# The Kangaroo and Emu Between Legal Worlds: Unsettling the Recognition of Difference

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This article is respectfully dedicated to the memory of Uncle Kevin Buzzacott, who passed away as this article was being finalised for publication.

## 1 Introduction

Colonialism is a series of complex interrelated practices that operate to supplant Indigenous claims to authority and legitimacy. Inherent to these practices are acts of physical and conceptual violence and the dispossession of land, culture and life. They may also, and frequently do, involve the co-opting of symbols, names and resources, (re)naming and (re)inscribing meaning. The colonial project is one that seeks to make invisible Indigenous ways of being and living. The result is a claim to singular authority based upon 'universalist' principles that seeks to erase ontological difference. As Irene Watson has observed, it is, at its core, a genocidal process, aimed at 'ensuring that the Aboriginal relationships to all things Indigenous are inevitably extinguished' (Watson 2016: 35). The colonial legal infrastructure provides a foundation for this project, asserting (and vigorously guarding) the legality of the colonial state's claim to sovereignty – the source of its own and legitimacy and power – and providing a mechanism for the ongoing violence, dispossession,

and erasure that are necessary to its continuing existence. In other words, the colonial legal system can be understood as a 'nomocidal' regime (Giannacopoulos 2020), killing people(s) as well as alternative ways of knowing and enacting law.

With the legal system's (in)ability to respond to difference as our focus, we explore these features of the colonial legal infrastructure through the decision in the case of *R v Buzzacott* (Hereinafter *Buzzacott*). In 2004 Arabunna (Arabana, Arabuna) Elder and Community Advocate Kevin Buzzacott was convicted of theft after 'stealing' a bronze Australian coat of arms from Old Parliament House. Part of broader protests associated with the thirtieth anniversary of the Aboriginal tent embassy, Kevin Buzzacott asserted his actions were not theft, but rather a reclamation – both a 'taking back' of, and insistence of Arabunna obligations to protect these sacred animals – a claim that stemmed from his cultural and legal obligations to country. The decision in *Buzzacott* and the multi-level court responses it provoked present a microcosm of clashing legal worldviews manifested in the colonial adoption and representation of the kangaroo and emu on the Australian coat of arms. We explore the arguments advanced by Uncle Kevin in his attempts to engage with, and demand both recognition and justice, from the colonial justice system. The court's response reveals its refusal to acknowledge the existence of – let alone take seriously – the normative legitimacy of Aboriginal laws and ways of being-in-the-world. Relying on Eurocentric notions of justice that remain embedded within (and which operate to perpetuate) a universalizing and singular worldview, the legal system maintains a preoccupation with liberal models of recognition that reduce difference to sameness (Coulthard 2014). In such models difference is accommodated but only to the extent that it can be effectively managed through processes of co-option and incorporation. That is, difference may be recognised – perhaps even 'celebrated' – but only if it does not challenge the colonial state's prevailing nomopoly (Giannacopoulos 2019) or its claim to sovereignty.

Our analysis of *Buzzacott* extends across two related levels, providing both a critique of the decision while also exploring how it reveals

possibilities for opening and prefiguring pathways to decolonial justice. The court's unequivocal rejection of Uncle Kevin's claims provides a compelling example of how the legal system reproduces and re-enacts colonial law's nomocidal framework, one that has striking similarities to many other legal challenges to the colonial state, including the often-lauded decision in *Mabo v Queensland (No 2)* (hereinafter *Mabo*). However, Uncle Kevin's actions and arguments also draw attention to the colonial regime's very real tensions, contradictions, and fractures. In his steadfast insistence that the court recognise Arabunna law (and his corresponding legal obligations under that law), he brought into question the colonial system's claim to be the sole source and purveyor of law and justice, to be 'an authority with authority' (Giannacopoulos 2020: 251). We read Uncle Kevin's radical praxis through the broader notion of political ontology (de la Cadena and Blaser 2018, Blaser 2013) and examine how it may be possible disrupt the colonising singularity of the state legal system. We argue that a reconceptualization of both law and difference (and their relationship) can open pathways to alternative forms of legality; ones that are multiple, relational, and maintain space for the (co)existence of different legal worlds.

## 2 Appropriated Authority and Contested Laws: The Australian Coat of Arms and the Emu and Kangaroo

One of the colonial state's key symbols of authority is the commonwealth coat of arms. The coat of arms signifies the commonwealth's claim of ownership and authority and, since 1973, the coat of arms has appeared in the Great Seal of Australia, used to signify commonwealth approval of *important documents* such as judicial appointments and letters-patent. While it is symbolic in function, its use is fiercely protected under competition, criminal, and intellectual property law.[3]

The coat of arms in its current form was granted by King George V on 19 September 1912, following a redesign of the original granted by King Edward VII on 7 May 1908. Surviving the redesign process were the Kangaroo and Emu, sporting a more 'realistic appearance', stood together supporting the shield, which now comprised the

heraldic badges of the nation's six constituent states. The presence of the Kangaroo and Emu was not without controversy. Debate in parliament following the redesign saw Mr Kelly, then Member for Wentworth, observe:

> It seems to me that the emu and the kangaroo are hardly symbolic of the best qualities of the Australian people. They have the smallest heads of any of the animal kingdom. Is that a mark of the Australian people?[4]

While the adoption of the Kangaroo and Emu may have sparked responses like this from Kelly in the moment, coats of arms, by design, endure for a long period of time. The result being that while the sign remains the same, in a material or physical sense, the cultural, social and political context of its meaning too can change (Mohr 2005). Competing and contested meanings can, and do all the while, co-exist.

