἐστίας οἶα δορίληπτοι.⁸³

(But the young and old, and women with their children, going in turn to Rome, to the forum and the temples, were wailing, saying that they had done no wrong, but that they, though they were Italians, were being forced to abandon their land and hearths, as though they were a people taken at spear-point).

78 Ambreena Manji, *The Struggle for Land and Justice in Kenya* (Boydell and Brewer, 2020) 139.

79 Ibid 155. As noted above, in the financial year 2019/2020, Rio Tinto extracted 12.3 million tonnes of bauxite valued at AUD548 million. See Northern Territory Government, ‘Bauxite’ (n 19).

80 Manji (n 78) 155.

81 Tyr 5 ἀμφ’ αὐτῆν δ’ ἐμάχοντ’ ἐννεὰ καὶ δέκ’ ἔτη | νωλεμέως αἰεὶ ταλασιφόρονα θυμὸν ἔχοντες | αἰχμηταὶ πατέρων ημετέρων πατέρες. | εἰκοσθ’ δ’ ὄμην κατὰ πτόνα ἔργα λιπόντες | φεῦγον Ἰθωμαίων ἐκ μεγάλων ὄρέων (‘For 19 years our fathers’ spearmen fathers, holding everlasting courage in their hearts, fought unceasingly over Messene; and in the 20th year the Messenians fled from the great mountain chain, Ithome, leaving behind their fertile fields’).

82 Perhaps best epitomised by the following lament: Verg., *Ecl.* 9.4–6 “‘haec mea sunt; ueteres migrate coloni.’” | *nunc uicti, tristes, quoniam Fors omnia uersat* | *hos illi (quod nec uertat bene) mittimus haedos* (“‘These things are mine; begone old farmers.’” Now, conquered, miserable, since Fortune turns all this way and that way, we send these kids as well to him (may it not turn out well’).

83 App. *B Civ.* 5.12.

The ‘resettlement’ of 28 Roman legions⁸⁴ on historically Italic land was (and still is) consistent with the construction of alienable person-place relations and entirely independent of local geographic knowledge. The plight of Appian’s Italians, both in their violent ejection from their ancestral land and hearths (γῆς τε καὶ ἑστίας) and in their treatment as subjugated enemies (οἷα δορὶληπτοι) emphasise the history of Western colonisation and dispossession as long-standing features of Western property systems. Nothing about this, however, is inevitable in the history of human societies’ relationships with land and environment. As we now explore, the Yolŋu property regime stands as an older and more enduring alternative to the Anglo-Australian model of property in land.

III *Milirrpum* and Yolŋu land law

This section considers the Yolŋu model of property as presented in *Milirrpum* and other accounts of Yolŋu Country, law and culture published by Yolŋu landowners and non-Yolŋu (or ŋäpaki)⁸⁵ academic researchers.

Unlike the anthroparchic paradigm underpinning Anglo-Australian property law, the paradigm supporting the Yolŋu Law, *The Rom*, situates humans within, and connects them to, the broader context of a specific place including its non-human members. The Yolŋu People are ‘a part of the natural order of things in accordance with the provision made by the ancestral spirits’.⁸⁶ Subsequently, the Yolŋu model of property can be classified as eco-relational. Relational property situates a legal interest or right within personal, structural and institutional relationships.⁸⁷ Thus, ‘each individual is in basic ways constituted by networks of relationships of which they are a part’.⁸⁸ The eco-relational model of property extends this definition of networked relationships to include ‘the wider ecological communities in which our lives are enmeshed’.⁸⁹ While it is important to note the impossibility and undesirability of a pan-Indigenous model of property, property research has repeatedly identified successful (that is, viable and enduring over long periods of time) property regimes of numerous First Nations Peoples as eco-relational.⁹⁰

84 See Lawrence Keppie, ‘Vergil, the Confiscations, and Caesar’s Tenth Legion’ (1981) 31(2) *Classical Quarterly* 367, 368–9.

85 Gay’Wu Group of Women, *Song Spirals* (n 1) ix.

86 *Milirrpum* (n 2) 182 (Blackburn J).