The modern view of the coat of arms, as told to many a tour group through Parliament House in Canberra, is that the Kangaroo and Emu were selected because they are physically incapable of walking backwards easily, thus symbolising Australia being a nation progressing and always moving *forward*, irrespective of head size. This account is also found on the website of the Department of Prime Minister and Cabinet.[5] This, like many an interpretation of a symbol, is largely a product of retrospective myth-making. The original coat of arms was likely heavily inspired by the Bowman Flag, designed in NSW in 1805/6 to commemorate the Royal Navy victory at the Battle of Trafalgar, which remains one of the oldest surviving depictions of the Kangaroo and Emu together through the European gaze. Kangaroos, in particular, would become strongly associated with images of Australia abroad, consistently being used to represent Australia throughout the 1800s, including on wedding gifts to the Princess of Wales in 1864, and domestically was used in many advertisements for goods and in the coat of arms of businesses (Hatton and Thomspon 2010: citing Lane 1979, Cozzolino et al. 1980). Kangaroos and emus are unique to the continent of Australia, and kangaroos in particular, had been associated with the European imaginary of the antipodes ever since George Stubbs' first European depiction, *The Kongorou 1771,* was exhibited in London in

1773.[6] This was reinforced by their breeding in captivity and housing in parks and zoos from 1794 (Gelder and Weaver 2020). The selection of the kangaroo and emu was less likely a conscious choice of a fledging nation to symbolise a forward-looking and progressive country on the rise rather than perhaps representing the formal adoption and consent to the label already ascribed by others.

But beyond this, the adoption of a native species as symbolic of sovereign power is emblematic of the colonial project, especially when it follows a process of (re)naming and hunting those species (Gelder and Weaver 2020). Indeed hunting kangaroos would be viewed by those back in Great Britain as representing a national pasttime, with the Duke of Edinburgh (1867) and the princes Edward and George (1881) participating during their respective royal visits (Hatton and Thomspon 2010: citing Gelder and Weaver in Hornadge 1972). (Re)naming, hunting, and treating as one's own are inextricably colonial actions. It is hard not to see the appropriation of such symbols as part of a broader attempt at claiming authority and ownership over the land and legitimising (as well as historicising and 'nativizing') the colonial occupation of the continent. And in the Australian context, these colonial acts in naming and adopting the kangaroo and emu as symbols of sovereign power creates an at once unique yet familiar tension with Aboriginal relationships to the kangaroo, the emu, and their image. But just as the understanding and use of the kangaroo and emu have shifted amongst competing European viewpoints, Aboriginal conceptions and relationships continue, and indeed enter into conflict.

To many Aboriginal Nations around the continent, the Kangaroo and Emu play important roles in Dreaming-creation beliefs and the subsequent legal orders these create. *Law story* articulates the connections of an individual and their community to *country* and to each other through Kinship and *country*'s connection to them. Country is not just land in isolation but carries the plural significance of cultural and spiritual meanings. In some communities, Kinship relationships are constructed alongside complex totemic systems. One's *totem* is a symbolic representation of an entire complex network of obligations

that the individual will have throughout their life. Totems may relate to personal identity, family or clan identity, have a relationship to gender, or be ceremonial in nature. Use of the term *totem*, however, should be understood as itself a problematic colonial vestige, representing an anglicised form of the Ojibwe word ᑑᑌᒼ or ᑑᑌᒻ. Totem, then, as a term originally to describe a unique practice amongst Indigenous Peoples in North America, doesn't fully express the reality of the separate and unique practice of obligation, responsibility, and law-making systems within diverse Australian Aboriginal communities.

Nevertheless, the Kangaroo and Emu are known to represent important totemic relationships across many Aboriginal Nations, with both being intrinsically linked to Aboriginal cultures, identities, and economies. This was particularly the case for Arabunna Elder Kevin Buzzacott who was indicted on 1 June 2004 with an allegation that:

> [he] at Canberra in the Australian Capital Territory on 27 January 2002, dishonestly appropriated property, namely a bronze coat of arms, belonging to another, namely the Commonwealth, with the intention of permanently depriving the Commonwealth of that property (*Buzzacott*: [1])

It was alleged that Uncle Kevin had forcibly removed a bronze plate depicting the Australian coat of arms from a pillar at the front of Old Parliament House and taken it to the Aboriginal Tent Embassy on the front lawns. In later interviews, Uncle Kevin explained his motivations on the day:

> I had watched the Federal Police arresting our people at the Tent Embassy and other places. They all wore these caps with the Emu and Kangaroo emblem on them. I knew how sacred these animals were to us and I had talked with old people about how the government was misusing them while they locked us up and treated us like dirt. On the 30th anniversary of the embassy I told everyone that I had a plan and that they should join me with their cameras. We went up to Parliament and I climbed up one of the pillars and grabbed the Coat Of Arms and walked off with it. It was in broad daylight and I said: "I'm not stealing this, I'm reclaiming it and taking back the use of our sacred animals. (McIntyre 2013: 268-73)

The ensuing prosecution saw Uncle Kevin pursue a number of judicial challenges in an attempt to have his, and his People's, claim to have the uses and depictions of the emu and kangaroo that were in direct conflict with Arabunna law and custom responded to in a way that recognised the legitimacy of Arabunna law, and Uncle Kevin's status as an Arabunna man bound to uphold that law.

Amongst early procedural claims during his committal was an argument that Aboriginal people had not ceded sovereignty and that the courts of the colonising state had no jurisdiction over him. Uncle Kevin also advanced a claim that a jury made up entirely of non-Indigenous jurors would infringe on his right to a *jury of his peers*, which must necessarily comprise Indigenous Elders (Anthony and Longman 2017: 31-32). This argument was advanced on the basis that non-Aboriginal jurors would likely be unable to understand or respect Arabunna legal obligations and the reality of enduring Aboriginal sovereignty. In support of this, his counsel noted:

> Given the level of ignorance of Aboriginal Justice Issues … and the level of hatred of Aboriginal Rights in the non-Aboriginal community – and the nationwide saturation media publicity on the coat of arms theft shock horror … it will be impossible for Kevin Buzzacott, Arabunna, to receive a fair trial from jury of [non-Indigenous people]. (*Buzzacott* 2004: 327)

These arguments weren't successful, with the Supreme Court of the ACT ultimately holding that 'the right to trial by a jury of one's peers does not mean that an accused person can demand that the jury panel be comprised solely of persons of a particular racial, ethnic, social or gender group' (*Buzzacott* 2004: 327), seemingly ignoring and rendering invisible that the socio-political identity of jurors as non-Aboriginal does not fall within these categories (Anthony and Longman 2017). Indigeneity is a unique legal identity created by the process of colonisation, as a distinct legal relationship status with the state, not one of race. Nevertheless, the court retained and exercised the power to define individuals and upon what basis their relationship and claims with the state would be understood.

One attempted argument, however, did see Uncle Kevin make representations himself to the High Court of Australia at an early stage. Uncle Kevin sought an order under *Judiciary Act 1903 (Cth)* section 40 to have his case removed from the ACT courts and instead heard in the High Court itself (the matter was recorded as *Buzzacott v Tait*).[7] The hearing, with Kirby and Heydon JJ presiding, was held on 9 May 2003. While a narrow legal question, and one never likely to go in his favour at such an early stage, Justice Kirby allowed Uncle Kevin to make representations of the nature of his claim. Responding to the question, 'what do you want to say?' Uncle Kevin spoke in Arabunna:

> Antha Arabana, antha pantu-nganha, antha maka-nganha, thirka-nganha, wangka antha yanhirnda arnakara wangka, wadlhu nhiki-nganha, apalka-nganha. Antu ngawi(ra) antha yanhirnda? Antha yanhirnda anthunha wangka, wangka nhikiri-nganha.
>
> … In English, I am saying I am an Arabunna man. I come from Lake Eyre. I come from the fire. I come from the ashes. I come from the dreaming time and this language I am talking, that is my language. That also come from the dreamtime. It belongs to this land, and I said also, "Do you understand that language? Do you understand me, what I am – what I just talked about, what I just said?" I do not know how the transcript people writing that down. In one of the lower courts I talked in the Federal Court and the transcript put that down as a foreign language, but it is not a foreign language.

Uncle Kevin was not speaking lightly of fire and ashes. He was conveying to the Court his sacred birthing ceremony where the newborn is placed in ashes. He was saying that his very essence of himself and his People comes from the Lake and the fire – and the dreaming – and ancient stories of the white kangaroo and bird men.

Uncle Kevin spoke again:

> We have got desecrations of sacred sites, dispossession of land and so on and so on. And also the misuse of our totems, the emu and the kangaroo, and I also see behind you, your Honour, you have the emu and the kangaroo up there and I am saying part of my argument here today is I want to put this to your court, the High Court, here so that

> I could really explain what those animals and those other symbols mean. I say also since I do not know exactly when they were put up on there, but I say also permission, it was done the wrong way. The permission was not given from my people for those animals to be used up there and also used against myself ...
>
> One of the main reason that I am here is Officer Tait is supposed to have arrested me and he is the reason why I am in this Court, because the point is I am saying is they also have the kangaroo and emu on their uniforms and I said to them before that it is wrong for them to arrest me with my spiritual symbol on them. I do not know whether they understand what the symbol is about ...
>
> It is my cultural obligations and responsibility. It is my job as well to look after my land, my country, as well as my sacred symbols as well, and this is why - this was one of the main part of this issue today so that I could be heard by a court where I have never been before so that I could hopefully get some justice ...

Despite allowing Uncle Kevin to express himself in language, to convey the importance of his obligations, and the realities of the kangaroo and emu to Aboriginal identities and relationships, Justice Kirby positioned himself and Justice Heydon as effectively hamstrung by the constitution, incapable of responding to the substance of his claim unless he continued to move through the procedural hoops of the lower courts with then a future potential prospect to appeal:

> Well, I understand what you say about [question of Aboriginal sovereignty and the legitimacy of the constitution] but Justice Heydon and I receive our commissions under the Constitution, so we have to obey the Constitution and we have to give it effect.

He continues, in response to protestations by Uncle Kevin about costs of court processes, and the effects of the western justice system on Aboriginal people, that nevertheless 'there has to be rule for everybody. It has to be a rule that respects everybody in the country', and that Uncle Kevin had 'tried to jump the gun' in seeking intervention by the High Court. He then proceeded to make the following order:

> The applicant states in his summary of argument that he took back the kangaroo and emu from an Old Parliament House pillar for religious and spiritual reasons. However that may be, no basis has been shown why this Court would remove the cause into the Court at this stage. It is pending in the Magistrates Court and listed for hearing on 2 June 2003.
>
> This Court has repeatedly stated its reluctance to disturb the hearing of criminal proceedings: see *R v Elliott* (1996) 185 CLR 250 at 257. Any intervention of this Court in such matters is normally most economically, usefully and properly reserved to the consideration of an appeal that follows the final outcome of such proceedings. So it should be here. Accordingly, the application for removal is refused.

Uncle Kevin's case progressed through the ACT courts, eventually concluding with a jury conviction for theft and receiving a 12-month good behaviour bond. Despite attempting to argue that he had a claim of right to the emu and the kangaroo, a claim that would negate the requirement of dishonesty and result in an acquittal, but because his claim was one under Arabunna laws and not one of the types recognised by the common law, this was rejected on the basis that it was merely a *moral belief*, rather than a *legal belief*. His claim would have required the courts to recognise that the adoption and (mis)use of the kangaroo and emu was itself a theft, a fundamental and serious breach of Arabunna law.