87 See, eg, Nicholas Blomley, ‘The Boundaries of Property: Complexity, Relationality and Spatiality’ (2016) 50(1) *Law and Society Review* 224; Jennifer Nedelsky, ‘Law, Boundaries, and the Bounded Self’ (1990) 30 *Representations* 162.

88 Jennifer Nedelsky, *Law’s Relations: A Relational Theory of Self, Autonomy, and Law* (Oxford University Press, 2011) 19.

89 Estair van Wagner, ‘Law’s Ecological Relations: The Legal Structure of People-Place Relations in Ontario’s Aggregate Extraction Conflicts’ (2016) 12 *Projections: The MIT Journal of Planning* 35, 37.

90 See, eg, John Borrows, *Recovering Canada: The Resurgence of Indigenous Law* (University of Toronto Press, 2002); Kirsten Anker, ‘Land’ in A Popovici and L Smith (eds), *McGill Companion to Law* (Paul-André Crépeau Centre for Private and Comparative Law, 2012) <<https://www.mcgill.ca/companion/list/land>>; Mary Graham, ‘Some Thoughts on the Philosophical Underpinnings of Aboriginal Worldviews’ [2008] (45) *Australian Humanities Review* 181.

For First Nations Peoples, ownership of land is an alien idea. In capitalist thought, *ruwe* becomes 'property', a commodity, which can be traded or sold. The Nunga relationship to *ruwe* is more complex. We live as part of the natural world; we are in the natural world. The natural world is us.⁹¹

Law, economy and environment 'all form parts of a rational whole'⁹² in this model which leaves little room for Western notions of alterity, exclusion and externalities:

in Indigenous ontology there [is] no clear distinction between persons and things such that underpins western notions of property. Relations to the sentient landscape [are] consubstantial, and distinctions between subjects and objects [are] limited, while relations between people, people and places and people and species [are] paramount.⁹³

In *Milirrpum* and in scholarly literature and landowner accounts subsequently published, the eco-relational nature of the Yolŋu model of property is evident in several ways.

Blackburn J acknowledged Yolŋu law as law, but did not recognise its three anterior conditions, linked by their eco-relational character, on which a sophisticated and enduring property regime has flourished for millenia. First, the source of Yolŋu law is the land itself, where land is defined as 'Country': the place-specific and coherent complex of interconnected processes and beings. Second, the law of the land is taught and learned in, through and as Country. Third, the Yolŋu People's ownership of land arises from their legal obligations to care for, and *as* Country,⁹⁴ under which Yolŋu People have a kinship connection to, specifically, Yolŋu Country.

The first condition of Yolŋu law is that its source is the Yolŋu Country itself. As Blackburn J observed in the evidence presented fifty years ago in *Milirrpum*, the claimants' system of laws was unaffected by people and politics:⁹⁵ 'The land is something that is always yours; it doesn't matter what politics do to change it.'⁹⁶ Unlike Anglo-Australian property, which derives from 'the law of men', is exercised *over* the land and is human-centred, Yolŋu property derives from Country, which incorporates, and thus decentres, the human. In this relational model of property, the world is not a suite of separable objects that are external to the human subject:

we believe the land is all life. So it comes to us that we are part of the land and the land is part of us. It cannot be one or the other. We cannot be separated by anything or anybody.⁹⁷

91 Irene Watson, *Aboriginal Peoples, Colonialism and International Law* (Routledge, 2015) 15.

92 Catherine Laudine, *Aboriginal Environmental Knowledge: Rational Reverence* (Routledge, 2016) 119.

93 Jon Altman, 'People on Country as Alternative Development' in Jon Altman and Sean Kerins (eds), *People on Country: Vital Landscapes, Indigenous Futures* (Federation Press, 2012) 1, 7–8.

94 Gay'Wu Group of Women, 'Caring as Country: Singing Up Sovereignties' in Nicole Graham, Margaret Davies and Lee Godden (eds), *Handbook of Property, Law and Society* (Routledge, forthcoming) ('Caring as Country').

95 *Milirrpum* (n 2) 267 (Blackburn J).

96 Yunupingu (n 57) 2.

97 *Ibid* 3.