## 3 Denying Life, Killing Law: Liberal Legalism, Nomocide, and the Limits of Colonial Law

It would be difficult to construe the outcome in *Buzzacott* as anything but expected. In fact, it is hard to ignore the striking similarities between the courts' responses in this instance, particularly the High Court, and other important decisions that have questioned the legality of Australia's colonial foundations. Take, for example, the decision in *Mabo*. Often lauded as one of the most significant judicial decisions in the history of the Australian legal system, it is frequently celebrated as a critical step towards justice for First Nation peoples in Australia (even

if it arrived somewhat late in the country's history). For the first time, the 'myth' of *terra nullius* was officially rejected, and the legal system acknowledged that the Australian land mass was not 'unoccupied' prior to colonisation. Previous courts had long upheld the erroneous (and convenient) assumption that Indigenous peoples had no interests in land at the time of colonisation. In *Mabo,* the High Court emphatically overturned a series of judgments which had rendered Indigenous Australians, their law, and their interest in country legally invisible. It also created a system of native title that would recognise, at least to a limited extent, pre-existing rights and interests in land (even if subsequent legislation and judicial decisions would weaken what were already extremely fragile rights).[8]

*Mabo*, however, is a case pervaded with contradictions and tensions. While the decision may have acknowledged limited native title rights, there was no recognition of the *independent* normative legitimacy of the Indigenous law which ostensibly underpinned these, nor was there any recognition of the injustice or illegality of colonisation more generally. In fact, the High Court refused to even consider the foundations of Australian sovereignty, viewing this as 'beyond' their remit and power (*Mabo*: 32). Native title rights thus exist not as a recognition of Indigenous laws and customs, but as a common law recognition of a historic fact, with the quality and content of those rights now refashioned and granted back to Aboriginal Peoples as a gift of the common law until the crown decides otherwise. The source of these rights stems from their recognition by common law (and later statute), the Indigenous laws through which they emerged now an historical evidential fact to be established, rather than a distinct and living normative world. In this way, the decision ultimately operated to reinscribe the colonial underpinnings of the Australian legal system (Watson 2017). It was clear that there was only one power who had the 'authority' to do the recognising and the terms (and underlying relation of power) on which this could happen were already predetermined.

In Australia, the courts have demonstrated a consistent refusal to interrogate the colonial foundations of the legal system. Not only does this work to reproduce and legitimise the broader colonial framework,

it also reveals the very real structural limitations faced by Aboriginal people when seeking justice from that system. This was starkly evident in the decision in *Nulyarimma v Thompson*[9] in which, after failing in the Federal Court to have the crime of genocide recognised in Australian law, the applicants (including Wadjularbinna Nulyarimma, Robbie Thorpe, and Isobel Coe) sought leave to appeal to the High Court. The High Court gave short shrift to the arguments, particularly those of Isobel Coe, which broached the broader (yet, arguably more compelling) issues of the court's role in, and ability to provide justice for, the violent impacts of colonisation. In language that was strikingly similar to that seen in *Buzzacott*, the Justices quickly dismissed Coe's concerns. Her questions remained outside the 'substantive' issues, and the court was unwilling (and unable) to consider them. As Giannacopoulos observes in her analysis of the decision:

> She [Isobel Coe] posed a question to the court, one that remains relevant for all scholars, believers, and lovers of the law: where can Indigenous people go for justice? Her question to the judges as colonial law's gatekeepers is structurally incapable of being heard. … The Justices who are the Court, who embody and speak the law, will not hear, or listen or respond to the call to help stop Indigenous deaths. This was a hearing that would not hear (2020: 256).

The decision in *Nulyarimma* (as well as those in *Buzzacott* and *Mabo*) really pushes at the boundaries of the legal system's claim to be the (singular) source and site of law and justice. If justice within the legal system is partly defined by, and dependent upon, the state's claim to be the sole legitimate source of power and authority, what space is there within law to seek justice against that determining power and authority?

In each of these examples, this more fundamental question is always structurally precluded from consideration. The judges present themselves as *institutionally* hamstrung, as simply acting in line with their 'role' or 'commission' in denying a forum for these claims. Perhaps this is not surprising, a commitment to, and reliance upon, institutional arrangements to deliver justice has long been a feature of liberal legalism. However, this also entails a disavowal and denial of

the inherent politics and relationships of power at play. It is a pretence that produces a passive and disconnected politics (Todd 2008: 32) and operates to defer[10] responsibility for any tensions created by this narrow and state-centric conception of justice. It is the institutions that bear responsibility, not the community or people involved, nor their actions (except insofar as their actions properly reflect and enact their institutional roles). Not only does this institutional deferral help to minimise and mask any issue regarding justice, but in doing this, it also reinforces the centrality and importance of the institutions themselves.

In *Buzzacott*, we see an insistence by Justice Kirby that process is key, and process begets justice. This is particularly evident in his directions to Uncle Kevin that he must first make his claim to the magistrate, and then only if the magistrate errs in their finding might he be given access to the High Court. Liberalism's claim to universality and the central claim of the sole sovereign authority of the constitution is explicitly centred when Uncle Kevin is told that it *must* be one rule and process for everyone and that as officers of the court granted their commission under the auspices of the constitution, judges are bound by its construction and conceit.

Similarly, this process was clearly evident in the *Mabo* decision. Justice was deferred in both a literal sense — it took almost two hundred years for these small steps towards recognition and justice to eventuate — but also in relation to responsibility more generally. It was the institution (in this context, the Australian legal system) that delivered justice by acknowledging the historical myth of *terra nullius* and offering a determination of the case. While this decision took place in a broader context and history of Indigenous activism and changing community values, these weren't the official *legal* bases for the decision, nor could they be. Even while acknowledging these, the majority still felt compelled to locate and offer up the requisite legal precedents to justify its decision. And, in doing this, the court also managed to symbolically cleanse the legal system from its historical participation in colonisation. The legal system shifted from perpetrator to saviour, further entrenching its central role as the sole source of political justice.

There is something very lifeless and passive about this process and commitment to institutional solutions. Justice is something that is 'distributed' rather than demanded; 'given' rather than fought for. The politics and power of law are disconnected from the lively relations from which they have emerged. Law becomes an external and sanitised force; the messy, complicated, and bloody work of the settler colonial institutions hidden from view (at least in the official record), masked by technical legal concerns with 'justiciability', 'substance', and 'procedure'. And, despite any claimed commitment to a civil and orderly institutional justice, it is crucial to remember that the work of colonisation – including the legal work – is inherently bloody.