There are ‘distinctions’ but not ‘divisions’ in this logic.⁹⁸

Western concepts of ownership and property which see humans as separate from the environment, and illusions of being able to own a separate non-human entity, conflict with Rom which conceptualises Country as sentient and agential, encompassing land, sea, sky, animals and humans. These cannot be separated. To do so is to defy Rom.⁹⁹

The interconnectedness of human and non-human interests in Yolŋu Country is illustrated in the design of the Bark Petitions sent to Canberra. Each panel is framed with legally significant representations of ‘each moiety or aspect of the universe’ and indicated that ‘the beings of Country are alive with agency and knowing’.¹⁰⁰ Because Yolŋu law, The Rom, is sourced in the deep time of Country, its scope and scale exceeds the unit of an individual human interest or lifetime: ‘the Law is ancient. Old, old, old. If we dig down, we will find ashes, charcoal, lirrwi, from a long time ago.’¹⁰¹ In this way, like other Aboriginal-Australian property regimes, The Rom takes ‘the long-term view’ of land ownership: ‘from this perspective, short-term tactics are of less consequence; it is important to keep the big picture in mind’.¹⁰²

The second condition apparent from the Yolŋu model of property is that, because it arises through Country, legal education is necessarily place-based and involves active observance of land. Yolŋu law is thus inextricable from Yolŋu knowledge about Yolŋu land:

we were taught the rules by our grandmothers and grandfathers, our aunties and uncles. It is about learning the language, the culture, the dances, the Law, the discipline, the different ceremonies. It is about learning how to read Country, to listen to what it tells you.¹⁰³

The idea that legal knowledge requires learning from the land is consistent with other Aboriginal knowledge:

for Aboriginal people, the land is *the* great teacher; it not only teaches us how to relate to it, but to each other; it suggests a notion of caring for something outside ourselves, something that is in and of nature and that will exist for all time.¹⁰⁴

The point of Yolŋu legal knowledge is then to sustain Yolŋu Country over a long period of time: ‘Aboriginal ways of knowing about the environment are about understanding and managing the relationship between people and the world around them so that attitudes conducive to long-term survival of the group are maintained and reinforced.’¹⁰⁵

Knowledge of Country, and The Rom, is conveyed through songspirals. *Manikay*, Yolŋu songs, ‘tell the story of Yolŋu life worlds’.¹⁰⁶ More than a

98 Graham (n 90) 189.

99 Gay’Wu Group of Women, ‘Caring as Country’ (n 94).

100 Ibid.

101 Gay’Wu Group of Women, *Song Spirals* (n 1) 176–7.

102 Graham (n 90) 183.

103 Gay’Wu Group of Women, *Song Spirals* (n 1) 109.

104 Graham (n 90) 183.

105 Laudine (n 92) 99.

106 Sarah Wright et al, ‘Telling Stories in, through and with Country: Engaging with Indigenous

record or transmission method of this information, songlines are regarded more fundamentally as

bringing Country into existence. Songspirals (commonly known as songlines) are rich multi-layered articulations, passed down through the generations and sung by Yolŋu people to wake Country, to make and remake the lifegiving connections between people and place — people co-becoming as place.¹⁰⁷

The concept of a songline, song cycle or songspiral is central to many Aboriginal Australian ontological, economic and legal systems and carry important information regarding navigation, economy, culture and law:

While the song law is specific to place and creates boundaries between peoples, the boundaries are unlike those that have been constructed by colonialists who laid straight lines across the land so as to mark out their state boundaries across the *ruwe*. The songs do not travel in straight lines and cut neat boundary areas between different Peoples' territories.¹⁰⁸

This is the reason that Yolŋu songlines are referred to as songspirals. Songspirals

are a line within a cycle. They are infinite ... our songs are not a straight line. They do not move in one direction through time and space. They are a map we follow through Country as they connect to other clans. Everything is connected.¹⁰⁹

The way that the Yolŋu law is learned, in and as Country, through songspirals, demonstrates the relational nature of the Yolŋu model of property which 'is embedded in Indigenous knowledge systems'.¹¹⁰ Indeed, 'songspirals are a university for us'.¹¹¹