Colonisation is an innately violent process, and the settler colonial legal infrastructure plays a central role in both perpetuating and legitimating this violence. This is captured powerfully by Giannacopoulos in her concept of 'nomocide' which she defines as 'the killing function performed by law in reproducing colonial conditions in contemporary Australia' (2020: 250). Nomocide draws attention to the array of deathly mechanisms – both physical and conceptual – that are mobilised by the legal system in support of the colonial project, mechanisms which seek to extinguish Indigenous people, as well as Indigenous ways of knowing and being in the world. And the catalogue of violence enacted and endorsed (both implicitly and explicitly) by this nomocidal regime is extensive.[11] Across their varied sites and practices (from the courts, to policing, to prisons), the legal institutions of the settler colonial state actively maintain systems of carcerality, death, torture, and surveillance directed against Indigenous people (McKinnon 2020).

Alongside this, the legal system also enacts a more conceptual or symbolic violence. An essential feature of the colonial state's nomocidal regime is the legal system's claim to have the power to provide (and enforce) interpretive closure with respect to questions of law. This is, in essence, a jurispathic function (Cover 1983: 40), that works by killing off alternative forms of legality. Such a process was clearly evident in *Buzzacott* in which, as we noted above, the court was unwilling to take

seriously Buzzacott's defence based on a claim of right. To acknowledge this defence, would be to acknowledge an alternative and competing source of law. Similarly, in *Mabo*, the 'traditional laws and customs' that formed the basis for recognising native title claim were relegated to historical evidentiary facts. They may be necessary elements to establish, but they are not an independent or continuing source of normativity. In vigorously maintaining the border of 'legitimate' legal authority through this nomocidal process, the legal system reproduces the structures which are integral to the larger colonial project.

An interesting comparison can be drawn here between the lifeless and violent legality of the settler colonial state, and the legality which underpinned the arguments of Uncle Kevin in the High Court. Unlike the judges he appeared before, he did not seek to deny life, but rather demanded that the court recognise and acknowledge the lively normative world in which he was situated and from which he spoke. As we noted above, his references to both 'ashes' and 'fire' in his opening statement were not made lightly and were not empty words. They spoke to his sacred birthing ceremony and were an attempt to communicate his connection to law and his obligations under that law. He did not seek to disconnect or divest life from law. As he explained, law emerged from, and is located within, country and the complex and entangled relationships (both human and more-than-human) that this encompasses. This includes language and, in addressing the court in Arabunna, he demanded that they hear and understand him on his on his own terms. 'Do you understand?' he asked, checking that his full statement was being accurately transcribed and not simply substituted with the phrase 'foreign language' as had occurred in the Federal Court.

By positioning himself within his status under Arabunna Law, Uncle Kevin's act was not one of theft, but of repatriation and repair. It was an assertion of sovereignty. As Muldoon and Schaap have observed in the context of exploring the broader positioning of the Aboriginal Tent Embassy:

> Buzzacott's strategic manipulation of the symbols of power reveals how it is the Australian state that mimics the Aboriginal sovereignty it

> usurps. His act of repatriation reveals how the constituted power lacks the sovereignty that Aboriginal people possess … the symbolic power of Buzzacott's attempt to repatriate the Emu and Kangaroo hinges upon the moment of disidentification: the moment when two different orders of signification are crossed and their meaning reconfigured … In effect it says: this is not what we have done to you, but what you have done to us (2012: 19).

## 4 Opening Pathways for Difference

In exploring pathways to decolonisation, Catherine Walsh has argued for the need to institute a 'decolonial insurgency' (Walsh 2018). For Walsh, this necessarily entails not just a critique of existing relationships and power structures (although that remains a key component) but also a radical praxis that promotes and enacts alternative ways of organising and living. As she summarises the project,

> it is in the *for*, in the postures, processes, and practices that disrupt, transgress, intervene and insurge in, and that mobilise, propose, provoke, activate, and construct an otherwise… [I]nsurgency urges, puts forth, and advances from the ground up and from the margins, other imaginaries, visions, knowledges, modes of thought, other ways of being, becoming, and living in relation. (Walsh 2018: 34)

It is not hard to identify connections between Walsh's proposal and the circumstances surrounding Uncle Kevin's protest and the decision in *Buzzacott*. Uncle Kevin may not have 'won' his case, but he successfully revealed many of the tensions, contradictions, and fractures in the colonial legal frameworks. His steadfast 'perseverance in difference' (Blaser 2013) and refusal to allow the court to circumscribe the limits of law, drew attention to the rich plural legal worlds which exist (and continue to exist) in the shadows of state law. In this way, he provided a powerful counterpoint to the colonial legal system, both resisting and unsettling its singular logic, while also articulating an alternative way of conceptualising and living in relation to law.

Uncle Kevin's strong assertion of the continuing relevance and vitality of Arabunna Law (and demands for this to be recognised)

provide important insights. In particular, drawing attention to how it might be possible to open and prefigure pathways to more decolonial forms of justice. In this final section we explore the radical potential of this, reading Uncle Kevin's actions alongside the concept of political ontology (Blaser 2013, Blaser 2014, Escobar 2018, de la Cadena 2015, de la Cadena and Blaser 2018).

Political ontology emerged as a part of the broader 'ontological turn' in the humanities and social sciences which sought to interrogate the limits of 'modernist' thought.[12] Such thinking has dominated European/Western knowledge practices since the Enlightenment and is integral to the colonial project. Central to modernist frameworks is a commitment to ontological representationalism, which separates the material world from the knowledge practices that seek to understand and explain it (Barad 2008). It is most commonly associated with the pervasive distinction between nature and culture (Blaser 2013: 554). Meaning is ontologically stripped from the world, creating a divide between a static and inert natural world and the cultural and scientific representations that give meaning to and make sense of that world. One of the key implications of representationalism is a commitment to a single 'universal reality', and any (mis)understood cultural differences become subsumed within a universalist hierarchy entirely defined by the Western gaze. Cultural differences are not appreciated as differences in reality, enabling and justifying colonial expansion by assuming linear, shared and inevitable progress to modernity, centring the European claim to superiority.

Critiquing the foundations of modernist frameworks, political ontology draws attention to ontological multiplicity. Within this perspective 'ontology is a way of worlding, a form of enacting reality.' (Blaser 2013: 551). 'Reality' doesn't just exist 'out there' waiting to be discovered or interpreted, it is continuously produced or enacted through complex socio-material practices and assemblages (Mol 2002). The ostensible appearance of a single, fixed 'reality' is itself a product of specific worlding practices (Law 2015). Importantly, this emphasis on ontological generativity and multiplicity takes alterity

and difference seriously, refusing to subsume them within universal or singular frameworks. We argue that this framework can help us to identify opportunities to create space for the enactment of multiple worlds (including legal worlds) and, in line with Walsh's 'insurgent decolonialism', opens pathways for alternative ways of 'being and living in relation.'

In making this argument, we do not mean to suggest that this is how Uncle Kevin understood his actions, nor are we suggesting that such a reading provides the only, or even most accurate, way to interpret these events. Rather, as critical legal scholars trained in the colonial legal system and writing from within university law schools, themselves integral to the continuation of the colonial legal project, we seek to reflect on the possibilities for, and ways in which, we might think and enact (colonial) law in less hierarchical and exclusionary ways. Even if it might be understood that political ontology contains tools to help us de-centre colonial paradigms, it must also be remembered that it too has emerged from the same systems of thought which (re)produce colonialism. We were drawn to exploring the utility of political ontology as a means to achieve such de-centring when thinking about the way in which the legal system, in its procedures and mechanisms of practice, treats, understands and responds to *difference*.

The decision in *Buzzacott* (as well as in the other cases we have surveyed), was thoroughly permeated with issues and questions of difference. While this is perhaps most noticeable in the decision's (re)enactment of the colonial state's claim to be the sole site of political and legal authority (thereby excluding alternative sources of normativity), it is also evident at a deeper level. In fact, the whole colonial project, and particularly its legal basis in the doctrine of *terra nullius*, speaks fundamentally to issues of difference. This is captured well by John Law who, drawing on the work of Helen Verran, summarises the application of *terra nullius* to Australia in the following way:

> The English *terra nullius* doctrine determined that Aborigines were not *settled*, they did not *cultivate* the land, and neither did they *parcel*

> *it up*. Then it argued that since they did not do these kinds of things, it followed that the lands were empty. (Law 2015: 126)

In other words, the application of this doctrine stemmed from a refusal of the colonisers to recognise the fundamentally distinct cosmology that informed Indigenous understandings of land. As Law goes on to note,

> [i]n Aboriginal cosmology land is not a volume or a surface with features, or a place that can be occupied by people. Instead it is a *process* of creation and re-creation. The world, including people, but also … plants, animals, ritual sites, and ancestral beings, are all necessary participants in a process of continuing creation. … The idea of a reified reality out there, detached from the work and the rituals that constantly re-enact it makes no sense. Land does not *belong* to people … *people* belong to the land. (Law 2015: 126-127)[13]

This is not to suggest that the classification of Australia as *terra nullius* simply stemmed from a naïve or innocent 'misunderstanding', even if this somewhat reductive perception remains part of the popular narrative of Australian colonial history. It is clear that the weight of normative authority for managing this difference and its implications always remained solely with the coloniser. This is exemplified, for example, in Justice Gibbs' focus on 'European' frameworks as the measure for legitimate territorial acquisition in *Coe v Commonwealth* (hereinafter *Coe*):

> It is fundamental to our legal system that the Australian colonies became British possessions by settlement and not by conquest. … For the purpose of deciding whether the common law was introduced into a newly acquired territory, a distinction was drawn between a colony acquired by conquest or cession, in which there was an established system of law of *European type*, and a colony acquired by settlement in a territory which, by *European standards*, had no civilised inhabitants or settled law. Australia has always been regarded as belonging to the latter class. (*Coe*: 408)

Nevertheless, the justifications proffered by the colonial state (both historically and continuing) were, as Law recognised, substantially

encapsulated by this difference in worldviews.[14]

There are several ways we might view or understand this difference and its role in colonisation. One way, for example, is to conceptualise this difference as predominantly cultural and epistemological. That is, the different worldviews of the English colonisers and Indigenous inhabitants stemmed from, and represented, distinct cultural perspectives or beliefs regarding the world. As Clifford Geertz might put it, they were different ways of 'imagining the real' (Geertz 2008: 173). This understanding of difference as largely cultural or epistemological has been at the core of modernist understandings and has informed most legal and political responses, both liberal and critical. Where liberal and critical understandings come into conflict with difference, their response is to attempt to manage that difference, not understand its construction.

From a liberal perspective, for example, the central concern is to identify a unifying principle that would enable any difference to be accommodated and respected (Law 2015). Ultimately, in this context, this unifying principle is located in the legal system itself, specifically, in its professed neutrality. That is, the legal system's commitment to neutrality (particularly procedural neutrality) means it is able to protect the interests of all citizens, notwithstanding any differences in cultural beliefs. As we discussed in previous sections, such institutional responses have very real limitations, and this remains one of the central insights of critical perspectives. While agreeing that this issue emerges from cultural differences, critical views assert that the legal system, despite its claims to neutrality, is itself a product of, and remains thoroughly embedded within, the English worldview. In other words, within a colonial context, difference is only recognised to the extent that it can be incorporated within, and managed by, prevailing colonial structures. Therefore, rather than challenging these structures, it works to reproduce them and extend the power of the colonial state (Coulthard 2014; Walsh 2018: 58). This critical understanding undoubtedly provides some useful political insights. Primarily, it reveals the Eurocentric nature of the colonists' view, and, in so doing,

profoundly unsettles their claims of universality. However, to the extent that is remains within a modernist ontological framework that treats difference as a question of culture or epistemology, it struggles to see a way forward.