The third condition evident in the Yolŋu model of property is the central role of obligations. A relational model of property foregrounds the connections and dependencies created by the parties' (or agents') interests. The idea of 'caring for country' is an expression of ownership that goes beyond notions of land management, although it might also include this work. Caring for country is an affective relationship with place and may be understood by non-Indigenous people through the concept of 'place attachment.' Place attachment is a theory in psychology research to describe 'the emotional bonds between people and a particular place or environment'.¹¹² G Yunupingu, for example, describes the anger and grief his father encountered when the bauxite mine was being set up:

In the early 1960s, I saw bulldozers rip through our Gumatj country in north-east Arnhem Land. I watched my father stand in front of them to stop them clearing

and More-Than-Human Methodologies at Bawaka, NE Australia' (2012) 29(1) *Journal of Cultural Geography* 39, 57.

107 Gay'Wu Group of Women, 'Caring as Country' (n 94).

108 Watson (n 91) 36.

109 Gay'Wu Group of Women, *Song Spirals* (n 1) xvi.

110 Watson (n 91) 13.

111 Gay'Wu Group of Women, *Song Spirals* (n 1) 33.

112 David Seamon, 'Place Attachment and Phenomenology: The Dynamic Complexity of Place' in Lynne Manzo and Patrick Devine-Wright (eds), *Place Attachment: Advances in Theory, Methods and Applications* (Routledge, 2nd ed, 2020) 29, 29.

sacred trees and saw him chase away the drivers with an axe. I watched him cry when our sacred water hole was bulldozed. It was one of our Dreamings and a source of our water.¹¹³

The bonds between Yolŋu People and Country that give rise to their proprietary obligations are inextricable: ‘Country is the way humans and non-humans co-become, the way we emerge together, have always emerged together and will always emerge together.’¹¹⁴

Relational models of property value obligation and care more highly than entitlement: ‘when one takes dependence seriously one must also take care seriously’.¹¹⁵ The role of care and obligation is apparent in numerous property regimes across Aboriginal nations in Australia and central to this role is the kingship relation: ‘terms for country linguistically reflect this concept of land as kin ... institutionalising relations between people and country as kin, with corresponding reciprocal responsibilities’.¹¹⁶ In contrast to hierarchical or unilateral legal relationships, kinship is a multilateral relation (another feature of a relational model of property).¹¹⁷ Anthropologist Deborah Bird Rose observes that the idea of Country is ‘a place that gives and receives life’ and that Country is ‘not generalised or undifferentiated’¹¹⁸ but is place-specific and includes both the land and the sea. The proprietary obligations of the Yolŋu People for Sea Country were recognised by the High Court in the *Blue Mud Bay Case*.¹¹⁹ ‘Indigenous laws about sea country have been described as relating to caretaking, responsibility and custodianship, as well as knowledge, language, sharing and family.’¹²⁰

Kinship is sometimes represented in Australian Aboriginal laws through totemic relationships. Unlike the anthropocentrism of Anglo-Australian law, which separates humans from the non-human world, what ‘the totemic relationship primarily signifies is the way that all things make up part of the whole, and the way that the human and non-human are essentially related’.¹²¹ Kinship relationships are affective but they are also, in material terms, economic and sustainable. Whereas Western knowledge considers life at the species level, ‘the unit of survival in the real biological world is *organism* plus *environment*. The organism may need the family line to reproduce but ... the family line or species cannot survive without its particular environment.’¹²² Proprietary obligations to care for Country provide a striking contrast to the ‘extractive mindset’¹²³ of the Anglo-Australian model of property: ‘to care is

113 Yunupingu (n 57) 2.

114 Gay’Wu Group of Women, *Song Spirals* (n 1) xxii.

115 Nedelsky (n 88) 28.

116 Laudine (n 92) 104.

117 Gay’Wu Group of Women, ‘Caring as Country’ (n 94).

118 Deborah Bird Rose, *Nourishing Terrains: Australian Aboriginal Views of Landscape and Wilderness* (Australian Heritage Commission, 1996) 7.

119 *Northern Territory of Australia v Arnhem Land Aboriginal Land Trust* (2008) 236 CLR 24.