It is, however, also possible to conceptualise these differences in a more fundamental way. To view them as not simply having an epistemological or cultural basis (at least not solely), but also an ontological basis.[15] This would involve thinking not just about difference but, to use a Deleuzean phrase, thinking about difference *in-itself* (Deleuze 1994: 138). 'Difference' in this Deleuzean sense speaks to an ontological view of difference rather than an epistemological or socially constructed one. In this respect, it challenges the dominance of representational approaches in which difference is always defined negatively by reference to already existing entities. That is, in a representational framework difference emerges from, and is always measured by, a proximity to fixed, determinable points, to sameness. Consequently, representational approaches to difference tend to be both sedentary and hierarchical. As Deleuze has argued,

> [r]epresentation has only a single centre, a unique receding perspective, and in consequence a false depth. It mediates everything, but mobilises and moves nothing. Movement, for its part, implies a plurality of centres, a superposition of perspectives, a tangle of points of view, a coexistence of moments (Deleuze 1994: 55-56).

Difference *in-itself*, however, relates to ontological difference. Ontologically prior to representation (and identity), it refers to a generative and productive process of differentiation, a way of conceptualising the continuous unfolding and becoming of life. This is an understanding of ontology that is not focused on essence or being, but rather is thoroughly immanent, material, and generative. It is this understanding of ontology that underpins political ontology. It is an understanding that fundamentally destabilises the idea of metaphysically fixed or static entities (as well as the reductive conceptual essentialisms upon which they are based).

To think of difference at this ontological level radically challenges

how we might understand and conceptualise the conflict between alternate cosmologies which shaped colonisation. Understood solely at the level of epistemology or culture, the different worldviews of the English colonisers and the Indigenous inhabitants are reduced to different *beliefs* regarding the world, or different ways of describing the same relatively static and 'fixed' reality. They are, effectively, cultural representations built on top of a singular, already existing, and relatively inert world. A central consequence of this is that in holding out the idea of an underlying singular world, it is also holds out the possibility that one interpretation may be more correct or accurate, or that the differences are able to be unified or brought together into a singular truth. And, as the history of colonisation demonstrated, this process of equivocation tends to follow entrenched lines of power.

However, it is also possible to conceptualise these worldviews along ontological lines and to understand them as part of the broader generative flux of life. That is, rather than simply offering an interpretation of (or a representation of) an already existing and static world, these worldviews (including the diverse range of material social practices through which they are enacted) can be seen as a part of life's constant unfolding and becoming. In other words, they actually participate in the continuous production of the world. Or, perhaps more accurately — especially if we are serious about destabilising fixed representational frameworks — they participate in the production of plural *worlds* (de la Cadena and Blaser 2018, Gad et al. 2015, Escobar 2018, Law 2015).

Of course, this doesn't remove larger questions regarding power. These enactments always take place in and through existing socio-material relations and, inevitably therefore, are shaped (and limited) by those relations in important ways, as was clearly evidenced throughout the legal response to *Buzzacott* and the cases we introduce above. As Blaser reminds us, 'humans are involved in the enactment of realities but not under conditions of their own choosing. They have to grapple with an environment whose features have been more or less sedimented and crystallised through previous actions.' (Blaser 2015: 552) However,

it does provide a mechanism for taking difference seriously and resisting the temptation to reduce difference to sameness. Further, in emphasising the generative and processual features of life, it opens pathways beyond critique and encourages productive engagements in the world.

This same dynamic can also be seen in relation to law more generally. Like the worldviews discussed above, law can also be thought of ontologically and enacted in ways which destabilise static and hierarchical legal frameworks and which are antithetical to current state-centric, singular formation. Law, as currently enacted by the colonial state, remains committed to a singular legal world. In this way, the concept of *terra nullius* can be understood not simply as a legal doctrine that outlines, and provides justifications for, the lawful acquisition of territory; it can also be understood as a specific *worlding practice*. As Blaser and Cadena note, '[*terra nullius*] actively creates space for the tangible expansion of the one-world world by rendering empty the places it occupies and making absent the worlds that make those places' (de la Cadena and Blaser 2018: 3). The decision in *Mabo* may have officially rejected the legal doctrine of *terra nullius*, but it refused to disturb the equivalent worlding practice which continues to operate to deny the independent normative legitimacy of Indigenous legal worlds. Similarly, the role, function and importance of the kangaroo and the emu to Arabunna law was given little weight, relegated to a rights claim not of the kind suitable to be recognised by the common law, in doing so implicitly (re)legitimising the coloniser's claim to them.

The singular 'legal world' is not a necessary or inevitable response. This can be seen, for example, in Uncle Kevin's insistence of Arabunna legal understandings of the kangaroo and emu; these do not operate as metaphors or myth. They are real. The legal obligations that emerge from them are real. Similarly, there are a number of recent examples in which state law has been opened up to multiple ontologies and Indigenous knowledges, cosmologies, and legal worlds have been explicitly incorporated in legislation, including legislation in New Zealand concerning the legal status of a river and a national park, and

similarly in the Ecuadorian Constitution.[16] To differing degrees, each of these enactments include Indigenous language and concepts as central components, as well as grants of rights to environmental entities not traditionally considered legal persons.

The Ecuadorian Constitution, for example, refers explicitly to 'Pachamama'. Along representational lines, this could simply be read as an *analogy* for nature, a linguistic or semantic acknowledgement or a metaphor, but little else. But from a political ontological perspective it is actually more than this. Pachamama doesn't simply refer to nature: it is an 'earth-being' (de la Cadena 2015), an ontological and real entity, but one that had previously been rendered invisible by the (singular) world-making practices of the colonial state. By incorporating these Indigenous cosmologies in this way, these Acts potentiate a redefinition of the relationship between different legal worlds.

This does not, of course, remove all the tensions. The power of the state remains and, therefore, so does the risk that these legal worlds will be subsumed and (re)incorporated into a singular world. In fact, this is what has occurred through subsequent government action in Ecuador and Bolivia following the enactment of their constitutions (Walsh 2018: 66-69). However, while there are always risks inherent in this process, and relationships of power that need to be negotiated, there are also opportunities, at least to begin opening pathways that may lead to decolonial forms of justice. For these reasons, it is important that we, we as critical legal scholars, also reflect on how we conceptualise, understand, and enact law through our own scholarly practices. Rather than attempting to identify and describe law's truth or being, or reduce it to a single, universalist expression, we must remain committed to tracing the diverse, complex, and interrelated socio-material practices that continuously enact and produce, legal worlds. As Haraway reminds us,

> It matters what we use to think other matters with; it matters what stories we tell to tell other stories with; it matters what knots knot knots, what thoughts think thoughts, what descriptions describe descriptions, what ties tie ties. It matters what stories make worlds, what worlds make stories. (Haraway 2016: 12)

## 5 Conclusion

*Buzzacott* provides an important and clear example of the profound dissonance that can emerge when Indigenous realities conflict with the colonial legal system in Australia. The hegemony of colonial legalism, as demonstrated in the court's handling of Uncle Kevin Buzzacott's assertions under Arabunna law, underscores a systemic reluctance to understand and respect Indigenous ontologies and legal worlds. The emblematic use of the kangaroo and the emu in the Australian coat of arms, and the ensuing legal contention over these symbols, epitomises the broader issue: a legal system steeped in colonial ideology, resistant to acknowledging the legitimacy and co-existence of diverse legal paradigms.

This paper argues for a critical re-evaluation and restructuring of the legal system, inspired by the principles of political ontology and decolonial thought. It is imperative that the legal system moves beyond the mere acknowledgment of cultural differences towards a genuine acceptance and space making for ontological pluralism. Embracing this multiplicity of legal realities is an important step towards decolonising law. Such a transformation necessitates a departure from entrenched colonial legal frameworks and a commitment to valuing and incorporating the diverse ways of understanding, living, and governing within and between legal worlds.

As we honour the memory of Uncle Kevin Buzzacott, his perseverance and challenge to the Australian legal system serve as a powerful reminder of the ongoing struggle for recognition and justice. His actions and the subsequent legal responses highlight the urgent need to rethink our legal systems. They call upon us, as legal scholars and practitioners, to actively engage in (re)shaping our legal landscape. This journey towards a truly pluralistic legal system is not only an act of decolonisation but also a commitment to creating a more just world that respects and honours the multitude of legal traditions and worldviews that enrich our communities.

## Endnotes

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2 Kristopher Wilson is a Senior Lecturer at the University of Technology Sydney. He is a descendant of the Arabunna and Dieri Peoples.

3 This protection comes in a variety of forms in, for example, the *Competition and Consumer Act 2010* (Cth); *Criminal Code Act 1995* (Cth) s 145.1; and *Trade Marks Act 1995* (Cth) s 39(2).

4 *Kelly, Willie (31 October 1912). Hansard (ed.). «House of Representatives: 31 October 1912: 4th Parliament · 3rd Session». Historic Hansard. p. 4954.*

5 This account can be read here: https://www.pmc.gov.au/honours-and-symbols/commonwealth-coat-arms

6 Stubbs' painting remains a contentious focal point for questions as to who has the better claim to possess it; Australia from which the subject of the painting originates, and sparked the early seeds for the national affinity with it as a symbol, or the British, for whom the painting symbolises discovery, empire, and scientific curiosity.

7 This transcript for this hearing can be found as *Buzzacott v Tait C5/2003* [2003] HCATrans 724 and can be accessed here: https://www8.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCATrans/2003/724.html?context=1;query=buzzacott;mask_path=

8 For an overview of the development of the doctrine of native title in Australia see Strelein (2009) and Bauman and Glick (2012).

9 *Nulyarimma* v. *Thompson* C18/1999 (Unreported, High Court of Australia, Gummow, Kirby and Hayne JJ, 4 August 2000). This was an application to seek leave to appeal from a decision in the Federal Court (*Nulyarimma v Thompson* [1999] FCA 119), itself an appeal from the Supreme Court of ACT. In the original action, Wadjularbinna Nulyarimma, Isobel Coe, Billy Craigie and Robbie Thorpe had sought to have key members of parliament, including then Prime Minister John Howard, arrested for genocide following proposed amendments to the Native Act 1993. The Federal Court decision (heard in conjunction with a separate action regarding genocide instigated by Kevin Buzzacott (*Buzzacott v Hill*) ruled against the applicants, determining that genocide was not part of the domestic law of Australia.

10 Although not directly drawing on or utilising this framework here, this has some connection with the argument of Derrida that the relationship between law and justice inevitably entails that justice is always deferred. See Derrida J (1992).

11 Although not seeking to compile a comprehensive list, this would include the colonial frontier massacres that occurred between 1788 and 1930 and were a feature of state's territorial expansion. Recent research into these note that '[g]overnment agents of the colonies and later states and territories, such as military and police, were identified as participants in around half of the frontier massacres.' (Ryan, Debenham, Pascoe et al 2017-2022). It is also important to acknowledge the more general role policing played in facilitating Indigenous dispossession and the continuing violence that still shapes the relationship between Indigenous people and the police today (Cunneen 2017). Additionally, Indigenous men, women, and children continue to overrepresented in prison populations, and continue to die in custody at rates far exceeding the general population (Cunneen and Porter 2020).

12 This perspective has been particularly prominent within Science and Technology Studies (Latour 1993; Mol 2002), anthropology (Holbraad and Pedersen 2017), and the feminist inspired new materialism(s) (Barad 2007; Coole and Frost 2010)

13 For an overview of this type of cosmology as understood by Yolngu people of Bawaka Country in Northern Australia, see Bawaka Country et al (2016).

14 For an overview of how these differences in worldview were used to justify colonisation, see Buchan and Heath (2006).

15 We do not mean to suggest that this is an either/or choice. In fact, they are best understood as interdependent. To capture this aspect, Barad has adopted the term 'onto-epistem-ology'. See Barad (2007: 185).

16 *Te Awa Tupua (Whanganui River Claims Settlement) Act* 2017 (NZ); *Te Urewera Act* 2014 (NZ); an agreement has also been made concerning the status of Mount Taranaki. In Australia, the *Yarra River Protection (Wilip-gin Birrarung murron) Act* 2017 recognises the significance of the river to the traditional owners and recognises that the river is a single living entity, but stops short of granting legal personality to the river itself.

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