120 Lauren Butterly, ‘Reconciling Indigenous and Settler-State Assertions of Sovereignty over Sea Country in Australia’s Northern Territory’ (PhD Thesis, University of New South Wales, 2020) 6, citing Buku-Larrngay Mulka Centre, *Saltwater: Yirrkala Bark Paintings of Sea Country* (Buku-Larrngay Mulka Centre and Jennifer Isaacs Publishing, 1999) 9–12.

121 Laudine (n 92) 106.

122 Ibid.

123 Richie Howitt and Sandra Suchet-Pearson, ‘Rethinking the Building Blocks: Ontological

to feel the nourishment, to be nourished, to nourish with and as place'.¹²⁴ Rather than conceptualising land (and waters) as something over which entitlement arises, Yolŋu law, *The Rom*, tasks its subjects with 'attending and responding to the messages of non-human beings who are respected kin, family members'.¹²⁵ This model legally obliges Yolŋu people to situate their land uses and encounters within the particular geographical and ecological conditions and limits of Yolŋu Country at a scale beyond a single species and a single human lifetime.

IV Conclusion

Fifty years ago, the Yolŋu model of property and the proprietary interests of the Yolŋu in their traditional lands were measured against the Anglo-Australian model of property and rejected in *Milirrpum*. The Court found 'that we therefore had no rights to our traditional country'.¹²⁶ Years later, Yolŋu land rights were thought to be recognised by the statutory grant of inalienable freehold title notwithstanding the simultaneous grant of a long-term lease to mine Country. The case and statutory land rights that followed actually perpetuated historical land injustice by failing to recognise, on their own terms, Yolŋu proprietary rights and obligations to care for Country.

In the 21st century, it is time to consider seriously what 'recognition' involves. 'The tension between recognising the familiar in order to confirm what we already know and listening for the unfamiliar that disrupts what we already know is at the heart of contemporary theories of recognition.'¹²⁷ Yolŋu law, *The Rom*, is disruptive to the Anglo-Australian model of property law. While *The Rom* is 'old, old, old', the dephysicalised model of property underpinning Anglo-Australian law is relatively young. The dephysicalised model of property arose, in part, from a Peter Pan like desire to transcend the material conditions and limits of life. Dephysicalised property not only absents 'things' from the property relation, it also conceptually fragments 'things' into composite parts devoid of their material contexts, such as bauxite. The Yolŋu model of property accounts for the unavoidable ecological and economic limits to production and consumption and does not seek to transcend and disown the materiality of life that the dephysicalised model of property encourages:

Far from an optimal regime, dephysicalised property underpins a paradigm of law that is not materially viable beyond the early modern worldview of abundance and plenty. Taking into account environmental scarcity and global conflict, it is no longer

Pluralism and the Idea of "Management" (2006) 88(3) *Geografiska Annaler: Series B: Human Geography* 323.

124 Gay'Wu Group of Women, 'Caring as Country' (n 94).

125 *Ibid.*

126 Yunupingu (n 57) 2.

127 Kelly Oliver, *Witnessing: Beyond Recognition* (University of Minnesota Press, 2001) 2, quoted in Kirsten Anker, *Declarations of Interdependence: A Legal Pluralist Approach to Indigenous Rights* (Routledge, 2014) 27.

possible to rationally defend and reproduce the model of dephysicalised property in the research, teaching and practice of property law.¹²⁸

The 50-year anniversary of the *Milirrpum* decision provides an opportunity to reflect on two very different models of property in Australian law, a conversation the case itself opened up. The Yolŋu model of property situates humans within a coherent complex of human-non-human relations. The Anglo-Australian model of property separates and then elevates humans from the non-human world. Where the former establishes proprietary obligations to care for Country, the latter facilitates extraction and exploitation consequently bearing varying degrees of harm to previously integrated ecological systems. Valuable lessons can be learned from this comparative analysis about the ultimate purpose of land law. The enduring authority, intellectual integrity and practical success of the Yolŋu model of property hinges on its capacity to prescribe adequately and regulate viable human land use and ownership within locally specific conditions and limits over the long-term.¹²⁹ Given the dependence of all life on Country, it is time to take up the opportunity to understand the Yolŋu model of property not simply as disruptive, but as educative in the task of adapting Anglo-Australian property law to the land itself before another half-century passes.

128 Graham (n 65) 282.

129 Graham (n 90).